HOUSE OF COMMONS

Scottish Affairs Committee

Oral evidence: Problem drug use in Scotland, HC 1997

Tuesday 9 July 2019

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Watch the meeting

Members present: Pete Wishart (Chair); Deidre Brock; David Duguid; Hugh Gaffney; Christine Jardine; Ged Killen; John Lamont; Paul Masterton; Danielle Rowley; Tommy Sheppard; Ross Thomson.

Questions 339-416

Witnesses

I: James Wolffe QC, Lord Advocate, and Iain Logan, Principal Procurator Fiscal Depute, Policy Unit, Crown Office and Procurator Fiscal Service.

II: Joe FitzPatrick MSP, Minister for Public Health, Sport and Wellbeing, and Beverley Francis, Drug Law and Health Harm Lead, Scottish Government.

Written evidence from witnesses:

– [Add names of witnesses and hyperlink to submissions]

Examination of witnesses

Witnesses: Lord Advocate QC, Lord Advocate and Iain Logan.

Q339 **Chair:** Thank you very much, Lord Advocate, for joining us this morning in our inquiry into problem drug use in Scotland. We will start the session a little bit earlier, if that is okay with you, to make sure that we have the maximum amount of time to ask you our questions and hear your answers. For the record, could you tell us who you are, who you represent and anything else, by way of a short introductory statement?

Lord Advocate: Thank you, Chair. Thank you for inviting me to give evidence to your Committee. I will give a short introduction to explain my role and responsibilities and how they relate to the work of the inquiry. I should say that I am here with Iain Logan, who is a senior prosecutor from the Crown Office policy unit.

As Lord Advocate, I am head of the systems for the prosecution of crime and investigation of deaths in Scotland. As such, I have overall responsibility both for the investigation and for the prosecution of crime. These are functions that I exercise independently of any other person. In Scotland, subject to any directions I may issue to the chief constable, the police report alleged offences to the procurator fiscal and must thereafter act in accordance with the instructions that the prosecutor may issue.

The relationship between police and prosecutor in Scotland is quite different from the position in England and Wales. I have used my power to issue directions to the police to facilitate the use of recorded police warnings in certain cases of minor offending behaviour, as an alternative to reporting the matter to the fiscal. Prosecutors in their turn exercise their decision-making functions within the framework of policies for which I am responsible.

The approach that prosecutors take to any alleged offence reported to them is set out in the Scottish prosecution code. In relation to each case, prosecutors ask two questions. First, is there sufficient admissible, relevant and credible evidence that the accused has committed a crime known to the law of Scotland? Secondly, if there is sufficient evidence, what prosecutorial action is in the public interest in the circumstances of the particular case? The options available to prosecutors, if there is sufficient evidence, include direct measures such as a warning, a fiscal fine or fiscal work order, diversion from prosecution, the initiation of criminal proceedings or a decision to take no action.

The prosecution code sets out some of the factors that, depending on the particular circumstances, may be relevant in assessing the appropriate response to an individual case. These considerations apply to every offence reported to the Crown, so in the context of your inquiry, they apply not only to offences under the Misuse of Drugs Act 1971, but also to

other offences—theft or crimes of violence, say—where there is an underlying issue of problem drug use.

Specifically in relation to offences under the Misuse of Drugs Act, we will prosecute robustly and with rigour those who are actively involved in and profit from the trade in illicit drugs. On the other hand, in relation to offences of simple possession, I have, through the recorded police warnings scheme and prosecution policy, supported the use of alternatives to prosecution, including diversion, where that is the appropriate response to the circumstances of the individual case.

As you will appreciate, there are limits to what I can appropriately do within the framework of the existing law. My responsibility is, after all, to enforce effectively and fairly the criminal law of Scotland. I cannot change the law. For practical reasons, as well as reasons of constitutional principle, the proposal presented to me for a safer drug consumption facility in Glasgow, about which you have heard evidence, was not one that I could, within the context of the current law, unilaterally enable by providing a letter of comfort. The introduction of such a facility would require a legislative framework, which would allow for a democratically accountable consideration of the policy issues that arise and which would establish an appropriate legal regime for its operation.

As you know, in Scotland the incidence of drug deaths is higher than in England and Wales. Indeed, I am told it is higher than in any other country in Europe. The situation calls for a serious, well considered and co-ordinated response. I welcome the announcement from the Minister for Public Health establishing a Drug Deaths Taskforce, which will provide an opportunity to develop a joined-up, evidence-based response to the challenge across health, social policy and justice. The Crown Office and Procurator Fiscal Service—Scotland's prosecution service, for which I am constitutionally responsible—will participate actively in the work of the taskforce and I am looking forward to that work.

