OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 14 March 2017

Session 5

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CONTENTS

Col.
INTERESTS ... 1
SUBORDINATE LEGISLATION ... 2
Scottish Tribunals (Listed Tribunals) Regulations 2017 [Draft] ... 2
First-tier Tribunal for Scotland Tax Chamber and Upper Tribunal for Scotland (Composition) Regulations 2017 [Draft] ... 4
Tribunals (Scotland) Act 2014 (Ancillary Provisions) Regulations 2017 [Draft] ... 4
First-tier Tribunal for Scotland (Transfer of Functions of the First-tier Tax Tribunal for Scotland) Regulations 2017 [Draft] ... 4
Upper Tribunal for Scotland (Transfer of Functions of the Upper Tax Tribunal for Scotland) Regulations 2017 [Draft] ... 4
LIMITATION (CHILDHOOD ABUSE) (SCOTLAND) BILL: STAGE 1 ... 7
RAILWAY POLICING (SCOTLAND) BILL: STAGE 1 ... 36

JUSTICE COMMITTEE
10th Meeting 2017, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*Mairi Evans (Angus North and Mearns) (SNP)
*Mary Fee (West Scotland) (Lab)
*John Finnie (Highlands and Islands) (Green)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Ben Macpherson (Edinburgh Northern and Leith) (SNP)
*Liam McArthur (Orkney Islands) (LD)
Oliver Mundell (Dumfriesshire) (Con)
*Douglas Ross (Highlands and Islands) (Con)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Alisdair Burnie (Transport Salaried Staffs Association)
Annabelle Ewing (Minister for Community Safety and Legal Affairs)
Nigel Goodband (British Transport Police Federation)
Michael Hogg (National Union of Rail, Maritime and Transport Workers)
Chief Superintendent John McBride (Police Superintendents Association of England and Wales (British Transport Police Branch))
Elinor Owe (Scottish Government)
Calum Steele (Scottish Police Federation)
Alexander Stewart (Mid Scotland and Fife) (Con) (Committee Substitute)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 14 March 2017

[The Convener opened the meeting at 09:45]

Interests

The Convener (Margaret Mitchell): Good morning and welcome to the 10th meeting of the Justice Committee in 2017. We have apologies from Oliver Mundell. I am pleased to welcome Alexander Stewart, who is attending as his substitute.

Agenda item 1 is a declaration of interests. Does Alexander Stewart have any interests to declare?

Alexander Stewart (Mid Scotland and Fife) (Con): I am delighted to be here. I am still a serving member of Perth and Kinross Council, and I will sit on its community safety committee until 4 May.

Subordinate Legislation

Scottish Tribunals (Listed Tribunals) Regulations 2017 [Draft]

09:45

The Convener: Agenda item 2 is subordinate legislation. The committee will consider the draft Scottish Tribunals (Listed Tribunals) Regulations 2017, which is an affirmative instrument.

I welcome to the committee the Minister for Community Safety and Legal Affairs, Annabelle Ewing, and her officials from the Scottish Government. Hannah Frodsham is a policy executive, Sandra Wallace is a policy manager, and John St Clair is a senior principal legal officer.

I refer members to paper 1, which is a note by the clerk, and paper 2, which is a Scottish Government briefing note. I invite the minister to make a brief opening statement.

The Minister for Community Safety and Legal Affairs (Annabelle Ewing): Thank you, convener. Good morning.

The regulations will remove the Crofting Commission from the listed tribunals—that is, the list of tribunals in schedule 1 to the Tribunals (Scotland) Act 2014. That list of tribunals was taken from a report by the Administrative Justice and Tribunals Council, which is a former United Kingdom-wide body. The AJTC listed the tribunals that it considered to be devolved. Before its abolition in 2013, the AJTC was required to keep the administrative justice system under review. During consideration of the Crofting Reform (Scotland) Bill, there was discussion of the Crofting Commission's status, and ministers at the time were minded not to remove it from the list of tribunals in order to keep it within the AJTC's supervisory remit. However, as I said, the AJTC was abolished in 2013, and the Tribunals (Scotland) Act 2014 does not include provision for a statutory body to have a supervisory role over the Scottish tribunals. In the absence of a supervisory body, and given that the Crofting Commission is not a tribunal in the true sense of the word, it is considered that the Crofting Commission can now be removed from the list of tribunals in schedule 1 to the 2014 act.

I am happy to answer any questions.

The Convener: Thank you, minister. Do members have any questions?

John Finnie (Highlands and Islands) (Green): Good morning, minister. Can you see any implications for the day-to-day business of crofting as a result of the proposal?

Annabelle Ewing: No, I cannot. We undertook a consultation on the instrument between 26 May and 24 June 2016 and received seven responses. Six of the seven responses were content with the proposal.

One of the responses was from Brian Inkster, who is a crofting law solicitor. He thought that the Crofting Commission should be retained as a tribunal. His main issue of concern was about the use of a particular section of the crofting legislation that allows the Crofting Commission to make an inquiry and then remove any or all of the members of a grazing committee from office. His concern was that there is no right of appeal to the Scottish Land Court so judicial review is the only avenue of appeal, but he thought that, if the Crofting Commission were to transfer to the Scottish tribunals, appeals could be made to the upper tribunal. However, for the reasons that I have given, the Crofting Commission is not a tribunal in the true sense of the word. The mention of the Crofting Commission in the list of tribunals was an historical quirk because of the AJTC's supervisory role at the time.

John Finnie will be aware from our programme for government that we will introduce crofting legislation during this parliamentary session. The issue of the right of appeal might be brought to the forefront of the debate on that legislation. Obviously, we will engage with stakeholders when we get to that stage.

John Finnie: That is what I was going to ask about. There are a lot of issues with crofting at the moment, so why deal with this issue now? Why not wait? Is the relationship with the Land Court substantially altered?

Annabelle Ewing: No. The reason for doing it now is that the AJTC was abolished in 2013. We are moving to the implementation of the 2014 act and looking at having the simplified statutory framework in place. This is an anomaly that has arisen for the reasons that I have stated, and it is timely to deal with it now.

The regulations should make no difference to the daily workings of the Crofting Commission because, since 2013, no supervisory role has been exercised in any event. The Lord President sits at the head of the Scottish tribunals system so, on a day-to-day basis, the regulations should not make any significant or substantive difference. The legislation is a tidying-up exercise and, as we go forward with the crofting legislation in the current parliamentary session, I am sure that the right of appeal will be brought to the forefront of the debate.

John Finnie: Does the relationship with the Land Court change in any way?

Annabelle Ewing: It does not.

John Finnie: Many thanks.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I have a simple little question in relation to the Scottish tribunals structure. Might we expect to see, in due course, any other outstanding matters around bringing existing bodies into that structure?

Annabelle Ewing: Yes. We plan to bring all the devolved tribunals within the Scottish tribunals structure, as set out in the 2014 legislation. There is a timetable for the proposed implementation of that approach, and we will proceed on that basis. It will be done by way of bringing to the committee the relevant Scottish statutory instruments for your consideration. I think that the next to be considered will be the additional support needs tribunal. We hope to bring that SSI to the committee in the autumn.

There is a rolling programme for the devolved tribunals; the reserved tribunals are for further down the line.

The Convener: As members have nothing further to add, we move to item 3, which is formal consideration of the motion. The Delegated Powers and Law Reform Committee has considered and reported on the instrument and has no comment to make. I invite the minister to move the motion.

Motion moved,

That the Justice Committee recommends that the Scottish Tribunals (Listed Tribunals) Regulations 2017 [draft] be approved.—[*Annabelle Ewing*]

Motion agreed to.

The Convener: That concludes consideration of the regulations. The committee's report will note and confirm the outcome of the debate. Does the committee agree to delegate to me, as convener, the authority to clear the final draft of the report?

Members *indicated agreement.*

First-tier Tribunal for Scotland Tax Chamber and Upper Tribunal for Scotland (Composition) Regulations 2017 [Draft]

Tribunals (Scotland) Act 2014 (Ancillary Provisions) Regulations 2017 [Draft]

First-tier Tribunal for Scotland (Transfer of Functions of the First-tier Tax Tribunal for Scotland) Regulations 2017 [Draft]

Upper Tribunal for Scotland (Transfer of Functions of the Upper Tax Tribunal for Scotland) Regulations 2017 [Draft]

The Convener: Item 4 is also subordinate legislation. The committee is asked to consider

four affirmative instruments relating to the transfer of the Scottish tax tribunals to the Scottish tribunals structure. Because the instruments are linked, we will take evidence on all of them together. I refer members to paper 3, which is a note by the clerk, and paper 4, which is the Scottish Government's briefing note. I ask the minister to make a short opening statement.

Annabelle Ewing: This suite of fairly technical regulations will transfer the Scottish tax tribunals to the Scottish tribunals structure, which was created by the Tribunals (Scotland) Act 2014.

The draft First-tier Tribunal for Scotland Tax Chamber and Upper Tribunal for Scotland (Composition) Regulations 2017 specify the type of member who will hear cases in the tax chamber. The provisions mirror the existing composition of the first-tier tax tribunal. The instrument also sets out the composition of the upper tribunal when hearing appeals from the first-tier tribunal tax chamber. The regulations allow for a legal member of the upper tribunal or a Court of Session judge to hear an appeal in the upper tribunal. Again, that mirrors the previous arrangements. The president of tribunals will determine who hears the appeals and may also select herself, the chamber president or, indeed, the Lord President, if appropriate.

The draft Tribunals (Scotland) Act 2014 (Ancillary Provisions) Regulations 2017 revoke part 4 of and schedule 2 to the Revenue Scotland and Tax Powers Act 2014, which established the Scottish tax tribunals and their procedures. The instrument also revokes four regulations that established the conduct and fitness assessment tribunals, the time limits on rules of procedure for both the first-tier and upper tax tribunals, the eligibility for appointment to the Scottish tax tribunals and rules concerning voting and offences in proceedings. Those matters are all covered by provisions in the Tribunals (Scotland) Act 2014, so the previous regulations are no longer necessary.

For brevity, I will summarise the last two sets of regulations together. The draft First-tier Tribunal for Scotland (Transfer of Functions of the First-tier Tax Tribunal for Scotland) Regulations 2017 and the draft Upper Tribunal for Scotland (Transfer of Functions of the Upper Tax Tribunal for Scotland) Regulations 2017 simply transfer the functions and members of the first-tier tax tribunal to the first-tier tribunal for Scotland tax chamber, and the functions and members of the upper tax tribunal to the upper tribunal for Scotland.

In addition, the regulations set out the transitional procedure for cases that are in progress on the date of transfer. As the first-tier and upper tax tribunals are listed separately under the Tribunals (Scotland) Act 2014, each jurisdiction needs to be dealt with under separate instruments.

Each of the instruments before the committee plays a part in enabling the transfer of the tax tribunals to the new structure. I am happy to take questions.

The Convener: Members have no questions for the minister. That being the case, we move to agenda item 5, which is formal consideration of the motions relating to the four affirmative instruments. The Delegated Powers and Law Reform Committee has considered and reported on the instruments and has no comment to make. The minister will move the motions, and members will have the opportunity to debate them if they wish.

Motions moved,

That the Justice Committee recommends that the First-tier Tribunal for Scotland Tax Chamber and Upper Tribunal for Scotland (Composition) Regulations 2017 [draft] be approved.

That the Justice Committee recommends that the Tribunals (Scotland) Act 2014 (Ancillary Provisions) Regulations 2017 [draft] be approved.

That the Justice Committee recommends that the First-tier Tribunal for Scotland (Transfer of Functions of the First-tier Tax Tribunal for Scotland) Regulations 2017 [draft] be approved.

That the Justice Committee recommends that the Upper Tribunal for Scotland (Transfer of Functions of the Upper Tax Tribunal for Scotland) Regulations 2017 [draft] be approved.—[*Annabelle Ewing*]

Motions agreed to.

The Convener: That concludes consideration of the affirmative instruments. The committee's report will note and confirm the outcome of the debate on all four instruments. Is the committee content to delegate authority to me, as convener, to clear the final draft of the report?

Members *indicated agreement.*

The Convener: I thank the minister and her officials for attending.

09:59

Meeting suspended.

10:00

On resuming—

Limitation (Childhood Abuse) (Scotland) Bill: Stage 1

The Convener: Agenda item 6 is our final evidence session on the Limitation (Childhood Abuse) (Scotland) Bill. I refer members to paper 5, which is a note by the clerk, and paper 6, which is a Scottish Parliament information centre briefing. I welcome back the minister. She is accompanied by Elinor Owe, who is a policy manager, and Scott Matheson, who is a senior principal legal officer, both with the Scottish Government. Minister, do you want to make an opening statement?

Annabelle Ewing: Yes. Thank you, convener.

As the committee will be aware, over the past few years, awareness has been increasing of the blight of historical childhood abuse and the fundamental challenges that survivors have faced in getting recognition and support, including access to justice. Members will also be aware that many survivors have campaigned long and hard for reform to the current limitation regime. The difficulties that survivors face in accessing the civil justice system were clearly highlighted by the Scottish Human Rights Commission in its interaction process. Survivors have, I would say, been let down repeatedly: they have been severely and fundamentally let down by their abusers and by the adults who were meant to protect them at the time, but they have also been let down again by a justice system that has, in effect, denied them access to a remedy.

I was therefore pleased to introduce the bill, which will remove, for survivors, a barrier to their accessing justice. That barrier of the three-year limitation period has meant that survivors have had to justify to the court why they did not raise an action earlier—a process that has proved to be extremely stressful and degrading for many survivors.

I listened carefully to the committee’s previous evidence sessions. As the committee has noted, the bill is no panacea, and raising a civil action will not be the solution for all survivors. However, the bill is about widening the number of options that are available to survivors and ensuring that they are not faced with an insurmountable barrier, should they choose to raise a civil action.

The bill is very much about striking a balance, and in that I have had to grapple with a number of difficult issues, including the need to consider carefully at every step of the process the implications of the European convention on human rights, and the need to strike a balance between being inclusive and seeking to avoid unintended consequences. The measures in the bill are intended to give the much-needed “reboot” to the system that one witness who came before the committee spoke about.

I have also made every effort to ensure that the provisions in the bill are justified and proportionate. As I am sure we will discuss in more detail, care has to be taken in considering where the balance is to be struck. There is a real possibility that the aim of the bill will be undermined and the process severely frustrated, should we upset that balance.

Finally, I point out that the bill is part of a range of measures for survivors of childhood abuse that the Scottish Government is taking forward. As the committee will be aware, other measures include the Scottish child abuse inquiry, the survivor support fund and the consultation on financial redress.

The Convener: Thank you for that opening statement, minister.

Stewart Stevenson: I suppose that the first and obvious question is this: why have a bill at all? I ask that in the context of the approach that was chosen in Jersey, which was to establish the historic abuse redress scheme, which was outside the civil and criminal justice systems. Of course, Jersey is a small jurisdiction and the problems were distinct and different there, so I do not map one to the other, but to what extent were options short of legislating considered, and why were they not seen as the way forward for dealing with this injustice, which we all recognise is validly waiting to be addressed?

Annabelle Ewing: As I said, the Scottish Government has taken and is progressing a number of actions, one of which is to improve access to justice through the civil law of our country—something that survivors themselves identified as a barrier. We are responding to survivors’ request to look specifically at limitation.

We are ensuring that there will be engagement and consultation on financial redress for in-care survivors. We expect the consultation to proceed in the months to come, and we will consider carefully any submissions to it. Work is currently under way at pace—through the centre for excellence for looked after children in Scotland and the interaction review group’s action plan on justice for victims of historical abuse of children in care—to pave the way, ensure engagement and consider what we can learn from international experience.

The bill is about the civil law of Scotland. Although there is, in principle, the possibility of raising an action for reparation, the hurdles that claimants have to overcome have proved to be insurmountable. I think that there has been one

case in which the discretion of the courts under the Prescription and Limitation (Scotland) Act 1973 has been exercised. That is eminently not fair—we have to ensure that there is equal access for everyone to the remedies in our civil law system. That is, therefore, part of the suite of measures that the Scottish Government is pursuing in order to ensure that survivors of historical child abuse get the justice that they deserve.

Stewart Stevenson: In essence, the operation of the Scottish legal system requires us to legislate to deal with barriers that might not have existed in other similar jurisdictions; for example, Jersey—although I do not want to open up a big discussion on that. That is why we need primary legislation.

Annabelle Ewing: Yes. We introduced the bill to ensure that the civil law of Scotland is there for everyone and not just for some people. We are responding to survivors' wishes and to the fact that limitation has been highlighted as a problem for some years.

Stewart Stevenson asked what alternatives the Scottish Government considered. Given issues to do with legal certainty, the finality of the law and the defender's right to fairness in the legal system, we considered whether there might be another way to secure our objective. The various approaches that we considered are clearly set out in the policy memorandum to the bill.

For example, we considered the possibility of having no limitation period at all for any action, but I think that that approach would fall foul of the European convention on human rights. We considered an extension to the limitation period for all actions, but that suggestion met resistance from other claimants and would not solve the problem that survivors of historical childhood abuse face.

We considered window legislation, whereby a window of a year would be given in which claims could be brought forward. That approach has been taken in the United States. However, it does not help a person who is not ready to raise their action within that window, nor would it help in the future when we revert back to the limitation period. It would not help people for whom limitation has been a problem, given the nature of the heinous behaviour, abuse and harm that is caught in the definition.

We considered a number of alternatives, but for the reasons that we have set out in detail in the policy memorandum, we thought that they would not secure the objective that is sought, which is to remove an obstacle to justice for survivors of childhood abuse.

The Convener: If we have learned anything from the survivors who have given evidence, it is that they must be consulted in advance. That message came through loud and clear.

Do I take it that there was no consultation of survivors about the Jersey scheme?

Annabelle Ewing: There have been a number of strands of work, which I tried to refer to in my opening statement. In terms of the work on redress, there have been a number of conversations with survivors over a period of time, as far as I am aware. Survivors have had an opportunity to discuss the subject, and the process that is being conducted by CELCIS and the interaction action plan review group, to make the necessary arrangements to pave the way for the consultation, as well as for engagement and consideration of responses, has been put in place, further to the most recent conversations with survivors. The consultation, which we expect to see in the months to come, will provide a further opportunity to make detailed submissions.

The Convener: What is survivors' view of the Jersey redress scheme?

Annabelle Ewing: I would not want to suggest that all survivors take the same view on all subjects, because that is not the case. The Deputy First Minister and Cabinet Secretary for Education and Skills announced that financial redress is how we intend to proceed after he had had conversations with survivors. I think that he wrote to the Education and Skills Committee convener some weeks ago to confirm that. People who feel that the Jersey model is the way forward will not hesitate to make their submissions to the consultation and engagement process.

The Convener: Was that model part of wider discussions, but not consulted on specifically?

Annabelle Ewing: There have been wider discussions on financial redress and the appropriate way to take it forward. There are many different approaches; those who make submissions to the consultation will promote the approach that they see as being most appropriate in the circumstances. I am sure that submissions on the Jersey model will be included.

Stewart Stevenson: I have a number of questions on proposed new section 17C, which the bill would insert into the Prescription and Limitation (Scotland) Act 1973, and which is on previous litigation. The committee has heard that there is no precedent for legislating away final determinations, which is what the bill seeks to do. Where we see a novel approach—"novel" is not always a term of praise in such matters—the committee has to look at it very carefully. How has the Government satisfied itself that allowing previous determinations to be reopened by a couple of mechanisms will not fall foul of ECHR legislation, in particular?

Annabelle Ewing: Stewart Stevenson has asked a very important question. That consideration informs our approach to the bill as a whole because—as I mentioned in my opening statement—we have had to strive to strike a balance in a very complex area—a balance that will allow us to fall on the right side of the ECHR and the article 1 of protocol 1 provisions. On previously litigated cases, we felt that not to include that as a possibility would create unfairness among different survivors.

However, we recognise that that is in contradistinction to what has been accepted as the normal rules on finality, which is why we sought to draft the relevant provision in proposed new section 17C carefully, such that it will be for the pursuer, in the first instance, to show that they have a reasonable belief that there had been a settlement that was agreed, further to the action falling on the ground of limitation. We believe that that is fair in the wider context, because those are circumstances in which there had been no substantive adjudication on the merits and the case had fallen because of application of the limitation rule. We feel that we have, through the onus being in the first instance on the pursuer to adduce the reasonable belief test, acknowledged a departure from previous practice and have introduced a safeguard in that element of the process, as far as previously litigated cases are concerned.

10:15

Stewart Stevenson: You are talking about the pursuer having to show that a case falls within the provisions of proposed new sections 17C(4)(a) and 17C(4)(b) and, in particular, 17C(4)(b)(ii), and I think that you used the phrase "personal belief". Is that an indication that omissions in the paper trail—which might sustain that belief—will not be a barrier to the ability to demonstrate personal belief in a civil court, in the balance of advantage? Is that what you are seeking to say by using the phrase "personal belief"?

Annabelle Ewing: I should correct the record: I meant to use the phrase "reasonable belief". We anticipate that that could involve a personal statement by the pursuer to the effect that they held a reasonable belief that a case had not proceeded because it came up against the insurmountable hurdle of application of the limitation period. With the bill, we are changing the limitation rule as it applies to this class of cases—we are not changing the law for reparation in general. The laws of reparation, all the related court processes, and how the court balances evidence and satisfies itself about the facts and circumstances of each case that comes before it, will all pertain. There may well an issue to do with records, but there may be ways in which that can be overcome. It will depend on the facts and circumstances of each case.

Stewart Stevenson: Cases will vary but, in general terms, what you say appears to confirm that gaps in the paper record would not be a barrier to a case being taken, under the provisions of the bill.

Annabelle Ewing: Such a gap would not preclude a case being heard in all circumstances. The court would be able to take the statement of the pursuer that they had a reasonable belief that the case had a fallen on the ground of the limitation period. It would then be up to the court, as master of the facts, to assess the facts and circumstances of that case and the evidence that it would adduce—or not, as the case maybe—and then to take a view. Obviously, if the pursuer makes a statement based on reasonable belief, it is up to the defender to rebut that, as they would with any claim or counterclaim in court.

I am trying to explain that—to answer the question—a gap in the paper trail would not be an insurmountable barrier in all cases. It would depend on the facts and circumstances.

The final thing to reiterate is that the bill seeks to remove obstacles to justice that have been identified—in particular, those that have been identified by survivor groups. It will not change the law of reparation in Scotland in other respects. It is important to remember that the courts deal with very difficult issues of evidence. They weigh up evidence on the balance of probabilities every day of the week, and they will continue to do that with respect to the bill's provisions.

Stewart Stevenson: I am sure that those will be helpful and useful words to have on the record.

My final question is on excluding people from access to the rights under the bill whenever even just a single pound has been paid in compensation. That strikes me—as a non-lawyer—as being rather unjust. People may have felt that they had no option other than to settle, even though a nugatory amount had been offered in compensation, because not to settle would simply mean that the case that they were engaging in would not proceed, and they would not even get the emotional justice that would come from settlement. What consideration has been given to whether limitation because of even nugatory amounts is denying people justice? I have used the example of identical twins who had cases with identical circumstances, one of whom settled for £1 and one of whom did not, who would now find themselves in a very different environment.

What are the issues around that decision, which is captured in proposed new sections 17C(4)(b) and 17C(5)?

Annabelle Ewing: That is a very difficult issue, with which I have a great deal of sympathy.

However, as I tried to emphasise in my opening statement, what we have tried to do is strike a balance between, on the one hand, proceeding with a major change in the law on removal of the limitation period for a class of claim and, on the other, the defender's rights, the finality of the law and legal certainty. We have sought—and have striven very hard—to strike that fine balance in the bill. We feel that we have to draw a dividing line somewhere; that is where the line is drawn, as regards the provisions in the bill.

I sympathise, but what we are saying on including previously litigated cases is that the key thing is that there was no substantive consideration of the merits and, in effect, no compensation was payable. In a case in which no expenses have been found to be due to or by either party, or in one in which expenses have been paid, that is not putting the pursuer in a better position—even marginally—than they would have been in if they had not raised the proceedings. That is the fundamental difference.

We are not saying that all cases that had previously been litigated can be subject to consideration of whether or not they can be looked at again. What we are saying is that victims, who will be the pursuers, will be entitled to seek to have brought before the court cases in which there has been no substantive adjudication on the merits, and which have fallen because of the application of the limitation period. We have to draw the line somewhere.

From memory, one of the witnesses who gave evidence was a lawyer who had acted for defenders in some 400 or 500 cases. If I remember correctly, that witness made the point that they thought, from experience, that that scenario is not very likely, in that there would have been no incentive for the defender to make even a nominal payment in excess of expenses. In any event, most such cases would have been settled on the basis of no expenses being due to or by either party.

Although I accept that it is not beyond possibility that there could be some such instances, the feeling—at least of the lawyer who acted for hundreds of defenders—is that they would not, in practice, have happened as a matter of course.

Stewart Stevenson: Finally—and because the minister raised something that I had not previously thought of—is it the case that an initial action can be disposed of by the court, in accordance with a relevant settlement, but without evidence having been led? You seemed to suggest to me—as a layperson, I emphasise once again—that a settlement would have been reached only where a determination on the evidence had been reached.

Annabelle Ewing: No. I am trying to explain that the only previously litigated cases that would potentially fall within the scope of the bill would be those that did not involve a substantive adjudication on their merits. That is the key point: the pursuer, who is the victim, did not have the opportunity to have their day in court—to use that cliché—because there was no substantive adjudication on the merits. They did not get to that stage, because the case fell at the hurdle of the three-year limitation period's applicability and they were not able to persuade the court to exercise its discretion to lift that application of the three-year limitation period. In fact, I understand that there has been one instance in which the court has so proceeded in the past 40 years or so, which shows that, as a matter of practice, there has been a barrier to access to justice for those victims.

Stewart Stevenson: I am going to have to read the *Official Report*, because I am not entirely convinced by that. I reserve the right to pursue it further if I—

Annabelle Ewing: Of course, and if the member wishes to write to me—

Stewart Stevenson: Indeed, I might do that. Thank you, convener.

Liam McArthur (Orkney Islands) (LD): I will follow on from that. We will come on to the discretion that is open to the court under section 17D, but my question is specifically on section 17C. Decree of dismissal and decree of absolvitor have been referred to in relation to cases that have been dealt with previously. A number of witnesses have expressed concern about what could be described as the innate conservatism of the judiciary in how they exercise their discretion now. Do you have confidence, borne out by the evidence that you have taken on extending the right in relation to decree of absolvitor, that the judiciary will not simply take the view that anything that falls within the category in section 17C is to be dismissed out of hand? Witnesses certainly had clearer concerns about that aspect of section 17C than about decree of dismissal.

Annabelle Ewing: I know that there have been a number of questions on that point. It is important to remember something that has been lost in the debate, which is that the decree of absolvitor is not necessarily always the appropriate decree when there has been a substantive consideration. The decree of absolvitor can also happen when there has been no substantive consideration. I think that people assume that the decree of absolvitor comes into play only when a case is disposed of

further to a substantive consideration of the merits, but that is not always so.

I go back to the examination of facts and circumstances by the court before which the action would be brought for consideration. For the removal of the time bar, the court would have to look into the facts and circumstances, as I tried to make clear in response to Mr Stevenson's questions. The key dividing line is whether there has been a substantive consideration of the merits; if so, it will not be possible to use the bill to reopen a case, because that would be an infringement of ECHR that we could not justify.

The bill applies to cases where there has been no substantive consideration of the merits, whether the cases were settled by a decree of dismissal or a decree of absolvitor. It is competent to grant a decree of absolvitor even when there has been no consideration of the merits.

Liam McArthur: That came through in the evidence, but I am thinking more about courts' inclination in relation to a decree of absolvitor. Notwithstanding the reassurances that you have given, the decree of absolvitor seems to have a particular significance such that courts will be more reluctant to reopen cases, which will in effect be dismissed.

Annabelle Ewing: Perhaps Elinor Owe can explain a bit more of the background to the work that we did.

Elinor Owe (Scottish Government): Mr McArthur makes a good point. We cannot predict how the court will react in such cases. However, the bill creates a default position, whose intention is for cases to be allowed to be reopened. Because that is the default position, the bill provides that there will be a need to point to something specific that is above and beyond the default position in order for such cases not to go ahead. The intention is for the courts to interpret matters in that way. As the committee will have seen from the bill's drafting, the issue is not just the possibility of prejudice; evidence will have to be pointed to that shows that it would not be possible to have a fair trial.

We completely recognise that there is a danger in what is proposed, but we cannot predict that danger. The bill sets the default position, and defenders will have to show something that is above and beyond that.

The Convener: I will look at the issue a bit more, because it is probably one of the more contentious issues in the bill. We are looking at substantive consideration. In effect, section 17C will overturn the legal principle of res judicata, which concerns the legitimate expectation that cases that have been considered—even if they have not been brought to trial—will not be overturned. I appreciate what the minister says about the pursuer possibly not having had their day in court. The assumption is that a decree of absolvitor is to be overturned because it was applied for on the basis that the case was going to be time barred. Instead of getting a decree of dismissal, insurance companies sought a decree of absolvitor to ensure that a case was not raised again.

When we took evidence from representatives of insurance companies, we found that they did not recognise that view. There was concern about whether the reasonable belief test would work in practice. What discussions have there been with insurance companies? The representatives from the Association of British Insurers and the Forum of Insurance Lawyers who appeared before us did not recognise the scenario that has been outlined. However, the minister says that it has been identified by some survivors. Will she elaborate on that?

10:30

Annabelle Ewing: Survivors have identified insurmountable obstacles to their cases going through to the next stage. As for the decree of absolvitor issue, I do not think that it would be causing such confusion if it were called something else. The confusion derives from the fact that people assume that such a decree is granted only after a substantive consideration of the merits of a case, but that is not the case—

The Convener: I have to stop you there, minister. That point was made in response to Liam McArthur's questions, and I think that he and the committee understand it. However, I understand that the Government is legislating for a niche—for cases in which the decree of absolvitor was sought by an insurance company and agreed to by the pursuer because they did not expect any other legal redress, as a result of the case being time barred. Is that right?