With that introduction, I am also looking forward to answering your questions.

Q340 **Chair:** We are grateful to you for that very concise statement. There are a number of issues there that we want to explore with you. I think we will leave drug consumption rooms for a minute. You issue instructions to the police about operational matters that are under the jurisdiction of the Scottish Government and Parliament. You mentioned the direction about police warning schemes, and some of the operational matters regarding the Scottish police and prosecution service. What is the limit of your powers when it comes to this? I am thinking specifically about the Misuse of Drugs Act, which is clearly set out in legislation. What could you do, within your powers, to suggest a way forward for the police? We have police warning schemes, but what other options are available to you?

Lord Advocate: I should perhaps make two points at the outset. First, my powers are not related solely to non-reserved matters. I deal with criminality across the whole spectrum, both reserved and devolved.

Secondly, operational matters are for the police. I have specific powers to direct the police to the fiscal in relation to the reporting of offences. The basic rule in Scotland is that the police investigate crime and, with the exception of discretion in really trivial cases, they report alleged offences to the Crown. Under the criminal procedure Act, I am able to give directions to the chief constable in relation to the reporting of crime. For certain classes of minor offending I have facilitated the use of a recorded police warning, rather than a report to the fiscal.

It is perhaps important for the Committee to appreciate that the relationship between police and prosecutor in Scotland reflects the normal European model, in which the police act in the investigation of crimes subject to direction from the prosecutor. That is quite different from the relationship that exists between police and prosecutor in England and Wales. If you ask what options are available within our system in Scotland, I facilitate the use of warnings by the police instead of reporting to the fiscal. When the police report a case to the fiscal, assuming there is sufficient evidence, the fiscal exercises a professional judgment about the appropriate prosecutorial response to the individual case. Depending on the circumstances, that may be diversion or a direct measure—that could be a direct warning from the fiscal, or a fiscal fine, a fiscal work order or the like. It may also be no action or a criminal prosecution. In the context of the Scottish system, it is important to appreciate that the point at which decisions about diversion are made—this is across all criminality, not specifically for Misuse of Drugs Act cases—is when the fiscal receives the case and considers how to respond.

Q341 **Chair:** Specifically on the Misuse of Drugs Act, diversion and warnings, is it possible that every incident to do with the possession of drugs could be diverted into one of these schemes? That would be a de facto decriminalisation, if I can put it that delicately.

Lord Advocate: One important feature that prosecutors come to appreciate through the experience they develop is that when dealing with prosecutorial judgments, there is no substitute for looking hard at the individual circumstances of individual cases. Conduct that in one circumstance may be eminently suitable for diversion might, in another case and depending on the particular circumstances of the accused or the nature of the offence, not be suitable.

Q342 **Chair:** Would it be possible, if guidance was issued by your officers, senior police officers or the Scottish Government, to say that what we want is for anybody caught in possession of cannabis, for example, to be given a diversionary sentence, instead of other types of prosecution?

Lord Advocate: I am not trying to be difficult but, in the context of the existing law, the right approach is where an appropriate judgment is exercised in the context of the particular case. My prosecution policy supports the use of diversion in appropriate cases across the board, and specifically in relation to cases where the accused has an identifiable need that can be met appropriately through diversion, rather than through being dealt with in the criminal justice system. It is very important, within

the context of our system, that that is a matter for the judgment of prosecutors operating within that framework of policy.

Q343 **Chair:** Senior police officers in front of this Committee last week, including the assistant chief constable, were telling us very strongly what should happen in their view. They said offences that major drug suppliers are charged with do not reflect the harm caused by their action, particularly the deaths of those who use drugs. Do you agree with that? Could charging practice be changed to reflect the wider harms of illegal drug supply activity?

Lord Advocate: I read that evidence and have to say that I do not recognise it for two reasons. First, we can only prosecute in respect of a homicide where there is an identifiable and provable causal link between actions and a homicide. That does not mean that those who are involved in the system, including judges when they sentence cases in the High Court, are not well aware of the harm that is caused by the trade in illicit drugs. I am confident that judges are well aware of that and will reflect that consideration in their approach to sentencing in those offences.