Annabelle Ewing: In essence, the expectation was that the case could not proceed because of the time bar but, instead of the disposal being by decree of dismissal, it was for whatever reason by decree of absolvitor. We are therefore talking about a procedural point. As you rightly said, the underlying issue is that such a case would have been concluded in that way because it was felt that it would not go through, as a result of the time bar.

We have included such cases because this is a procedural point. To those who could not pursue their claims because of failure under the time bar and the limitation approach to such cases, and because the discretionary safeguard has not been invoked—or not more than once—for such

claimants, it seems unfair for their cases not to be included in the bill, given that they fell on the same ground, which is the application of the limitation rule. If such cases were not included, there would be a perception of unfairness to that group of claimants.

That is why we have included the cases in the provisions. As I have said, the onus will be on the pursuer of a previously litigated case to show the court that their reasonable belief was that the settlement, be it by way of decree of dismissal or decree of absolvitor, was arrived at on the basis of someone saying, "Look, you might as well stop this. You're not going to get to the next stage because the limitation rule applies." That is the underlying and key principle.

The Convener: How can that possibly be proved? Are we turning the whole thing on its head and saying that any decree of absolvitor that was granted in respect of a case that would have been time barred is automatically assumed to come under the provisions?

Annabelle Ewing: I always go back to first principles, and the underlying purpose is to ask people who have not had access to justice because of the applicability of the limitation period—it has a discretionary lift, but the evidence that we have seen shows that that has not been exercised on behalf of this group of claimants—what we can do to ensure that they have that access.

We have introduced the bill, which will apply retrospectively to cases of abuse after 26 September 1964, and we are allowing consideration of whether in all circumstances it would be equitable for previously litigated cases to be looked at again. In those circumstances, we are talking about cases that fell because there was a reasonable belief on the pursuer's part, which could have been set out as a personal statement to the court, that the case was settled as a result of the limitation period and in which, to go back to Mr Stevenson's earlier point, the pursuer received no financial compensation.

Those are the key principles. We felt that it would be unfair to exclude a limited set of cases that were settled through decree of absolvitor rather than decree of dismissal. That is a procedural decision—because the same set of key facts underlies the settlement, we have included such cases.

Elinor Owe: I know that, in a previous evidence session, there was discussion with insurance companies about how such cases ended up being absolved. From the point of view of policy and how we have developed the bill, it does not matter exactly how cases ended up having a decree of absolvitor.

If there were a link between a case having a decree of absolvitor and the fact that it would have failed on limitation, it does not exactly matter what the process was and who proposed what, because the point is that the case failed as a result of limitation. That is the clear link that determines which cases should be allowed to go ahead. It is not any case—it is one where the link to failing on limitation can be demonstrated.

We have had discussions with insurance companies on a range of issues, but perhaps not on that point. The key aspect is linking why the case was absolved to the fact that the case was likely to be failed on limitation. That is the policy background.

The Convener: So the reasonable belief test would be satisfied by a statement from the pursuer to the effect that that was their belief.

Annabelle Ewing: Yes—it could be. At the end of the day, it will be for the court—the master of the facts—to decide on the facts and the circumstances of the case and the evidence that is adduced before it what view it takes on the issue.

Douglas Ross (Highlands and Islands) (Con): I have been trying to get in since the start. I will go back to the minister's choice of language in her opening remarks. She said that survivors have been let down by the justice system itself. Was that a criticism from the Scottish Government of judges for not using the discretion that is available to them?

Annabelle Ewing: It is fair to say that survivors have collectively been let down by the justice system. On the point about legislation, judges can only deal with the legislation that is before them. The applicability of the limitation period is a policy matter for the Government of the day.

The judges have the 1973 act and the policy that emanates from it, which set out the parameters within which they must proceed, and that is how they have proceeded. If there is a limitation period, that will in effect be the norm. There may be provision for an exception, but the norm will be to apply a limitation period.

Let us look at other jurisdictions. In Australia, the Royal Commission into Institutional Responses to Child Sexual Abuse, which reported in 2015, took the view that it was not appropriate for limitation periods to apply to this class of claimants. The Scottish Government and I agree with that. To do that would lead to the creation of an in-built resistance to such cases proceeding, which is what we have seen.

Judges have acted within the applicable legislation, which is the 1973 act.

Douglas Ross: Your criticism is that the survivors were let down by the justice system

itself—those are the words that I wrote down. You have cited only one case where the discretion has been used. Why has it not been used? It is not as though judges have no powers at all—they have the power to use it. Why have you been forced to introduce the bill now, in 2017?

Annabelle Ewing: As I said, if a limitation period applies to a class of cases, as in this instance, that limitation period will apply. The exercise of discretion is, obviously, a matter for judges, but they have to operate within the policy provisions that emanate from the legislation that is in hand, which is the 1973 act.

The Government and I consider that such cases present a unique set of circumstances. We all agree that abuse is absolutely abhorrent. The victims were incredibly vulnerable, because they were children. Over the years, we have seen from various studies the all-encompassing effect of abuse on children. There is the silencing effect—some studies have cited the average time for victims to come forward as 22 years.

Given all the circumstances, a limitation period in and of itself is not appropriate and will cause problems for people in such circumstances in accessing justice. As I said, it creates an in-built resistance to cases proceeding, so we have introduced the bill that is before the committee.

Douglas Ross: I am not getting what I hoped to get from you on what has been done up to this point to see whether judges require further clarification of their powers or further powers. You are introducing legislation, which is an overt step to overcome the problems, but I think that we have had only one example since 1973 of the discretion being used. What action has been taken in the intervening period? What action has the Scottish Government taken while your party has been in office over the past 10 years and what action have previous Scottish Governments taken since devolution to overcome a problem that, if the discretion has been used only once in 30 years, was clearly apparent?

Annabelle Ewing: Since we took office, the Scottish National Party Government has proceeded with a number of steps to ensure that survivors get the support that they should have had years ago. That includes access to a remedy in court and many other strands that I have referred to. For example, work by the Scottish Human Rights Commission has gone on apace—I am sure that the member is aware of that and the report. The Scottish Law Commission has looked at the limitation period and it concluded that, if there were problems, one could seek to go down the discretionary guidance route. However, for the reasons that I have stated, I do not think that that would lead to a meaningful and significant solution to the problem that survivors in particular have aired. As I have said, the existence of a limitation period in and of itself creates an in-built resistance to cases proceeding. That is why we have to remove the limitation period for a unique class of claimants.

Douglas Ross: I will go back to something that you said in a previous answer. You said that the bill is important because of the victims' vulnerability, as they would have been children at the time. Would it be right for a 19-year-old with a mental age of under 18, for example, to be exempt from limitation?

Annabelle Ewing: The general limitation rules do not apply and the limitation period does not run while there is a period of unsoundness of mind. That deals with that issue. However, in terms of the—

Douglas Ross: I am sorry to interrupt but, for clarity, is that for bringing forward a claim or for someone who had a lower mental age when they were abused? That is the point that I am getting at.

Annabelle Ewing: The time limit does not run during a period when a person was not aware of the harm that was suffered from industrial disease, for example, and the limitation period does not run during a period of unsoundness of mind. That is the current position.

We thought carefully about the definition of a child under the bill, but we took the view that the prevailing definition of a child—we can look at the Children (Scotland) Act 1995 and the United Nations Convention on the Rights of the Child—is that of a person who is under the age of 18. Because of the impact of abuse on a child, excluding 16 and 17-year-olds is not appropriate in the circumstances.

Douglas Ross: I am sorry, but my question was not about that. If someone is 19, 20 or 30, but they had a mental age of under 18 when they were abused, so they were, in effect, a child—that could be diagnosed and confirmed—they will not be able to use the bill to bring forward a claim. That is despite their vulnerability in having a mental age of under 18. You have said twice that vulnerability was a key driver in bringing the proposals forward, but such a person would not be able to use the bill, because their actual age was over 18, despite their mental age being below that, which meant that they were vulnerable.

Annabelle Ewing: Such a person would be deemed to be a vulnerable adult. As I have said, the limitation period does not apply during a period of unsoundness of mind. Perhaps Elinor Owe can clarify the position for any carer, guardian or whoever who can act or intervene on such a person's behalf.

Elinor Owe: The concept of a person's having the mental age of a child sounds similar to the concept of a person's lacking capacity to attend to their affairs, which is the concept of unsoundness of mind. Our bill would not be relevant there, but the limitation period would not apply to such a person, under section 17(3) of the 1973 act. If a person has the mental age of a child and lacks capacity to deal with their own affairs, they are exempt from the limitation period anyway.

Douglas Ross: A person's mental age could progress. Some people do not maintain the mental age of a child indefinitely. The point that I am getting at is that a group of people who have a mental age of under 18 and who were abused years ago because they were vulnerable might want to bring a claim, perhaps by themselves. If they did that, people would say that they were not included in the provisions, because they had the ability to bring forward a claim themselves. You are saying that, under the bill, they would not be able to bring forward a claim because their physical age when they were abused was over 18. They might now have the mental capacity to bring forward a claim but, under the bill, they would not be allowed to.

Annabelle Ewing: That is to do with vulnerable adults and unsoundness of mind. There is a legal definition of a child but, as Elinor Owe said, the limitation period does not apply during periods of unsoundness of mind. If the hypothetical person to whom you referred recovered their mental capacity, the limitation period would run from the time at which they did so.

Douglas Ross: Like Mr Stevenson, I will reserve my right to come back to the issue.

Annabelle Ewing: Okay.

Douglas Ross: In your opening remarks, minister, you said that the aims of the bill could be threatened if we upset the balance. Could you explain further what you were alluding to?

10:45

Annabelle Ewing: Yes—and I have tried to come back to that fundamental principle in my answers to members' questions. We recognise that the proposals mark a major departure from Scots law principles thus far. I have set out why I feel that, in the circumstances, that is justifiable. There is a unique set of circumstances around the class of claimants that we are discussing and I therefore feel that we are pursuing a legitimate aim, that what we are proposing is proportionate, and that although we have considered other possible routes, we have found them wanting in different regards.

We conducted in advance the European convention on human rights test to proof the bill and I feel that we have struck a balance between recognising what is a major departure from the hitherto established principles of Scots law, recognising the legitimate policy aims that underpin the bill and recognising the position of the defender. We have struck that balance through the careful drafting of the provisions and it is that important balance that will ensure the integrity of the bill, should there be any subsequent attempts to undermine it. The balance has carefully crafted, one element versus the other, the different strands of the bill. That is the point that I was trying to make.

Douglas Ross: If we can move on to some of the other evidence—

The Convener: Could we leave that for now, please? I will come back to you, Douglas. There are follow-ups to the line of questioning that you have been pursuing.

Fulton MacGregor (Coatbridge and Chryston) (SNP): This relates to Douglas Ross's earlier line of questioning. Would the minister agree that the Scottish Government has introduced the bill now partly because of the significant change in social attitudes towards such abuse, noting the high-profile cases that have been in the media, the work of survivors' groups and a breakdown of the taboo and the social attitudes that have applied. Does the minister believe that the Scottish Government is responding to that? I think that we all agree that it is the right thing to do for survivors.

Annabelle Ewing: I have tried to list a number of actions that have been taken since about 2007, with the involvement of the Scottish Human Rights Commission, the very important interaction process and survivors feeling that they would get a hearing and would be listened to. I imagine that that reflects other developments in society at large, such that they now feel that this is a time when they can make some progress. I give all credit to them, because it is very difficult, as I think that we all appreciate, for survivors to make their views known and to lobby on the subject. We all wish to work with them.

There have been a number of different developments over the years, and that has led to now being absolutely the right time for us to get on and take away this obstacle to survivors accessing justice. As I have said, that is not a panacea. You have heard evidence that people still have to go through the normal court processes for reparation and all the rest of it, but the bill will remove at least one barrier and that is important to ensure that survivors who have called for this measure feel that they are being listened to.

Stewart Stevenson: I seek clarity. Section 17(3) of the 1973 act states:

"In the computation of the period ... legal disability by reason of nonage or unsoundness of mind ... shall be disregarded".

Therefore, the category of people we have been talking about already have the rights to set the normal limitations to one side. The bill is about creating that right for a new class of people, and it is not required for people who,

"by reason of nonage or unsoundness of mind",

already have such a right.

Annabelle Ewing: Yes. In brief—I can see that the convener is keen to keep to her schedule—that is the position. As regards the limitation period for people in those categories, the clock is stopped, and it does not start again until there is capacity or until someone is no longer in the position of nonage. With regard to survivors of historical abuse, we have seen that they simply cannot progress because of the limitation period and the in-built resistance to cases proceeding. That is what we need to tackle, which is what the bill is designed to do.

The Convener: Douglas Ross wants to start another line of questioning. Mr Ross, you will be followed by Mairi Evans, Rona Mackay, Mary Fee and John Finnie, so could you be brief, please?

Douglas Ross: Minister, what is your prediction of the number of cases that will come forward? The committee has seen a variety of figures quoted, some of which are significantly lower and some of which are significantly higher, so I hope that you will give the committee your best estimate. Given that number, do you think that the court system is adequately equipped to process those claims in a timeous manner for the people who want justice as soon as possible?

Annabelle Ewing: I refer the member to the financial memorandum, which is one of the bill papers. We have tried to come up with a best estimate or indicative figure, and a methodology for that is set forth clearly in the financial memorandum. The midpoint figure that we have come up with is 2,200. Of course, nobody knows what the exact figure will be and whether it will be higher or lower than that. The evidence before the committee shows that we simply cannot scientifically determine the exact figure. It is fair to say that the route of going to court will not be right for many survivors. That is a matter of individual choice and informed choice. It would be absolutely wrong of me as minister to suggest that anybody should take a particular course of action, because that is entirely for the survivors to decide. It may well be that other people, in quoting figures, have not taken into account the fact that not every survivor will choose to go down that route. Our best estimate is the figure of 2,200 that is referred to in the financial memorandum.

On the member's question about the court system, it is important to state that we do not expect all those cases to be raised simultaneously, to be raised in the same court or to proceed at the same rate. There will be different issues and disposals at different times. In the financial memorandum, we set out what we feel is a reasonable estimate of the impact on the Scottish Courts and Tribunals Service and its business. I again refer the member to the financial memo for the detail of that, because it sets out cost estimates for each year of a five-year period, which we felt was a reasonable period to consider.

Obviously, we will always be in touch with the Scottish Courts and Tribunals Service, and I am sure that it will not hesitate to alert us to any particular issues that might arise. Obviously, in our normal budgetary considerations, we will keep those matters under advisement.

Douglas Ross: It is useful to get that on the record. We have read the financial memorandum, which as you said gives a midpoint figure of about 2,200, yet it has been suggested to us in evidence that one Glasgow law firm alone has 1,000 survivors on its list and is ready to bring forward actions should there be a change in the law. The 2,200 figure that the Government has quoted seems slightly low, considering that one law firm has half of that number ready to go if there is a change in the law.

The minister said that she will listen to concerns coming from the Scottish Courts and Tribunals Service. Can we take it from what the minister has said that, if the bill is passed and the legislation is implemented and survivors start to come to MSPs or the committee to say that they were given reassurances and have waited a long time for the legislation but they feel that they are not being seen quickly enough or that the justice system is not treating them as a priority, the Government will look favourably on any request for increased funding to meet the needs of a court system that is more burdened because of the legislation?

Annabelle Ewing: We always keep under advisement what is going on in our courts. One direct impact on the Scottish Courts and Tribunals Service concerns the issue of fees, and we have of course moved to 100 per cent or full cost recovery. That should be borne in mind in looking at any financial impact on the Scottish Courts and Tribunals Service in terms of its resources. As I said, we expect that we will see actions raised in various sheriff courts and not just the new personal injury court. Of course, the Court of Session is an option for cases over a particular threshold. As I say, we do not anticipate that all potential victims will choose the route of going to

court. It is absolutely up to them to decide what is the most appropriate way in which to proceed, and I would not prejudge that for a second. We have come up with a best-estimate figure and we will continue to monitor the situation closely.

Douglas Ross: Finally, on funding, do local authorities and third sector organisations have adequate resources to meet the burden that they will face in investigating and defending claims that are made against them?

Annabelle Ewing: I have seen representations to the committee, in particular from the Convention of Scottish Local Authorities. At this point, of course, no one can say definitively what the impact will be across the piece. As I said, we will keep such matters under advisement.

We have been discussing matters with COSLA; officials met COSLA last week or thereby, and I will shortly meet the spokesperson on children and young people. Through officials, I offered to meet COSLA last autumn, but the offer was not picked up. However, I am happy to meet COSLA and officials continue to do so. We will keep the matter under careful advisement. At this stage it is a bit premature to discuss particular figures, because no one knows what the figures will be. We must wait and see.

Douglas Ross: Can we take some comfort from the fact that the Scottish Government is addressing the issues that COSLA raised?

Annabelle Ewing: We are certainly in conversation with COSLA. We have to see what happens. For some councils there might not be a particular impact—

Douglas Ross: But for others there could be a significant impact—

Annabelle Ewing: There are so many variables, as was recognised in the evidence that was submitted to the committee, that we are simply not in a position today to be able to bring out a crystal ball. As a responsible Government, we will continue to engage with COSLA. Those discussions will continue during the passage of the bill and—if it passes, as we hope that it will do—thereafter.

Mary Fee (West Scotland) (Lab): My question follows on from Douglas Ross's question about the potential burden on local authorities. The support services that victims use might also require additional support. If people come forward after waiting for years and years they might need additional support, even if they have been receiving some support. Is there enough flexibility in that regard? Are you alive to the need to ensure that the correct support is put in place for people as their cases come to court?

Annabelle Ewing: That is an important point. Funding is available from the in-care survivor support fund—it is now called "future pathways"—for a number of activities. It is important that we ensure that the court system looks at the issue from the perspective of the survivor and considers the support that they need, for example as a vulnerable witness who is giving evidence. That must be well recognised. I understand that we have been in broad-brush discussion with the Scottish Courts and Tribunals Service on support at court. We have also discussed with the Law Society of Scotland whether it can instigate specialist training for lawyers or perhaps even set up specialist accreditation for this area of work.

We are mindful of the point that you rightly raised, because it would be an empty gesture to provide the possibility of a legal remedy while not recognising the serious practical issues involved.

Mairi Evans (Angus North and Mearns) (SNP): You mentioned the definition of "child" in the bill; I want to ask about other key definitions. The panels that the committee heard from were in general agreement about the definition of "child", but there has been a lot of discussion about the definition of "abuse" in the bill.

Some groups thought that the definition should be more prescriptive; others welcomed the fact that what abuse is can be interpreted more broadly. The Scottish Human Rights Commission thought that neglect should be specifically mentioned in the definition. Will you consider including neglect in the definition?

11:00

Annabelle Ewing: I have noted the views about definitions in a number of submissions. Again, it comes back to first principles and the delicate balance that we have sought to arrive at in the legislation. Of course, some have said that the definition of abuse is too wide, while others have said that it is too narrow, and we have tried to reach a place where we can protect the bill's integrity by not taking it too far away from the core principles that justify our taking this action in the first place.

With regard to emotional abuse, we have drafted the list in question with reference to

"sexual ... physical ... and emotional abuse"

to ensure that it is inclusive rather than definitive. That is important, because we cannot begin to imagine all the forms of abuse that these people have suffered at the hands of the perpetrators or, in trying to represent this heinous and abhorrent harm, set out all the kinds of abuse that could be involved. As a result, we need to let the courts

decide; indeed, the Scottish Human Rights Commission has said:

"the Scottish courts are well placed to make"

such

"assessments".

After all, they make these assessments every day of the week.

Coming back to emotional abuse, I also think it important to recall that existing legislation in Scotland—for example, the Matrimonial Homes (Family Protection) (Scotland) Act 1981—also covers the possibility of mental injury. Again, the courts have had a considerable period of time to get to grips with that. I therefore feel quite confident that we have struck the right balance.

Neglect was covered in the draft bill that we consulted on, and many of the comments that we received suggested that such a move could make things too wide and lead to unintended consequences. In my view, the definition as it stands does not exclude neglect per se, but it would include only neglect that was a result of abusive rather than negligent behaviour. Again, the court would make such an assessment.

As I have said, I feel that we have struck the right balance, but I have looked at the evidence that has been submitted and I will read the committee's stage 1 report on this subject with interest.

Mairi Evans: The Scottish Human Rights Commission told the committee that there is already quite a clear definition of neglect. I understand your point about the term "emotional abuse" encapsulating many of the types of abuse that have been mentioned—indeed, that has been recognised in some of the submissions that we have received—but I note that people have also highlighted the terms "spiritual abuse" and "psychological abuse". What do you think about that? Do you consider that such aspects fall into the "emotional abuse" bracket and that, therefore, the bill should be left as it is, or will you consider including such things?

Annabelle Ewing: In their evidence, the Law Society of Scotland and the Scottish Human Rights Commission took the view that the notion of "spiritual abuse"—which, despite being an undefined concept, raises very interesting issues—could fall within the term "emotional abuse". I share that view, and I also feel that psychological abuse or harm would most certainly fall within it, too. Indeed, I have already cited the 1981 act and the fact that it features mental injury.

Like the Scottish Human Rights Commission, I feel that the courts are, as masters of the facts, well able to make these determinations and get to the key issue of justifying this departure from the normal law of Scotland for abuse of such a heinous nature and its being perpetrated on an incredibly vulnerable person—a child. As has been well documented, the effect of that abuse is such that for years and years the person is not necessarily in a position even to acknowledge that it has happened. That is the level of seriousness that we are trying to address here.

Again, though, we do not want to be too prescriptive, because I do not think that we can imagine all the possible kinds of harm that could have been perpetrated, including, as an example of neglect, children being told that nobody wanted them. We do not know all the kinds of heinous behaviour that could have gone on, and we need a definition that does not close off or shut down the possibility of a survivor accessing justice. I think that we have struck the right balance, but obviously I will look carefully at all the committee's deliberations on this point.

The Convener: That is very much appreciated by the committee because, when we took evidence, there was a feeling that emotional abuse did not quite cover spiritual aspects of abuse in which there is indoctrination and that that went a little bit further, almost on to psychological abuse. Perhaps neglect could come under that, too. There might be a case for having that on the face of the bill and the committee welcomes the minister having an open mind on that particular aspect.

Rona Mackay (Strathkelvin and Bearsden) (SNP): The Forum of Insurance Lawyers said that the burden of proving that there is a "relevant settlement" for the purposes of section 17C would rest with the person who was raising the action, whereas the Law Society thought that it would rest with the defender. Who is right? Does that need to be clarified in the legislation?

Annabelle Ewing: As I said earlier, it is quite clear that, with the possibility for the court to look at previously litigated cases in which there was a settlement, it is for the pursuer in the first instance to show that they have reasonable belief that the previous action was settled on the basis of the applicability of the limitation period. I noted that the Law Society seemed to have a question about that, but I was curious as to why, because it seems quite clear on the face of the bill that that is where the onus would lie.

I state again for the record that a pursuer would have to show that they held a reasonable belief and they could do that by giving a personal statement, for example. It would be up to the defender to seek to rebut that, which would get us back into the normal rules of court operation in terms of balancing evidence. In the first instance, it would certainly be for the pursuer to prove. Yet

again, I say that this is a major departure from the applicable civil law of Scotland and we have to be mindful of that as far as the application of the European convention rights are concerned.

Rona Mackay: As a layperson, I was confused as to why the Law Society thought that the burden of proof would rest with the defender, as that seems to turn the system on its head. Can you offer any reason why the Law Society thought that?

Annabelle Ewing: I imagine that the committee might wish to seek clarification from the Law Society on that point, and I would read that with interest. I am clear that it would rest with the pursuer in the first instance, with the explanation that it would be possible for the pursuer to make a personal statement to adduce that they had held that reasonable belief.

Mary Fee: In evidence, COSLA and other people who came to talk to the committee suggested that a specialist hub of the personal injury court might be the best place to hear these cases. I would be interested to hear your thoughts on that.

Annabelle Ewing: I noted that, and that approach could have attractions in that a specialism would be built up. On the other hand, playing devil's advocate, one could argue that a specialism might lead to a lack of innovation and, if a case were heard before the average sheriff court, that court might bring a fresh eye to it. However, I accept that there are lots of arguments in favour of having specialisms.

As to the decision making on that issue, it would be a matter for the Lord President to designate such courts. I feel fairly confident that the Scottish Courts and Tribunals Service will look very closely at the official records of this committee to see the points made that have application to it.

I think that it was the ABI that suggested that all actions would have to be brought at the new all-Scotland personal injury court, but that is not the case. Actions can be brought at any sheriff court in Scotland, or in the Court of Session, should the quantum threshold be reached. That is important and it should be borne in mind.

On balance, specialisms are helpful rather than unhelpful, but it would be a matter for the Lord President to designate such a court.

Mary Fee: Given the comments that you made in response to my earlier question about giving additional support and training to lawyers and solicitors in court, there might be some advantages to that. I suppose that we have no idea how many cases will come forward or what the burden on courts will be, so specialist hubs might be beneficial in dealing with cases as we go forward.

Annabelle Ewing: They might be. As I have said, I am fairly confident that the Scottish Courts and Tribunals Service will look closely at the committee's work on the bill and will reflect on any suggestions. I would not like to abrogate the rights of the Lord President to decide what happens in the court system, because I might get into trouble if I did. It is important to point out that it would be for the Lord President to decide, but I note what the member has said.

Mary Fee: Thank you.

Liam McArthur: I want to go back to the issue of the court's discretion, which we touched on in relation to section 17C. Under section 17D, the court will have the discretion to reject a case when the prospect of a fair hearing is not likely or the retrospective application of the law could result in substantial prejudice. You will have seen from the evidence that we have received that a number of witnesses have expressed concern that, if there is no guidance or clarity about how that discretion might be exercised, the judiciary could in effect, if they take a more conservative approach, use that discretionary power to apply the time bar by other means. Do you recognise that concern? Has it come through in the discussions that you and your officials have had with witnesses? What consideration was given to whether more guidance on how such a discretionary power might be applied could be beneficial in allaying those fears?

Annabelle Ewing: The substantial prejudice test under section 17D brings us back to the onus falling on the defender to show that proceeding would be of substantial prejudice. It would not just be theoretical prejudice, and it would not just be that it might be likely, as Elinor Owe pointed out; it would be substantial prejudice. Furthermore, in consideration of that test, the court must balance it with the pursuer's interest in proceeding. It is only after that further balancing consideration is made, presumably in terms of the gravity of the substantial prejudice, that the court would find in favour of the defender and find that the action should not proceed.

After careful consideration, we have included this mechanism to reflect the delicate balance that we need to strike in the drafting of the legislation to ensure that we have the best possible chance of defending the integrity of the bill should there be any subsequent attempt to undermine it. By including the fair hearing test—which applies anyway—and the substantial prejudice test, we have reflected the balance needed, whereby we need to recognise the defender's interest in legal certainty and finality of the law. We have recognised that through putting the mechanism

into the bill and we would have the courts so proceed.

The test would be in the bill and the courts would not be able to ignore it. Setting such a mechanism is helpful for the integrity of the bill and for the courts and the defender.

Liam McArthur: You quoted the Faculty of Advocates earlier in suggesting that the bill provides a reboot, and the faculty certainly expects that there will be a change in approach because of the switch to where the balance lies. Nevertheless, should that not be the case or should future case law suggest that access to justice is still being denied because of the way in which the discretionary power has been applied, is there then an opportunity to provide further guidance to reinforce the central message of the legislation?

Annabelle Ewing: There are different views about whether we should amplify that in the bill. One view is that it might provide further clarity, while another is that it could cause confusion. What is the guidance to be? There are so many possibilities of substantial prejudice that, if we set forth only some of those, even if the list is not exhaustive, it might nonetheless set off red herrings that might distract the court, possibly to the exclusion of the consideration of other matters. I am not convinced that setting forth any particular non-exhaustive list in guidance would necessarily be helpful from the perspective of the integrity of the bill and the defender's interest.

11:15

You raised the issue of whether the test would change the balance so much that the test would always be met, which would be to the detriment of the interest of the victim, who would have to overcome that obstacle to get their case into court. Again, the provision was crafted carefully to ensure that we demonstrated that we seek to meet the test of restrictions on rights under article 1 of the first protocol to the ECHR by looking at the legitimacy of the legislation's aim and the proportionate nature of what we are setting forth and whether there were any alternatives.

We feel that the mechanism that we have in the bill is proportionate in light of the considerations around the integrity of the bill. This area is full of very difficult challenges, but we feel that we have struck the right balance in the bill. At the end of the day, the court will have to make a consideration, and what is important is that the onus will be on the defender to show that there is substantial prejudice, rather than just that prejudice is likely or that there is a risk of substantial prejudice, and, even if that is proven, there will have to be further balancing of that with the pursuer's rights to proceed with the action.

We therefore feel that, for all circumstances, we have embedded in the bill through the prejudice mechanism a balancing of the respective rights of the pursuer and the defender.

Liam McArthur: We have heard concerns from representatives of personal injury lawyers that the exercise of the judgment on prejudice and fairness will occur at the end of proceedings. There are those who believe that it should happen at the outset. One can see the benefits all round for it to happen earlier in the process, because that would reduce the impact on the individuals involved and reduce the cost of taking forward proceedings that will ultimately fall because of the exercise of discretionary judgment. What is your understanding of where the judgment on prejudice and fairness is likely to happen?

Annabelle Ewing: Consideration of the applicability of the limitation rule in any exercise of discretion does not always happen at the beginning of proceedings. That consideration is a matter for the court in the instant case, so it can happen further down the line. It would be the same for the substantial prejudice test; it would be a matter for the court to make the determination at the point at which, in the instant case, it felt that it was most appropriate to do so.