I also do not recognise it because the Crown takes a robust—one might say remorseless—approach to the way that we respond to drug-related offences involving importation and trafficking. We will bring the charges that are supported by the available evidence. They will include charges under the Misuse of Drugs Act. If the evidence supports it, they will include statutory serious organised crime offences.

What we have seen since the creation of Police Scotland and the multi-agency work centred on the Scottish Crime Campus—here I agree with the assistant chief constable—is really effective police work directed at serious organised crime groups. That has been reflected in the prosecutions that we are able to take up and the convictions that are being secured. We will respond not only by prosecuting those involved in the illicit drug trade, but will seek, where appropriate, serious crime prevention orders that can continue to restrict the activities of those involved after they leave prison.

We will seek criminal confiscation orders to strip the proceeds of crime from those responsible. The Civil Recovery Unit will consider using civil asset recovery procedures under the Proceeds of Crime Act, which are available regardless of whether there has been a criminal conviction, where there is a proper basis for doing so.

We will deal with these offences rigorously and robustly and I am confident that the judges who pass down sentences in these serious cases in the High Court are well aware of the consequences of the illicit drug trade.

Q344 **Paul Masterton:** I want to follow up on a couple of questions from the Chair. I want to be absolutely clear on this. We got evidence last week that several thousand police recorded warnings were issued for cannabis use. Whose decision is it to give one of those warnings? Is it a decision made by the prosecutors after having received all the paperwork, or is it

a decision made on the ground by the officers in question?

Lord Advocate: The purpose of the recorded police warning scheme is to allow the police officer on the ground to decide, in cases to which the scheme applies, to issue a recorded warning instead of reporting the case to the fiscal. That does not mean that in those cases an officer cannot decide to report the matter to the fiscal if the officer chooses to do so, but it is in effect a facility that frees up the police, in cases of minor offending, to respond by way of a warning.

Q345 **Paul Masterton:** So the answer to the Chair's question must be yes. If you received guidance or a decision was taken that those warnings were to be used for a broader range of possession than simply cannabis, theoretically that would be perfectly possible.

Lord Advocate: I have a statutory power to issue directions to the police in relation to the reporting of crime to the fiscal. Therefore, it is a matter for me, acting independently, to determine the scope and nature of the option.

Q346 **Paul Masterton:** I have a final point. Whether or not it is desirable or appropriate is one question, but in terms of the theoretical possibility, there is nothing within the current legal framework to stop you extending the applicability of police recorded warnings to possession of other substances.

Lord Advocate: The scope of the warning scheme is a matter for me. I can exercise judgment in terms of the extent to which I give police officers that discretion. It is a discretion, because they remain free to report cases if they consider it appropriate to do so.

Q347 **Hugh Gaffney:** Lord Advocate, there have been over 1,000 deaths. In Scotland, it is rising, while England and Wales have stabilised. Some of those dying are people who are on treatment—they are getting treatment but still dying. What advice are you giving to the Scottish Government? Have you looked into that?

Lord Advocate: My particular role relates to the fair and appropriate enforcement of the criminal law. That challenge posed by the incidence of drug deaths in Scotland is not lost on me. It is why I welcome the creation of the Drug Deaths Taskforce. It is why the prosecution service will be actively involved in the work of that taskforce. It is really important that we look at the causes and at what we can do that will work in response to the particular challenge that we face in relation to drug deaths in Scotland.

Q348 **Hugh Gaffney:** Our inquiry is partly about trying to find those answers. But when people are getting treatment and still dying, that worries me. As a law enforcer, you have done your part, but somewhere along the line we are still falling behind and these people who are getting treatment are dying. You also advise the Scottish Government, and that is why I am asking you the question: are the Scottish Government looking at this?

Lord Advocate: The Minister established the Drug Deaths Taskforce precisely to take an evidence-based approach and engage health, social

policy and justice, because what is really important in looking at what will work to address harm is that we do not do that in silos. We must look at all the systems. When we talk about diversion, prosecutors can only make good decisions on the basis of the information they have, so the quality of the information that prosecutors get is an important part of the picture. Prosecutors can only divert if diversion programmes, facilities and options are available. So it is really important that we look across all parts of the system in addressing our way forward.

Q349 **Danielle Rowley:** I want to come back to Mr Masterton's question. You said the framework is there for recorded warnings to go wider than just cannabis possession, so why is that not happening? Are there barriers there or is it, as you have said, about a lack of information or follow-on services? Why is that not happening if it can happen?