Liam McArthur: Would one expect such determinations more often to be made later in the process rather than at preliminary hearings?

Annabelle Ewing: That is a very difficult question to answer, unless I am missing something.

Liam McArthur: In terms of the financial memorandum, it is material that, notwithstanding your point about full cost recovery, there will be greater financial implications for the SCTS if the determination happens later in the process. Some sort of judgment must therefore be made about where it is reasonable to expect that judgment to be exercised in the majority of cases.

Elinor Owe: No. The short answer is that it would be for the court to decide. The issues around a fair trial and substantial prejudice are very difficult for the court to determine. In a particular case, it might be that, until all the evidence has been heard, it will not be known what evidence is relevant. For example, a witness could die and the defender could claim that that made the trial unfair, but the evidence could show that that witness's evidence was not relevant and that the trial would not be unfair because of the witness's death. There could therefore be cases where the full picture of the evidence would be needed in order to be able to determine what was

fair or not, or the level of substantial prejudice. However, it would be for the court to determine.

Liam McArthur: I appreciate that, but I return to a point that Douglas Ross raised earlier about expectation management for survivors, many of whom will have gone through a tortuous process even to be at the point where they feel that they might be able to take forward a case. The longer the case proceeds before there is a ruling on whether there is substantial prejudice, the more damaging it could be if the discretion is ultimately exercised in a way that appears to them no different from the current limitation of the time bar.

Annabelle Ewing: The difficulty in providing any sort of dirigiste guidance would be that, as Elinor Owe pointed out, the decision is wrapped up in the facts and circumstances of each case. One could make a judgment call, but that might not be helpful to the pursuer in a particular case.

We must recognise that the courts are masters of the facts. We are not changing the whole law of delict or how courts go about reparation cases. We are seeking to change the applicability of the limitation period and the balancing that we feel that we have to conduct in that process.

It would be difficult to come up with a rule that would be appropriate in each case, because in each case the instant case will determine at which point the considerations are most relevant. I feel that we have to leave that in the hands of the courts, which are masters of the facts.

The Convener: In your opening statement and at various points throughout your evidence, you have made it crystal clear that court action will not be for every survivor. You listed some things that are in the policy memorandum, such as the historical child abuse inquiry, the survivor support fund and the national confidential forum. However, you did not refer to the Apologies (Scotland) Act 2016. Some survivors suggested that some people would choose the remedy of the 2016 act's provisions, as opposed to choosing court action. As you know, the 2016 act was granted royal assent in February last year and the expectation was that commencement would be six months after that. The act was passed when your predecessor was in the post. Will you tell the committee where we are with the 2016 act?

Annabelle Ewing: The convener will be privy to some of this information, because we have discussed the implementation of regulations regarding the 2016 act. During the passage of the Apologies (Scotland) Bill—it was my predecessor, Paul Wheelhouse, who oversaw that—further to representations received it became clear that, for some bodies, the processes of the bill were not appropriate and that those bodies wanted to be excepted. At, I think, stage 3, Mr Wheelhouse made a commitment to proceed with that. Proceeding with that has brought up other issues, because other bodies have come forward to say that they are in the same position. We discussed that with the convener, given her direct interest in the matter. We were not able to reach an agreement on the best way forward but we feel that we have an obligation, further to Mr Wheelhouse's commitment to Parliament and the discussions that we have had with regulatory bodies, to proceed in good faith and act on that commitment. We hope to bring forward the regulations shortly, and they will come before the committee. I am sure that there will be a full discussion on them and I am happy to come back to the committee at that time to answer any questions that you may have.

The Convener: I will press you on that. The previous minister's commitment was to look at health regulators. Further to our discussions, I am seeking clarification from the Cabinet Secretary for Justice about the issue. I have a letter from him that says:

"I am pleased that the passing of the Act meets the recommendation by the Scottish Human Rights Commission in their 'Action Plan on Justice for Victims of Historic Abuse of Children in Care' to give the merits of an Apology Law full consideration."

He goes on to say:

"a commitment was made to Parliament to ensure no unintended consequences for health regulators"

as a result of the bill being passed. Will you confirm that the other regulators that you are talking about are health regulators, which were excluded from the 2016 act's provisions because of the duty of candour?

Annabelle Ewing: The exclusion is not based on the duty of candour. You will be aware from our discussions that other health regulators that will be in the same position as the two that were referred to at the outset, which are the General Medical Council and the Nursing and Midwifery Council, came forward. In addition, two other regulatory bodies have said that they are in the same position. We must take that in good faith and we will bring forward regulations that reflect the good-faith discussions that, as a responsible Government, we are required to have. We hope to bring forward the regulations quite soon, and the Justice Committee will want to have a discussion on them once we do.

The Convener: What are the two other bodies?

Annabelle Ewing: As you will be aware from our discussions, they are the General Teaching Council for Scotland and the Scottish Social Services Council. They are the ones that we discussed in our meeting.

The Convener: It is good to get that on the record. Perhaps we will pursue that further on another day.

John Finnie: The committee has not been party to those discussions, so we look forward to the regulations. To what extent will they impact, if at all, on the issue that we are dealing with here, which is historical abuse? We have heard that people welcome the opportunity to receive an apology and that not everyone wants to go to litigation.

Annabelle Ewing: The specifics are to deal with particular procedures of, I think, eight health professional bodies and the two additional non-health bodies, which makes 10 in total. They will not impact on the civil remedies that will be provided through the Limitation (Childhood Abuse) (Scotland) Bill. The exclusions are not related to the duty of candour.

As you said, you have not been involved in the three discussions that the convener and I have had on the subject, but you can rest assured that the issues raised in the bill are separate from the issues raised in those discussions.

The Convener: The issue is for another day. In the meantime I thank you and your officials for attending this worthwhile evidence session.

I suspend the meeting to allow the witnesses for the next item to take their seats.

11:26

Meeting suspended.

11:31

On resuming—

Railway Policing (Scotland) Bill: Stage 1

The Convener: Agenda item 7 is our second evidence session on the Railway Policing (Scotland) Bill. I refer members to paper 7, which is a note by the clerk, and paper 8, which is a SPICe paper.

I welcome the panel, which comprises Nigel Goodband, national chairman of the British Transport Police Federation; Chief Superintendent John McBride of the British Transport Police branch of the Police Superintendents Association of England and Wales; Michael Hogg, regional organiser at the National Union of Rail, Maritime and Transport Workers; Calum Steele, general secretary of the Scottish Police Federation; and Alisdair Burnie, staff representative, Transport Salaried Staffs Association.

We will go straight to questions from members.

Douglas Ross: The British Transport Police Federation states in its submission that it

> "sincerely hopes that the views of those most affected by the integration of the BTP in Scotland into Police Scotland, namely the BTP police officers ... will be given due consideration in the final decision for integration."

Do you think that that is happening at this stage? Are you concerned about the fact that the consultation on the Smith commission's proposal that powers over the BTP in Scotland be devolved to the Scottish Parliament focused only on one area—taking the BTP into Police Scotland—rather than on other options that were available? On page 9 of its submission, the federation says that the process has been one of "engagement but not consultation". Will you elaborate on that?

Nigel Goodband (British Transport Police Federation): As a federation, we believe that, right from the outset, the question that the Scottish Government was asking was how best to integrate the BTP into Police Scotland, and not whether that should happen. A number of options were put forward by the British Transport Police Authority but, in our opinion, the Scottish Government dismissed all the options bar one—that of total integration. In the process that we have been involved in, we have seen no evidence of that approach having any benefit—or, indeed, of the Smith commission recommending full integration. It recommended that the relevant powers be devolved, but it did not recommend that the BTP should be subsumed into Police Scotland. That was very concerning from our perspective.

We feel that, right from the outset, there has been no acknowledgement of our views or those

of the police officers whom we represent, because a simple decision has been taken that there is only one option—that of full integration.

Douglas Ross: I want to go further into the British Transport Police Federation's written submission. You mention the BTP command and control system, which seems to operate very well. Will you explain that further? Last week, Parliament was presented with a report from Audit Scotland on Police Scotland's failed i6 project, which was a £46 million project that was all about information technology systems for the single police force. The report concludes that our officers in Scotland are still using

"out-of-date, inefficient and poorly integrated systems."

What concerns does that give the federation and the other organisations that are represented on the panel about the BTP functions coming into a force that has an antiquated and potentially dangerous system that is not working for our officers?

Nigel Goodband: I can only comment on what the British Transport Police has in place at the moment, which is a seamless command and control system. It has one crime recording system and a reporting line through train drivers and victims. The existing process works and is successful. There were teething problems with the introduction of the new Niche Technology system that has been implemented in the BTP, but it is a positive. The Niche command and control system is better than previous systems and is proven to work.

The media comments on the failure of the i6 project in Police Scotland raise concerns. One is that there will possibly be two command and control systems and there could be issues about deciding where a victim sits between the two. A victim might get on a train in London but then suddenly report a crime in Scotland, which could lead to a debate about where the crime occurred and whether it was in England or Scotland. That could throw up unnecessary difficulties.

Chief Superintendent John McBride (Police Superintendents Association of England and Wales (British Transport Police Branch)): I thank the committee for the opportunity to share the views of the BTP branch of the Police Superintendents Association.

As an operational commander and senior leader, I believe that it is imperative to have one joined-up command and control system, whether it is in Police Scotland, the legacy forces or the BTP. That is an imperative in railway policing. I will give an operational example. Right now, we are preparing our plans for the forthcoming world cup qualifier between Scotland and England. In the current BTP context, it is really important for me as an operational commander to be able to see train loadings and where all the fans who are travelling by train get on, whether that is in Birmingham, Manchester, Aberdeen or Inverness. Post April 2019, as the operational commander in any new railway division, it will be vital to have clarity on where my resources are in that division so that we can deliver for the public and the train operators and perform at the operational optimum.

Calum Steele (Scottish Police Federation): To an extent, we cannot help an awful lot on what might happen with command and control systems if the BTP comes into Police Scotland. We would need assurances and a response from the police service on that. However, I can comment from a perspective of logic and common sense.

I have experience of the BTP system, having been foolish enough to leave a bag on a train, which, through the skills and good offices of the diligent officers at the Haymarket depot, I was able to recover the same day. Given all the difficulties that the Police Service of Scotland has, I would find it odd if there was a suggestion that it should simply switch off the current system if or when it takes over the BTP functions in Scotland. It seems to me inherently logical for the service to continue to maintain a system that works. That is in line with the assurances that Bernie Higgins gave that a dedicated transport policing system will be maintained in the Police Service of Scotland. I cannot imagine that anyone in the IT departments of the service is devising a cunning plan to get rid of something that works and replace it with something that might not.

There might even be benefits for the wider police service if it looks at what the BTP has and whether that model could be used in the police service. It is not just a question of where there might be disbenefits; in the opposite direction, there might be benefits. For all the reasons that Nigel Goodband and Chief Superintendent McBride have laid out, I cannot envisage that the service would simply turn off those things. Ultimately, however, all that we can do is speculate, because we are not in a position to answer that question.

Michael Hogg (National Union of Rail, Maritime and Transport Workers): As far as the staff are concerned, it is crucial to have a fit-for-purpose system in place, because it means that the correct information can be relayed to the BTP. That is a fundamental for the drivers and guards on the trains. It is crucial that we get the communication correct and have a proper system in place.

Alisdair Burnie (Transport Salaried Staffs Association): I am speaking today primarily as a staff representative from the TSSA, but I can comment on the capabilities of the Niche

Technology IT system. The command and control system is also integrated into crime and case management. Chief Superintendent McBride alluded to the benefits of having a live, instant management system, but it also has great advantages for crime recording and management and the case management that follows. An integrated system means that there should be no gaps in inquiries or victim services and a common standard throughout Scotland.

In comparison, Police Scotland has at least eight different crime recording systems and at least eight case management systems, none of which speaks to the others. The advantages of our system are huge and it is to the benefit of all. Moving to Police Scotland's current IT systems would be disadvantageous.

Douglas Ross: I was going to come to this point later but, as you have raised it, will you further explain the difference between crime recording in Scotland and in England? I understand from the evidence that that is not a problem at present because the BTP records the crimes. However, am I correct to say that, in Scotland, crimes are recorded from one point but in England they are recorded at another point? Is there, therefore, potential for loss of evidence and an inability to record crimes as efficiently as you do at present?

Alisdair Burnie: That is essentially correct. England and Wales obey the Home Office counting rules and crime recording standards, whereas in Scotland, including in the BTP, we obey the Scottish crime recording standards, and our performance has been measured as excellent.

One difference is the locus of the crime. Generally, our crimes are transient, and the start and end locations can cross borders. For commonsense reasons, the BTP considers the end location to be the location and it begins to allocate crime inquiries from there, whereas Police Scotland considers the start location to be the location of the crime. I am talking about instances when the exact location is not known. If something happens en route between England and Scotland but it is not possible to say exactly where the crime occurred, we will record the end location and begin our inquiries there. Police Scotland considers the start location to be the location of the crime. An English location could mean that different legislation, procedures and inquiries apply.

Douglas Ross: I have a final question on that point, although I would like to come back to other issues if we have time. Calum Steele mentioned the evidence that Assistant Chief Constable Higgins gave last week about having a dedicated railway policing unit within Police Scotland. Did the witnesses—particularly the federation and Chief Superintendent McBride—take reassurances from the evidence that we heard last week about the two or three weeks of additional training that would be given to all officers who come into Police Scotland, which would upskill them enough for them to be seen as dedicated railway policing officers?

I also have a question about the personal track safety certificate that officers need to have. What implications will there be if officers in Scotland are not trained to the same level as BTP officers and they do not have a personal track safety certificate?

11:45

Nigel Goodband: I was not reassured by Mr Higgins's evidence. I do not think that he has thought about the consequences of training every police officer in Police Scotland. The training does not come free; there is a massive cost to it. Every officer in Police Scotland who intends to police the railway—or go anywhere near the railway—will have to have the personal track safety certificate. If someone enters that dangerous environment without the understanding and expertise that ensures that they know where they can stand, where they can walk, what the direction of travel is and so on, they will put themselves in a dangerous situation. I am sure that Mr Steele from the Scottish Police Federation would be really concerned if his members were suddenly patrolling the tracks with no certification and no guarantee that, if something happened, they would get support from the organisation.

There is a misconception that an officer can simply be trained to work in the railway environment. There is initial training, but training is biennial and officers must keep taking a pass-or-fail refresher course and recertify in order to continue working in that environment. They must also carry their certificate with them when they are in that environment. There will be a continual cost for every officer who works in the railway environment. Speaking personally, I was not reassured by Mr Higgins's comments, given the massive cost implications.

Chief Superintendent McBride: As Mr Goodband said, danger is ever present on the railway. BTP officers undertake track safety training, which is refreshed regularly. Such skills have to be used regularly, because if they are not used, the training will wane over time. Police officers are bombarded with training in a range of areas, and if officers are not using their track safety training and do not have that familiarity with the dangerous, hostile operating environment that is the railway, people could be put in danger.

We go through the personal safety training because, from a health and safety point of view, it is necessary to protect our officers, but the endgame in all of this is to ensure that police procedures are honed and improved to reduce disruption to the public. That is why we do the PTS. The benefits that flow from that are all geared to the public and to recovering operations more quickly when they have been brought to a stop by a criminal act or mental health episode.

Michael Hogg: The RMT supports the proper training of people who have to be anywhere near our railway. That is crucial.

I read the evidence from last week's meeting, and we do not necessarily accept what was said about the proposed merger. Our position is clear: from a trade union perspective, we do not support the proposal that is on the table to merge the British Transport Police and Police Scotland. We have not ruled out the option of taking industrial action to retain BTP officers on the railway, because we are concerned about the safety of railway staff and passengers on trains in Scotland.

The retention of the British Transport Police on our trains is part of the safer Scottish trains campaign that we have embarked on, because the British Transport Police and safer Scottish trains are inextricably linked. We see the need to have BTP officers on our trains. They are properly trained, and having staff with a personal track safety certificate is crucial. Anything else is pure nonsense, as far as we are concerned.

Calum Steele: To some extent, my response will reflect what I have already said. As members of the committee will know, I am not in the business of unnecessarily defending senior officers in the Scottish police service, or the service itself. It is probably not helpful to try to second guess or interpret what Assistant Chief Constable Higgins has said. However, I did not take his evidence to mean what Mr Goodband has said. To my mind, ACC Higgins made it clear that, although every officer would receive an additional three weeks of training on aspects of policing of the railway, the specialist railway policing element would receive additional training over and above that. I am sure that, if someone was to write to him and ask him to clarify his view, he would confirm that. It will not be the case that there will just be three weeks of training for everyone and that will tick a box for policing on the railways.

I agree with the points about how dangerous the railways are. Trains are bloody fast and they can scare the bejesus out of you if you are not used to working in railway environments. I came from a smaller provincial force where the relationships and the reliance on the local officers and BTP officers were not the same as those in the central belt, where there are multiple tracks and all the rest of it, but I have worked—albeit not to any great extent—on the railways. I have recovered bodies from railways. I appreciate that working on single lines where the train has come to a halt is entirely different from the elements of track safety associated with passing trains and all the rest of it.

However, I do not consider it feasible—I find it incomprehensible—that the service, be it the BTP in its current state, a hybrid or a transport service within the Police Service of Scotland, would put a police officer out to work on a railway line without their having the appropriate track safety requirements. The old adage "If you think health and safety is expensive, try an accident" would come bearing down on them at a hell of a rate of knots—and I would be at the front of the queue knocking lumps out of them for even suggesting it should be done that way.

On ACC Higgins's general evidence, the awareness raising and additional training for the police service would be a very good thing. I was also pretty comforted—as far as I could be without working through the detail of what we are going to be looking at in an absolute sense—that whatever specialist resources are going to be reserved for the railways will receive the adequate and necessary training to do their jobs.

The Convener: Members have a number of supplementaries following Douglas Ross's line of questioning.

Rona Mackay: My question relates to Nigel Goodband's opening statement. What is his reaction to last week's evidence from Chief Constable Crowther of the BTP, who said:

> "I totally accept that the Smith commission recommendations, as taken forward in the Scotland Act 2016, bring about the devolution of the functions of the British Transport Police in Scotland—there is no doubt about that and we totally support it.—[*Official Report, Justice Committee*, 7 March 2017; c 8.]

Nigel Goodband: I totally agree with that statement. I said at the beginning of the session that we have seen no evidence in the Smith commission's work that states that there should be full integration of the BTP into Police Scotland.

We support and understand the Smith commission and the devolution aspects of it; we do not dispute that. However, we are in dispute with the process. A number of options were proposed to assist the Scottish Government in achieving that aim, but only one option has been considered throughout the process. That is our concern.

Rona Mackay: What was your preferred option?

Nigel Goodband: My personal preferred option would be for the BTP to remain as one national

police force policing the railway environment. If the Scottish Government's will was to take more ownership and control over that, I see no reason why BTP officers cannot remain in the British Transport Police, which could be renamed and rebadged as the Scottish transport police, for example; officers would remain part of a national police force.

It is interesting to hear that there is a view in Scotland that the Government is trying to create, and have accountability for policing in, one national police force. The BTP is a national police force, and a very successful one. I regularly hear my members ask, "Are they just robbing Peter to pay Paul to achieve the same aim?" To date, we have seen no evidence that there would be any benefit in that approach, or any failing of the BTP that would suggest that such a change should be made. In inspection after inspection, we have proved that the way in which we police the railways—our policing model—is successful, so why would you want to change that? Another relevant saying is, "If it's not broken, why fix it?"

Rona Mackay: I do not think that anyone is suggesting that there have been failings on the part of the BTP, or questioning its excellence. The question is about why the BTP should not be integrated into Scotland's national police force.

Nigel Goodband: That is because, ultimately, you would be severing the services of a police force—that is to say, the BTP. As I have said, we are a national force. Suddenly to take the BTP of Scotland away from the BTP would be making that severance and, for me, creating an unnecessary border between two police forces.

Rona Mackay: Does anyone else have a view?

Alisdair Burnie: I totally concur with what my BTP Federation colleague has said. We do not understand why you are trying to fix something that is not broken. You already have what you need. It appears that you want to break up the BTP in Scotland simply to—

Rona Mackay: It is not a question of breaking it up.

Alisdair Burnie: But, ma'am, that is the feeling. Then you will recreate it in some other form in Police Scotland. You already have that, so you can have what you want at no cost: basically, option 2. I am sorry, but I just do not understand it—and neither do the staff.

Chief Superintendent McBride: Mr Higgins said—not at the committee's recent meeting, but at a previous round-table session—that although that could be done it would be "massively complicated". I certainly would not disagree. The BTP superintendents branch will work to help the Parliament and the committee to understand all the risks, as we see them from our professional point of view.

Ministers have said repeatedly how highly they value the service that the men and women of the BTP in Scotland provide. In trying to replicate that service, and in going down the proposal route as it is, we are extracting something that has been immersed in our railway policing culture for over 150 years and in its current format for about 67 years. From that has been born significant innovation in our approaches to honing necessary police procedures so as still to fulfil our every need but to do so in a way that reduces any disruption that might be caused by those police procedures.

There are generally five areas that cause criminal disruption to the railway in this country: trespass and vandalism; cable theft; level crossings; graffiti; and mental health and deaths on the railway. Each of those happens in a very hostile operating environment. The BTP has looked at how we investigate those matters and has innovated, in many ways, to ensure that we can do it and cause the least possible amount of disruption to train operators and thereby to the travelling public. That is so that the travelling public can have confidence that the services will get them to work each day, on time and consistently, and to business meetings and family celebrations without any more disruption than is necessary.

That specialism, which has been built up over many years, is what I think is at risk. I will work to try to replicate that. I use the word "replicate", because that is what I hear people saying. We want the service to be at least as good as it is just now.

12:00

In accepting the journey that we might be on, we need to remember that this will, as Mr Higgins said, be massively complicated, and we should accept that there is likely to be a level of disruption or a diminishing of the service as we transition to the Police Scotland railway division.

However, there is a risk to all the good that we do. Criminal disruption costs more than £5 million—and if you add in the suicide and deaths element, you very quickly go up to more than £13 million. From our data across the country, we know that, when local police get involved in some of those investigations from the start, it takes at least 50 per cent longer to carry out a full investigation and recover the service. I suggest, therefore, that there is likely to be an additional cost in that respect.

However, we will work and, as we do right now, share our practices with the Scottish Government and its seven workstreams. We are working to

share with Police Scotland colleagues how we police the railways in order to try to build that specialism; however, it is born out of a 150-year-old culture and attitude, and a leadership that allows the men and women in the division to problem solve more with the railway than with police colleagues, simply because of the environment that we work in and, through that innovation, to arrive at solutions that deliver for the public.

The Convener: Ben Macpherson is next, to be followed by Mary Fee. These are still supplementary questions, but it is a good line of questioning.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): It is important to bear in mind that there is a collective determination to maintain a transport policing ethos, no matter how Parliament chooses to proceed. Contrary to what Douglas Ross has said but in a similar vein to Calum Steele's comments, my interpretation of last week's evidence from ACC Higgins is that a specialist railway policing entity will be maintained in Police Scotland together with extra training in transport policing for all new recruits who go through Police Scotland's training programme at Tulliallan. Given that collective determination to maintain a transport policing ethos—indeed, to enhance the transport policing offering here in Scotland—I would have thought that that extra capacity in the police service would be welcomed by the panel.

Nigel Goodband: An example of this occurred recently in Holland; unfortunately it did not work there, and the Dutch railway now has private security. The train operating companies use private security to police—

Ben Macpherson: But, with respect, I do not think that anything like that is being proposed here.

Nigel Goodband: You are suggesting that integration with Police Scotland would provide wider specialism and wider resource, and I would contradict that by citing Holland as an example in which the same perception was given when the same decision was made, but where the move itself did not work. Similarly, in his review of the terrorist threat to London—which, I note, has the largest police force in the UK—Lord Harris has recommended that the Metropolitan Police adopt some of the BTP's good practices.

I return to my response to Ms Mackay's question and ask: why fix something that is not broken? We provide an excellent service, and there is no logic, no reason and—most important—no evidence as to why the service that is being provided today should be transferred to another police service.

Ben Macpherson: As Rona Mackay pointed out, there is no perception here that the British Transport Police is broken. As I understand it, the proposed approach is about enhancing the available transport policing offering in Scotland by utilising the economies of scale and the extra specialist services that Police Scotland would bring.

On your points about Holland and London, I understand that the proposal is to maintain a specialist railway policing entity within Police Scotland. Those specialist skills will be maintained and enhanced, and extra capacity will be created on top of that by greater awareness and training through the Police Scotland programme. The idea that that is a contraction of the railway policing offering is a misrepresentation—capacity within the service will be enhanced.

Chief Superintendent McBride: The enhancement is an interesting area. Crime on the railway in Scotland is at an incredibly low level, and the railway is probably one of the safest environments in the country. The chance of someone being an assault victim or suffering any violence is one for every 275,000 passengers; that gives an idea of the levels of criminality. While enhancements are always welcome, a decision always has to be made about prioritisation over where crime happens.

Our history, our planning and our policing plan development acknowledge the key role of front-line staff who work in the railway. I mentioned innovation earlier; a number of years ago we brought about the DNA spittle stick, the use of which has been rolled out from the railway to buses and other public transport. The stick allows anyone who is spat at—which is a disgusting assault—to take a sample, which is analysed; very often we get a successful hit. There are priorities to be made; if we deal with about 5,000 crimes on the railway, that is one of our priorities. I am pleased to say that we have fewer than 100 assaults on staff every year on the railways in Scotland. That is too many, but it is at a low level, as is crime in general. The challenge for us is keeping the level that low.

Enhancements are welcome if staff are trained. At the round-table session, Mr Hanstock and Mr Higgins spoke of collaboration when our backs are to the wall. When there is serious disorder, we come together; we plan for events with Police Scotland, as the committee would expect. However, if our backs are not to the wall and we are not in a heightened serious disorder mode, when it comes to tasking specialist resources I would use BTP specialists—dog handlers, working-at-heights teams or public order officers—because they understand the operating context of the railway, and understand that some police

procedures can add to disruption on the railway. Our procedures have been adapted and honed, and they are understood by those specialists. We would not always bring in people from other forces, because that level of knowledge is not there just now. As we progress our work and share our training with Police Scotland, we hope that they will see how we train and operate, and see our culture of policing on the railway.

In 2012, for every million passenger journeys, we had about 48 crimes; that figure is now down to 45 crimes. The railway environment in Scotland is incredibly safe—I hope that no-one misunderstands that fact—and we are charged to keep it thus. We do that through our specialist skills and training, and through being immersed in a much bigger body that innovates to provide solutions that keep services running and delivering for the public.

The Convener: We have two more supplementaries, and we will then move on to our main lines of questioning with Stewart Stevenson.

Mary Fee: Specialist resources have been mentioned and it is worth pointing out the work that the BTP has done in reducing the incidence of metal theft. There has been an 87 per cent reduction in such theft in the past few years, which has had a massive knock-on impact on the wider rail network. I do not know whether you want to comment on that.

On another issue, BTP officers tend to be visible. I am not by any means saying that Police Scotland officers are not visible, but the perception is that BTP officers are visible, particularly during antisocial hours, when we expect to see BTP officers in stations late at night and early in the morning to prevent or tackle antisocial behaviour, or any incidents that kick off on trains. Passengers have an expectation that they will see BTP officers. What impact might there be on that visibility if the merger was to go ahead? Do you envisage there being a pull-back from that visible policing?

Chief Superintendent McBride: I do not. I know that there is a danger that BTP or future railway policing officers could be pulled away. In fact, we explained in our written submission why we think that there is a danger that that could happen in some abstraction.

On the issue of late-night disorder, I am pleased that you have seen the visibility of BTP officers. We have just spent the past 12 to 18 months looking at our demand profile and how we meet it both across the force and here in Scotland. On 9 April, we will change the rosters for officers and staff. That is never popular, but we are doing it because we feel that we are slightly out of step with the main demands.

In my view, the railway is the economic backbone of the country because it contributes so much. In that regard, we can talk about the situation during the day of commuters being confident about getting to work or we can talk about the night-time economy and people going into our larger towns and cities to enjoy the theatre, pubs, cafes or whatever. We can pull railway staff into that consideration because they sometimes have to deal, as Mary Fee indicated, with the less savoury characters who take to the trains of an evening. My officers are out there to bring confidence to the railway staff. If the staff are not on the trains because they do not have that confidence, the trains are unlikely to run—being in the railway police for 28 years has taught me that. In addition, if the public do not have that confidence, they will not travel in on late-night services or, more important, travel home on them after they have enjoyed an evening out with their friends, during which they have spent money that goes into the local economy.

I will not say more about the issues of late-night disorder and abstractions, because they are covered in the written submission from the BTP superintendents branch, but I will talk briefly about the issue of metal theft. I could talk at length about metal theft, but I will save the committee from that.

In my experience, the phenomenon of metal theft was first identified by the British Transport Police, above any other force in the country. We saw it because we saw the impact that it was having on the trains as a public service for people getting into work—we saw the disruption that was being caused. We worked closely with Network Rail and train operators to devise a plan that would help to overcome that disruption. However, we saw very quickly that metal theft went much wider than the transport network. We saw that it arose from the economics of supply and demand, because the price of metal was going up around the world. However, we saw that metal theft was starting to affect critical national infrastructure, local authority housing stock, faith buildings and a range of areas across communities, but particularly local businesses.

The BTP led a number of national campaigns against metal theft. The first one, which was done with the help of the Home Office and a £5 million grant, brought about some legislative change. As committee members will know, we have done something similar in Scotland through a £600,000 grant from Transport Scotland. We have encouraged, engineered and collaborated across critical national infrastructure with utilities companies, other police forces and other law enforcement agencies to bring about a reduction in metal theft.