Lord Advocate: I suppose I will answer that in two ways. First of all, it is important to appreciate that, in cases that do not fall within the scheme or those where the officer chooses to report the case to the fiscal, that does not mean that the outcome will be a prosecution through the criminal justice process. It is then a matter for the professional judgment of the prosecutor. The prosecutor may take the view that a warning is an appropriate response, that diversion is an appropriate response or that the right response is prosecution—or, indeed, no action or a direct measure. Reporting to the fiscal does not automatically mean that the case is heading off to court; there is an important exercise of professional judgment by the fiscal.

I think it is really important for the Committee not to proceed on the basis that anything that is not capable of being dealt with by, or is not in the scope of, the recorded police warnings scheme automatically heads off to prosecution. That is not the way our system works. There is really important professional judgment exercised by fiscals. I might ask Iain to explain how that works on a practical basis.

The second point I should make is that the warning scheme is discretionary; officers may report cases that fall within the scheme to the fiscal. There may be reasons why officers decide to put the decision making into the hands of the fiscal. It is a facility for officers to use in cases to which it applies. When I frame it, I obviously have to look at the relative seriousness of different types of offending, as is reflected in the terms of the legislation that Parliament has passed.

Q350 **Chair:** Are there any incidents of people being prosecuted for cannabis possession in Scotland in the last few months or years? Do you know of any at all? Are there any numbers on that?

Lord Advocate: I do not have data immediately to hand, but I can certainly let the Committee have any information we have about that.

Chair: Could we see that, just to get a sense of the numbers involved in being put on one of the diversion schemes or being prosecuted for possession in Scotland?

Q351 **Ged Killen:** That is what I was going to ask—could we have that across the board for substances other than cannabis, where people are not prosecuted but diverted to some other course of action? That would be useful for the Committee to have.

Lord Advocate: I will certainly provide the Committee with such data as I am able to provide and such explanation as I am able to offer.

Q352 **Chair:** In the big debates about decriminalisation—I know you are more than aware of this—people talk about this being done formally. What we are trying to get to is whether there could be a de facto decriminalisation by the deployment of the diversionary schemes, as opposed to prosecutions. We are just trying to get a sense of the range of your powers when it comes to making those decisions and giving guidance to police forces and prosecution services.

Lord Advocate: Well, in the reporting of crime, the police are obliged to act in accordance with my directions. Prosecutors exercise judgment within policies I lay down. These are matters that are entirely for me.

Q353 **David Duguid:** On that same question, is there a risk, if you are not taking criminal action in cases of small amounts of possession, that those instances are not counted? The Chair and Mr Killen have asked a good question: can we get the number of times that has or has not happened? However, is there a chance that it is not happening so much that it is very difficult to count?

Lord Advocate: I will certainly look into what I can provide the Committee by way of data. I do not know if anything more can be said.

Iain Logan: In terms of whether the recorded police warnings are being issued, those numbers will be available. Certainly, for any case that is reported to us as an organisation, we will have the numbers and record the data in relation to those cases and what we do with them.

Q354 **David Duguid:** I guess my question is: can we have the confidence that even if a criminal prosecution does not occur, we are somehow measuring every instance of someone being found with an illegal substance?

Iain Logan: In terms of being found, that would be a question for the police.

Lord Advocate: We will certainly look at what data we can provide and what other sources of data may be available. I suppose, in the context of decriminalisation, it is just as important that I make clear that I operate within the framework of criminal law that Parliament has laid down. The starting point is that we are dealing with individuals against whom there is sufficient evidence for them to be prosecuted for a crime. The question is, what is the appropriate response in that context?

Chair: We have the Minister coming after your session, so we will ask some of the more general political questions about that.

Q355 **Paul Masterton:** I want to come back to Ms Rowley's point: I want to be clear, particularly because the Minister is coming next. Theoretically, it is possible to extend the recorded warning system to include other substances. The system's scope is your call and your judgment, so it would not be for the Scottish Government. A Minister could not stand up and say, "We want police recorded warnings to be used for possession of any and all substances." That would have to be your decision as I understand it.

Lord Advocate: Yes.

Q356 **Paul Masterton:** That comes back to Ms Rowley's question, to which I do not think we got an answer. On what basis, evidence or information do you make the call about whether to extend that warning scheme to other substances? If it is up to you whether to extend the recorded warning for cannabis to other things, what would be the evidence and information basis and the impetus for you to make that call more widely?