I think that the figures that were quoted are the railway figures, but a 52 per cent reduction in metal theft across Scotland has been brought about by the leadership that the BTP has shown in the campaign; the way in which we have galvanised other law enforcement agencies, local authorities and utilities to better protect their assets; more enforcement that has targeted metal thieves; work with scrap metal dealers and new regulation; and work with the Parliament, officials and ministers to change the law. That is the contribution that the BTP has made on metal theft, and that has led to that reduction.

12:15

Alisdair Burnie: I want to say something in the vein of what the area commander has just said. The mutual metal theft operations resulted in many crimes—some of which were off the railway—being dealt with in their entirety by the BTP. That means that they were detected and reported as positive crime statistics. Those statistics were all transferred to Police Scotland, so it got the benefit of that in its statistics. We are integrated in the common aim of achieving justice.

Michael Hogg: A visual presence in freight and Network Rail yards is absolutely crucial; my members have certainly advised me that seeing the BTP regularly visiting such locations is absolutely crucial. The link between the BTP and the staff—obviously, BTP officers know the staff—and knowing the railway terrain are also absolutely crucial.

From a staff and trade union perspective, we can see the BTP expertise and knowledge being lost if the merger of it and Police Scotland goes ahead. The BTP would potentially be swallowed up because of Police Scotland resources. Let us consider Edinburgh Waverley, Glasgow Central and Glasgow Queen Street stations. You can bet your bottom dollar that if there was an antisocial behaviour incident in Princes Street, BTP officers in Edinburgh Waverley station concourse would be expected to deal with it. The expertise in, and knowledge of, dealing with any form of assault or antisocial behaviour on station concourses in Edinburgh and Glasgow or—God forbid—on the trains would therefore be lost.

A lot of information about verbal and physical assaults comes to the trade union, so they are a big concern for us. We are engaged with Transport Scotland, in conjunction with ScotRail and the BTP, about the possibility of using body cameras to address antisocial behaviour and physical or verbal assaults. It is coming over loud and clear from my members throughout the country that keeping the BTP's expertise and knowledge, and the presence of BTP officers on the railway, are absolutely crucial and fundamental.

The Convener: John Finnie can ask a brief question before we move on to our main line of questioning.

John Finnie: I declare membership of the RMT parliamentary group.

It is not very often that I take a different view from Michael Hogg's; I share his view on retention of a specialist service. I want to go back to a point that Chief Superintendent McBride made earlier—maybe I heard wrongly what you said. You were not implying that Police Scotland would deploy officers other than risk-assessed ones. That risk assessment would clearly show whether there was a requirement for additional training.

Chief Superintendent McBride: Sorry?

John Finnie: You talked earlier on about the need for specialist training. There was almost an implication that people could be deployed who have not been given specialist training.

Chief Superintendent McBride: Does that go back to track safety competence?

John Finnie: Yes.

Chief Superintendent McBride: I am not sure what point you are referring to.

John Finnie: Let me rephrase my question. Given the contractual requirements—never mind the legal and moral requirements—would no police officer, regardless of how he or she is badged, be deployed in a specialist area without having the necessary training?

Chief Superintendent McBride: It would certainly be my best professional advice to Police Scotland colleagues that they should not do that.

John Finnie: Okay. Thank you.

Stewart Stevenson: I want to talk about interfaces, which have come up. Each day, between 40 and 50 trains appear to cross the Scottish border. Each day, passenger trains leave the UK—London, in particular—for the Netherlands, Belgium and France, freight trains regularly come from Spain and Germany, and the first freight train from China has just arrived in the Great Britain network. The number of vehicles involved appears to be greater than the number that cross the Scottish border. It is worth saying that, as at 12.15 today, 7,393 trains had been operated in the GB network, 766 of them in Scotland. At the moment, there is an interface between policing by the BTP and general policing, in relation to those 766 trains, and there are 40 or so trains that go across the border. Does the arrangement governing management of the interfaces between the BTP and Nederlandse

Spoorwegen, the SNCF and the SNCB work? It appears that I am hearing the suggestion that the proposed policing arrangement could not be made to work across the border between Scotland and England, but I am not hearing that the existing cross-border arrangements cause huge problems with France, Belgium, the Netherlands and other jurisdictions with which the UK is connected by train.

Calum Steele: I am not sure that I understand the question.

The Convener: I fear that you have baffled us with statistics.

Stewart Stevenson: I think that it was Mr Goodband who first raised the subject of interfaces, but I am open to being corrected.

Nigel Goodband: I am sorry, Mr Stevenson, but I am not in possession of any facts regarding the policing of the railway in Holland, other than the fact that—

Stewart Stevenson: Do forgive me. I was not asking about policing in the Nederlandse Spoorwegen network. My point is that we have trains that cross borders to other jurisdictions. An issue that was raised earlier was that the existence of a different jurisdiction in Scotland would be a major problem. Could you tell us about the problems between London and Paris, London and Brussels and London and the Netherlands?

Nigel Goodband: I have no evidence to enable me to answer that question. I have not suggested for a moment that there would be a difficulty with policing cross-border services between Scotland and England—we prove now that there is not a problem with that. We draw the inference that there could, because of the involvement of two different forces with different command structures, different crime recording systems and different communication systems, be a problem. I am not suggesting that there is a problem between Scotland and England at the moment. In fact, quite the reverse is true; the current model for policing cross-border services is successful. I hope that it will continue to work in that way.

Stewart Stevenson: Who records crimes on the 17 return journeys a day for passengers between London and Paris?

Nigel Goodband: I am not sure of the answer to that question.

Stewart Stevenson: So, that recording has not been of such character as to have come to your attention.

Nigel Goodband: No.

Stewart Stevenson: Cross-border policing of rail services—at least in that instance—has not been an issue.

Nigel Goodband: It has not, that I am aware of.

The Convener: If the witnesses would like after today's meeting to provide further evidence on information that they are not currently aware of, the committee would be happy to receive it. However, we need to move on. We have got Stewart Stevenson's point—unless anyone has anything substantial to add.

Chief Superintendent McBride: It might help the committee to know that the example that was mentioned involves a much more controlled environment—we are talking about ports, with all a port's controls. I am not sure what the levels of crime are, but the system would work in the way that we have described: crimes would be recorded at the end-station destination. St Pancras is an international port, so crimes coming in would be recorded there for the reasons that have already been given by others: police have the victim and can get statements and start the inquiry. That is a much more controlled environment. I do not know the crime statistics for the Eurostar operations.

As Mr Goodband said, arrangements currently work effectively for trains that pass over the border between Scotland and England. I suppose that the proposal will bring in almost dual controls—we are asking two organisations to think completely differently about how crimes are recorded, and how incidents are dealt with, and about their competence as trains cross the border.

The Convener: We will move on.

Alexander Stewart: We were given to believe that one of the benefits of creating Police Scotland was that there would be specialist policing across the whole country and a seamless transition for employees in terms of their rights and conditions. That is not quite the picture that has been painted today. We have been advised that the transfer of rights and conditions for the BTP should be as seamless as it was for Police Scotland, although whether there was a seamless transition there is open to interpretation; I do not believe that the members and employees of Police Scotland saw it as seamless. I have major concerns about how the conditions for individuals and employees of the British Transport Police could be managed, maintained, retained and sustained as we go forward. Can I hear some views on that?

Nigel Goodband: That point is a major concern for the British Transport Police Federation, because the officers of the British Transport Police have dual status. As you have heard already, they are employees and police officers, but they are not Crown servants. In the transfer from the previous eight forces to Police Scotland the transfer was from Crown servants to Crown servants. To date, we do not know—we have not been shown—what the legal mechanism is for the transfer of

employees to Police Scotland, where they will be Crown servants. That is a major concern.

Mr Matheson has sent me a letter to circulate among the officers of BTP Scotland and we hear the term, "triple-lock guarantee". However, the terminology that is used in the letter and the policy memorandum say that that is the aim where "possible". In my mind, that does not give a "triple-lock guarantee". That level of uncertainty continues among British Transport Police officers: what exactly will their terms and conditions and their pensions look like when—or if—they transfer to Police Scotland?

Michael Hogg: The RMT does not represent the BTP—its employees are not our members—but from a railway staff perspective, terms and conditions are absolutely crucial. If there were to be attacks on terms and conditions, pensions or railway passes, the RMT would not hesitate to take industrial action and issue ballot papers. The RMT stands shoulder to shoulder with the British Transport Police Federation on protecting its members' terms and conditions. It is not unreasonable to require a guarantee that their terms and conditions would be protected.

Alisdair Burnie: Police staff and TSSA members are now in fear of the proposed integration. They cannot see what is coming and they do not find any comfort or reassurance anywhere. It feels like we are being pushed towards a life and career cliff edge and will either jump or be pushed with no idea of what the landing will be like. The Transfer of Undertakings (Protection of Employment) Regulations 2006 were mentioned initially and then, understandably, discounted. A version of TUPE was similarly mentioned and discounted, and the latest idea is to use Cabinet Office statement of practice, or similar, staff transfer regulations, under which staff remain with the same employer and with the same pension fund, but that is not the case here.

I have to report that there is fear among staff about what might happen. One major fear is that they would not be able to remain with the TSSA once the transfer is completed, and would instead be with a union organisation that does not understand the lead up to the transfer, or the pay and conditions. Most staff who have options will take them, so please do not think that the number of staff that you expect to transfer will necessarily transfer, because that will not be the case.

12:30

Alexander Stewart: The number of transferring staff is one of the main cruxes that we are looking at. The information that we have been given assumes transfer of a certain number of individuals. The package of quality and skills that comes with that transfer is important. Do you believe that, in reality, the number will be diminished because of the fear and anxiety that is being created by the situation?

Alisdair Burnie: Yes—that is accurate.

Calum Steele: In response to Mr Stewart's question, it is important to make a couple of small points. I would never presume to speak for members of support staff about how the transfer from their former forces into Police Scotland went. However, from a police perspective, because terms and conditions were universal—by and large, bar one or two local nuances—the change resulted in very little difficulty.

Secondly, I understand why Mr Goodband made the reference to Crown servants, but the police are not Crown servants in Scotland. That common shorthand translates wrongly north of the border. It might be counting angels dancing on the head of a pin, but that is not the status of police officers in Scotland.

There are issues with regard to transferring employed police constables into roles that hold the office of constable, but from the preliminary examination that I have undertaken on the arrangements that exist at the Cabinet Office and how they relate to the TUPE principles, I do not see the issues as being insurmountable. Police Scotland currently employs officers under a variety of different terms and conditions based on when they joined and their particular arrangements. I suspect that there are very few officers left who are entitled to our rent allowance, but there are a large number who are entitled to transitional housing allowances. A very small number of officers—Mr Finnie was directly responsible for this—secured bespoke arrangements based on promises that they were given before they were due to start in 1994, versus what they were given when they started in October 1994. Officers are also on different pension schemes—those are known as the 1987, 2006 and 2015 pension schemes.

If—or when—the decision is taken to take the officers of the BTP into the Police Service of Scotland, one of my responsibilities in looking after the officers who would be my members would be to engage as proactively as possible with the British Transport Police Federation, with which we have nothing but the best working relationship, to ensure that we understand all the nuances across the range of entitlements of BTP officers, and that they are transferred into the Police Service of Scotland. I know that that will not necessarily be a clean and simple thing to do, because the nature of bringing people into an organisation is that it always results in differences. I suspect that we will, as happens with all organisations as they

evolve, get closer to something that looks and feels similar to everybody, rather than having numbers of people on different elements of entitlement, as is currently the case in the police.

Mary Fee: My question is similar to Alexander Stewart's: I wanted to ask whether you had been given any long-term guarantee about terms and conditions. I asked a question last week about staff terms and conditions on transfer, because it is my understanding that TUPE does not apply. Assistant Chief Constable Higgins said to me that he had

"been assured by ... the Scottish Government ... that they are working furiously to ensure that the current conditions of service of all British Transport Police staff will be honoured".—[*Official Report*, *Justice Committee*, 7 March 2017; c 20-21.]

Mr Foley added that it was his belief that that was "the Government's intention". I take it that today's witnesses have been given no guarantees that that will be the case.

Nigel Goodband: We definitely have not been given guarantees. I very much welcome Mr Steele's stance that the SPF would support officers if they transferred to Police Scotland, but there is a slight stumbling block. British Transport Police officers are under a contract of employment under employment legislation. They are not employed under police regulations. It is questionable whether our members could be represented by a police federation that is covered in statute under police regulations. We, the British Transport Police Federation, exist under the Railways and Transport Safety Act 2003, not under police regulations.

I am not suggesting for one moment that we cannot achieve that, but there are many obstacles in the way that nobody understands. It has never been done before, and there is no legal mechanism to allow it. Yes, we can use the Cabinet Office statement of practice on staff transfers in the public sector but that is no guarantee for an officer who may transfer a year or two years down the line, because it contains no legally binding guarantee that those officers will keep their terms and conditions, their pensions and, in some cases, their free travel. Unfortunately, we do not have that guarantee.

Mary Fee: My concern is that British Transport Police officers' enhanced set of terms and conditions will naturally be eroded over time. I accept Calum Steele's point that there are a number of different legacy arrangements across Police Scotland, and that different officers have different enhancements. As officers leave, however, those enhancements are not maintained and there will be a natural diminishment. I am concerned that the same would apply to the British Transport Police.

Nigel Goodband: Yes.

Calum Steele: I will respond specifically to Mary Fee's point about whether the position is one of enhancement or detriment. I am not sure that that question has been answered. It is certainly a bold statement to say that that is a position of fact. There are certain elements where the conditions of BTP officers are better than those of Police Scotland officers, not least regarding entitlements to travel on the rail network but, certainly from my understanding, those vary, depending on when people joined the BTP.

As regards general terms and conditions, it would be a bold step to state that there is a risk of deterioration for anyone coming into the police service of Scotland. I would like to think that, at this point, in no small way because of the work of the Scottish Police Federation among others, we have significantly better terms and conditions than police officers in many other parts of the UK. There is a danger of getting into apples and oranges here, but I know that many elements of the conditions that apply to the police service in Scotland are superior to those in England and Wales. To a large extent—although not exclusively—the BTP conditions of service are more closely aligned, in general terms, to those in England and Wales than to those in Scotland.

Chief Superintendent McBride: I turn to the substantive points in Mr Stewart's and Ms Fee's questions about terms and conditions. It is undoubtedly true that the proposals have caused significant angst and uncertainty among staff. Those are staff who we expect to go out every day and police the railways, in the really successful way that has been acknowledged by the committee, ministers and others. That angst is driven by complete uncertainty over the legal mechanism and what guarantees that mechanism may bring.

I will use an example. Mr Goodband has asked officials and others this question about the legal mechanism a number of times. Some of the staff in the BTP in Scotland have said, "Why would it be the 284 of us? Why is the wider organisation not", if I can use the phrase, "at risk of going across? We do not know the legal mechanism and whether it would necessarily be us."

As I said before, that comes from a culture of specialism and a conscious decision to join a specialist railway police force. People are saying, "Why would I want to transfer into something that is much more generalist?"