Lord Advocate: The background to the scheme was an assessment of the outcomes across a range of relatively minor offending, consistent with a general prosecutorial policy of focusing on the outcome and seeking to achieve the appropriate outcome in a proportionate way. We looked across—the service continues to look across—a range of criminal offences and at what decisions prosecutors and courts are making. That information was part of the initial impetus for the recorded police warning system and the recognition that there is a category of relatively minor cases where a satisfactory outcome could be achieved through the police exercising that, rather than the prosecutor making a decision at a later stage in the process.

That is part of it. Of course, part of what feeds into the appropriate outcome is the relative seriousness of the offence. If one is looking at categories of crime, that is driven, among other things, by the maximum sentences Parliament lays down for particular offences. Beyond that, my policy unit looks at a range of evidence. We will keep the range of policies that we operate under review in the light of evidence as it comes forward.

Q357 **Tommy Sheppard:** Good morning and thank you very much for being here. You will be aware that across the world, there has been a shift of emphasis in public policy. People are now trying to tackle this problem within a health framework. Indeed, you sounded supportive of that approach in Scotland. One of our lines of inquiry is to ask whether the current criminal law, as framed, in any way hinders or compromises the ability of health services to make those interventions. That is why we have been incredibly interested in the debate about the drug consumption room in Glasgow.

In 2017, your advice gave no comfort to those who wanted to pursue that direction. Could you explain your reasoning in layperson's terms and say exactly which parts of the 1971 legislation you feel would have been breached by that facility, and what potential offences the individuals involved in it might have been exposed to?

Lord Advocate: The basic point is a recognition that, for such a facility to operate effectively, you need an appropriate legislative framework that establishes an appropriate system for licensing and oversight, addresses the scope of exemptions from the criminal law, and deals with issues of civil liability. There must also be a recognition that legislation resolves the policy issues in a democratically accountable way. I simply cannot create that kind of regime through a letter of comfort.

I suppose that it is important to appreciate the nature of the proposal that I was being asked to consider, which was a facility where users would bring their own drugs on to the premises and would be supervised in the consumption of those drugs, with no control over the nature or type of drugs consumed. I was also being asked to facilitate tolerance by police officers of individuals found in possession of illicit substances on their way, or claiming to be on their way, to the facility.

The list of potential offences included a range that could be committed by both users and staff, including offences under section 4, section 5, section 9—

Tommy Sheppard: Could you just say what they are?

Lord Advocate: Yes. Section 4 is supplying and being concerned in the supply of drugs. Section 5 is possession and possession with intent to supply. Section 8 is a provision directed specifically at the manager or occupier of premises that are used for certain drug consumption activities, so potentially the board, the council or staff. Section 9 is the consumption of opium and section 9A is the supply of articles for administering or preparing drugs. There are also potential issues under the Smoking, Health and Social Care (Scotland) Act 2005 and the Psychoactive Substances Act, and there are potentially crimes of culpable and reckless conduct and culpable homicide in the common law, so a wide range of statutory offences and, potentially, common law offences, could be committed by users, staff and those operating the facility.

Q358 **Tommy Sheppard:** To go back to the earlier questioning, is it theoretically possible for you to issue advice saying that in defined circumstances, those offences ought to be dealt with by way of police recorded warnings rather than prosecution?

Lord Advocate: I have the power, as I have explained, to issue directions to the police in relation to the reporting of crime. It is open to me to give those directions. I operate within a constitutional framework where there are limits to what it is appropriate for me to do as the person charged with the enforcement of the criminal law.

The context of the proposal that I was being presented with, the practical issues that would have arisen in the management and oversight, and the range of potential circumstances for which I was being asked to give comfort meant that it would not be appropriate for me to deal with it in this way. In my view, it is clear that this is something that requires an appropriate legislative framework, as we see in other jurisdictions.

Q359 **Tommy Sheppard:** I also take the view that we need to change the law on this. I appreciate that you cannot say that something is not a crime when it is, but I am talking about the consequences that follow when a crime is committed in certain circumstances. Is it possible for you to issue prosecutorial advice that says that, within the context of a defined establishment, health service professionals in breach of this provision of the 1971 Act should be dealt with by way of reporting, rather than prosecution? Is that theoretically possible? I am trying to explore the limits of the existing law.

Lord Advocate: The making of prosecution policy is a matter for me. Prosecutors exercise judgment within the policies that I lay down. It is a question of what the appropriate policies are in the context of the constitutional and existing legal arrangements.