The pension arrangements are quite different, with a funded rather than an unfunded scheme, different accrual and contribution rates, different benefits and opportunities to retire and different indexation start points. It is "massively

complicated", to quote Mr Higgins again from the Justice Committee meeting on 1 November 2016.

The BTP is working with the Scottish Government and Police Scotland in the workstream on terms and conditions to try to unpick the issues and see how provision might transition across. It is undoubtedly extremely complicated and has caused great uncertainty and angst among the people who serve you in the BTP in Scotland.

The Convener: For information, members will remember that last week Mr Foley undertook to give an explanation of why TUPE did not apply. He has since responded to the clerks and referred the explanation to be made by the Scottish Government.

Fulton MacGregor: This question might best be directed at Mr Goodband, and perhaps also Mr McBride. Where are the majority of resources and assets for BTP situated, first on a UK basis and then on a Scotland basis?

Nigel Goodband: Each of the four divisions has centralised specialisms, that is crime scene investigators and managers, detectives, and reactive and proactive specialisms within the criminal investigation department. There are also centralised force specialisms in London at force headquarters. In the case of major incidents such as a murder investigation, support for the existing resources within divisions will be deployed.

Chief Superintendent McBride: As Mr Goodband has explained, like most other police forces, we are concentrated around a number of hubs. In Scotland, the majority of our resources are in the central belt, as they are for Police Scotland colleagues.

Fulton MacGregor: The reason why I asked was to come back to an earlier point from Mr McBride, who spoke about the significant cost increase if Police Scotland is involved at the start of an investigation or incident. In what circumstances would Police Scotland need to be involved at the start of an incident and how often does that occur?

Chief Superintendent McBride: I missed the start of that question. I said that there would be an additional cost increase—

Fulton MacGregor: Yes. An increase of 50 per cent was mentioned.

Chief Superintendent McBride: What I said was that we know that criminal disruption on the railway costs X amount. If local police forces attend first, we know that it will normally take at least 50 per cent more time and therefore additional cost to get the railway recovered and people moving again.

Fulton MacGregor: The 50 per cent was more in terms of time. How often does that happen? How often across Scotland does an incident occur on the railway that Police Scotland is first to respond to?

Chief Superintendent McBride: The figures for this year show that Police Scotland attended first at 1.8 per cent of incidents on the railway. That is roughly 2 incidents in a week out of a total of about 250 incidents.

Fulton MacGregor: What sort of incidents are they most likely to be?

Chief Superintendent McBride: Police Scotland would be called to intervene right across the spectrum of criminality. It could be trespass, vandalism, antisocial behaviour, disruption at stations and incidents on trains—a wide spectrum of incidents.

Fulton MacGregor: When Police Scotland or BTP arrive at the scene, do you accept that there are joined-up working arrangements in place between the services?

12:45

Chief Superintendent McBride: Yes, absolutely. We collaborate daily. As I think I said earlier, we plan together for most big events. Police Scotland plans for the policing of the event. We normally always plan for the movements on the mass transit system, as tens of thousands of people can be going to see the concert or sporting event or whatever it happens to be.

Fulton MacGregor: Do you think that the confidence that John Foley, for example, and Bernie Higgins expressed when they were on our panel last week, which we have also heard about from other members [*Interruption.*]—

Chief Superintendent McBride: Sorry—I am struggling to hear you above the noise of the wind.

Fulton MacGregor: I know—I am noticing it too.

The Convener: Can you speak up, please, Fulton?

Fulton MacGregor: Last week, we heard from John Foley and Bernie Higgins that they were confident that the merger would be successful. Is that confidence a result of how current operations work, with Police Scotland already being involved? Does that mean that people feel that the merger can work successfully?

Chief Superintendent McBride: I do not know that I picked up on the confidence, if I am honest. It may very well have been there and I may have missed it.

Fulton MacGregor: I have some quotations here—I think that other people mentioned them earlier, but—

The Convener: I am trying to get everyone in, Fulton.

Fulton MacGregor: John Foley said:

"We are extremely confident that we will deliver the merger successfully"

and Bernie Higgins said:

"I am confident that the transition would occur and that it would be done in collaboration and partnership".—[*Official Report, Justice Committee*, 7 March 2017; c 29-30.]

Chief Superintendent McBride: I am probably on record both on behalf of the Police Superintendents Association and as the divisional commander as saying that, if we are talking about policing, there is no difference between arresting someone in Central station, Waverley station or Aberdeen station and arresting them on the high street. Police officers are police officers and they will be able to do that.

Where the specialism comes in—the cultural difference in a specialist police force—is in the discretionary effort and the discretionary benefit that we bring to the travelling public, the train operators and the wider Scottish economy. We allow service recovery by honing our police procedures and ensuring that they do not disrupt any more than is necessary. We add value by getting the service back up and running so that people can get to their work or their business meeting.

I am not convinced yet—although we are working with Police Scotland to share our procedures—that that discretionary effort and benefit will be available on day 1, on 1 April 2019, or any time soon after that. It could be quite disruptive.

Michael Hogg: I have an observation. Police Scotland would not have access to our railways if there was a derailment or a collision or any trespass on a railway. If Police Scotland officers do not have a PTS certificate, they cannot go on or near the running line.

Mairi Evans: I will hark back to an earlier point and follow on from what Fulton MacGregor said. Last week, John Finnie asked a question and I asked a follow-up question about how the British Transport Police were deployed across Scotland. We received those figures as part of supplementary evidence this week. There is quite a heavy presence in the central belt, but I am concerned that there is less of a presence as you move up towards my constituency of Angus North and Mearns, up around the north-east and across to the Highlands as well.

In that sense, if we are looking at a specific transport division within Police Scotland where those officers are trained, it would give me more comfort that if there was an incident in some of the areas that are not so well staffed at the moment, at least there would be a presence there that was capable of dealing with that incident. What are your thoughts on that?

Chief Superintendent McBride: I will go back to what I said earlier. We have just completed the demand review work and, from 9 April, we are changing how we look and feel to adapt to the demand. The demand in the north-east for the BTP is primarily football based. Quite a lot of work is done and effort is put in with the offshore industry because of some issues that can arise when people come back onshore. Some particular trains come down from the north-east all the way to Newcastle and they have to be policed seamlessly across the border because of the risk of disorder on those trains.

This is a two-way process. Police Scotland attends some of our calls—I think that I mentioned 1.8 per cent, or an average of about two every week. Over a year, we receive more than 1,000 missing persons inquiries and requests from Police Scotland; over the past two weeks, for example, we have received four requests for specialist search capability track side to look for evidence or missing people, and we supply that capability back into the system. It is, as I have said, a two-way process, and our analysis of the criminality and disruption on that particular line and in the north-east region is causing us to change our staff profile—not just the number of staff but the times that they work—in order to meet demand better.

Mairi Evans: I want to ask Mr Burnie in particular about the results of the staff survey that was carried out. How many staff members took part? I see that 37.5 per cent indicated their intention to leave, some through retirement but many in the expectation that they will be made redundant post transfer. Have you been given any indication that that is what will happen to those staff?

Alisdair Burnie: We believe that that will certainly be the case. We have already seen removal of, and redundancy among, Police Scotland staff, and we know about their low morale. Obviously we want no part of that, because we are safe and comfortable where we are. If we are transferred across, our salary will be on average £3,000 less; we do not know where the posts will be; and the fact that police staff roles in Police Scotland vary regionally means that the same role can be paid differently and have different conditions depending on where it is in Scotland. All of that is adding to our anxiety and to

our conclusion that if we have the option to go elsewhere before then, we should do so.

Mairi Evans: Just for clarification, is it just your belief that these redundancies will take place, or have you been told as much by someone from Police Scotland or the Government? Similarly, is what you have said will happen to salaries your belief or something that you have been told is going to happen?

Alisdair Burnie: It is the case. We have checked it out.

Mairi Evans: With whom?

Alisdair Burnie: The TSSA with the respective Police Scotland—

The Convener: It would be helpful if you could provide more information on that to the committee, as it would allow us to move on. I have supplementaries from Liam McArthur and Douglas Ross, and if we have time, I will bring in John Finnie and Ben Macpherson.

Liam McArthur: I want to give Calum Steele an opportunity to come back on some questions. First, on the issue of confidence that Fulton MacGregor highlighted, I note that we have had similar expressions of confidence from the Scottish Police Authority and Police Scotland in the run-up to i6. Clearly what we need to do is to satisfy ourselves that such confidence is well founded.

On the issue of morale, which a number of witnesses have mentioned, I realise that any change process is difficult, and I note that the policing 2026 strategy raises the prospect of a reduction in the number of police officers. Can Calum Steele tell us what the impact on the morale of police officers in Police Scotland is likely to be if it is felt in the coming negotiations that, in order to facilitate this transfer, other officers will be coming in on more preferential terms and conditions?

My other question is for Mr Burnie, in particular. In the staff survey that has been referred to, upwards of 40 per cent have indicated that they might leave the service through one means or another. How disruptive would that be for maintaining any sort of service during a period of transition? As I have said, we all accept that any transition or change will be difficult, but the order of magnitude quoted in the staff survey would, I think, give rise to concerns for any organisation.

Calum Steele: I will get to Mr McArthur's questions presently.

To some extent, I am going to slightly contradict what I said earlier about speaking about the terms and conditions of support staff—I suspect that there will be Unison colleagues watching the committee being broadcast who will be screaming at their television sets—but the harmonisation of support staff terms and conditions in the Police Service of Scotland has not yet taken place in a way that the service would expect. Rather than identifying that as a problem and something to be feared, I think that that shows that the TUPE principles under which staff came from the former forces into the Police Service of Scotland have been adhered to. Only those same principles could apply to police staff or support staff members coming from the British Transport Police Authority into the Police Service of Scotland, so the transfer will not result in a diminution in terms and conditions; under TUPE, it will result in the maintenance of what staff currently have, at least until such time as we come to a position of harmonisation in the future—no one can ever have what they have had in the past forever.

On the specific issue of the impact of the policing 2026 strategy on numbers and morale, there is a distinct difference between police officers and support staff when it comes to reductions in numbers and redundancy. Police officers—certainly those who hold the office of constable—cannot be made redundant. As such, any impact on the morale of those who are losing their job does not really exist; it can only be on those who are left and because people who have retired or have left through natural attrition have not been replaced. Self-evidently, there is a morale issue if the loss in numbers results in a reduction in capacity—on those who are left doing the work of the 400 or so, which is the figure that is floating around just now.

Liam McArthur: On that, if a deal is to be struck with the BTP that will allay the concerns that have been expressed today, that were expressed during the round-table meeting and that are in the written evidence that the committee has received, someone will have to claim success in protecting terms and conditions on BTP's migration into Police Scotland. Against that backdrop and in the context of the debate around policing 2026, surely to goodness that will give rise to some degree of, if not resentment, at least questioning of why that debate is happening over here, with officers who are coming into the force being treated in one way, when there is a separate debate with Police Scotland officers that is happening in a very different and more difficult context.

Calum Steele: I do not agree. There is a fundamental difference between those who hold an office and those who are employed.

The one thing that, until now, probably has not been explored is what happens to those who are currently employed when they hold an office. Do they retain their entitlement to redundancy and some of the associated questions? I cannot see

how that is possible. Whilst there are advantages to being an employee, there are also advantages to not being an employee and to holding an office. On that single particular issue, I do not think that the two are compatible.

There are efforts in the police service in England and Wales, where people are able to apply for a form of voluntary redundancy—although they do not call it that; I forget the terminology, and there is no help coming from my colleagues to my left—

Nigel Goodband: Is it A90?

Calum Steele: No—oh, it does not matter. Either way, redundancy in policing does not work.

We have deliberately not stepped into the natural territory of the British Transport Police Federation on this, but when or if we have these discussions, the maintenance of current terms and conditions should be quite easily secured, because we have secured some of the protections that would be expected—in respect of residency and the positions that apply under the terms of the transfer—for officers from the former forces, and it is only right and proper that the same thing should apply for Scotland.

The Convener: If his points are very brief, I can take Douglas Ross.

Douglas Ross: I will be brief, convener. I have two final points on the evidence that we have received.

First, I thought that the staff survey was interesting because while 37.5 per cent said that they were intent on leaving, the other 62.5 per cent did not give a ringing endorsement of remaining with the BTP when it comes into Police Scotland; they said—cautiously—that they intended to stay. We have considered the impact on morale, but I would like to ask the panel about the loss of not just morale but resources and experience that we in Scotland would suffer if the potential figures bear any resemblance to what actually happens in respect of a lack of officers coming forward.

I also have a specific question for Mr Steele, who mentioned transition. It is fair to say that he is more supportive of the plans than others on today's panel, and I saw his tweet last week about how impressed he was by the evidence given by ACC Higgins, who mentioned the "luxury" of having two years to implement the changes.

Even with that "luxury" of two years, given the problems with creating a single force that the Scottish Police Federation and its members have expressed, the uncertainty in Police Scotland and the problems that it is still going through, with SPF members highlighting problems daily, is this the right time to be integrating BTP into Police Scotland?

13:00

Calum Steele: I will be brief. On the specific question, that is a matter for Parliament and is something over which the Scottish Police Federation has little control.

It is important to deal with the question of support. The Scottish Police Federation remains neutral on that question—even now. In my evidence today I have highlighted some of the areas that could work and how the SPF and the service would approach them, but we have not taken—and would not take—a position on a body of employees who are not our members. That would be wholly inappropriate. We will get to that stage when Parliament makes a decision.

Douglas Ross: I was not casting aspersions on your evidence in general, Mr Steele.

The Convener: If there is anything that witnesses want to add or reflect on, the clerks will be happy to receive any clarifications or additional information.

Michael Hogg: Staff morale—for on-board, gateline and station staff—is at rock bottom and we are greatly concerned. We engage with our members up and down the country and they are greatly concerned about the implications of the transfer for the BTP. If there is any thought of taking away the British Transport Police officers from our railways, that would be a great cause for concern, because their knowledge and expertise are crucial to ensure that we have a safe railway.

Chief Superintendent McBride: The demographics show that within the division—if that is who will move across—there are in the region of 30 to 40 people who are approaching the end of their service, if I can put it like that, and who may choose to go. We have talked about the uncertainty, but if those people choose to go, we would be looking to fill their posts from within Police Scotland, which takes me back to the point that I made in my written submission about that specialism possibly taking a hit right away.

The Convener: That concludes our questions. I thank the witnesses for their very detailed and helpful evidence.

Douglas Ross: We heard some difference in opinion on crucial information that we received last week from ACC Higgins—some members and witnesses had concerns about training and others did not. Given that that is a vital aspect of BTP integration, can we ask for a full response from ACC Higgins on the intention as regards Police Scotland training for current and future officers joining a specialist railway division and for all 17,000 officers? We need a full and detailed analysis of that so that the witnesses who have raised concerns today and those others who

believe the training to be sufficient have that information and so that members have it before we reach our conclusion.

The Convener: I agree. We will ask Mr Higgins for that information.

That concludes today's meeting. Our next meeting will be on 21 March and the main item of business will be further evidence on the Railway Policing (Scotland) Bill.

Meeting closed at 13:04.

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