Q360 **Tommy Sheppard:** If it could be demonstrated to you that certain actions within a defined facility were actually keeping people alive who would otherwise die, would that not motivate you to issue such guidance?

Lord Advocate: The challenge with this proposal is ultimately one of principle, given the range of potential offences being committed, not just by staff but by users. To some extent, it is also about the uncertainty of the potential circumstances in which that letter of comfort might apply and the lack of any arrangement that I can put in place for appropriate oversight and licensing. I cannot require, in the way that a licensing regime could require, that particular protocols are followed in the operation of such a facility, and so on and so forth. There is a whole host of reasons—both practical reasons and reasons of principle—why, in my view, this is something that requires an appropriate legislative response and is not something that I can appropriately do within the current law.

Q361 **Tommy Sheppard:** Let me follow on directly from that. I would like to see an appropriate legislative response. We were told last week by a Government adviser that the legislative response required to enable a DCR in Glasgow would be quite minor; it would not require primary legislation but could be done by way of statutory instrument. Would that be your considered view as well?

Lord Advocate: There are wide powers under the Misuse of Drugs Act—sections 7 and 22—for the Secretary of State to make exceptions by regulation. If you look at the 2001 regulations, in a whole range of circumstances exceptions have been made to the operation of the Misuse of Drugs Act. The Psychoactive Substances Act also has regulation-making powers to exempt activities from that Act. A lot could be done through regulation.

Going through the list of crimes, I mentioned that, at least potentially, there were common law crimes. There is also an issue of potential civil liability for the operators of these premises. That is something that you see dealt with in legislative schemes in other jurisdictions—in the Irish and New South Wales Acts.

Ultimately, I suppose, the question is one for policy makers: whether dealing with those other features—the possibility of common law offences and matters such as civil liability—could not be done by regulation under the Misuse of Drugs Act, simply with exceptions from that Act. It is for policy makers to decide whether, to have a satisfactory scheme, they need to deal with those other matters and deal with the whole thing as a whole. If that was the view that policy makers took, they would require a Bill—primary legislation.

Q362 **Chair:** I know you have further questions, Mr Sheppard, but before we move on from this point, we had our in-house lawyers look at this very issue. They said that legal opinion suggested that it would be enough simply to reach local agreements and an understanding with the local police and the CPS not to prosecute relevant offences in the context of the Misuse of Drugs Act. As a caveat—as always—that would always be susceptible to collapse if the individuals and organisations changed. You said, I think in response to Glasgow City Council when it approached you on this issue, that it would be necessary to gain an exemption from the Misuse of Drugs Act. To get a legal safe drugs consumption facility, or at least one with no prosecutions, what in your view would be required? What would we need to do?

Lord Advocate: An exemption from the provisions of the 1971 Act can be created by regulations under the powers that already exist in the Act. As I say, the question that policy makers would have to consider is whether the potential list of other offences—not the offences under the Act—and issues such as civil liability were such that the powers under the Act would not be sufficient. That is ultimately a matter for policy makers.

Q363 **Chair:** But in local agreements—the Ottawa example was brought up this morning—arrangements are put in place between the people who run the facility, and local police forces and prosecution services almost to turn a blind eye. Would that not be possible at all in your view in running a facility like that in Scotland?

Lord Advocate: In the context of the criminal law as it currently exists, in my view that would not be an appropriate approach.

Q364 **John Lamont:** I want to go back to the safe consumption facility. You explained very clearly why you did not give the dispensation that was sought and why you think primary legislation is required. One aspect of the dispensation which you mentioned was the tolerance by police officers in respect of those individuals going to the facility carrying drugs such as heroin. Will you talk us through what legislative changes would be required to accommodate that?

For example, somebody travelling from my constituency or from elsewhere in Scotland to a consumption facility says to the police officer, when they are found carrying heroin, that they are going to this facility. Surely that just gives a defence to anybody carrying drugs, because they will be able to say that is what they are doing; they are simply going to the facility to consume drugs. Would legislation have to be changed to accommodate that, or are you saying that the tolerance would be

something that you would be able to grant to the police?

Lord Advocate: It is obviously for others to design a legislative scheme and to consider what provisions they would want to put into any legislative scheme. In the context of a lawful facility operating in an appropriate lawful way, it would be open to those involved to approach me with a view to inviting me to consider whether there are things that I should do and could appropriately do to support the operation of a lawful facility. That is obviously the critical point.

I give the example of the needle exchange scheme. Under the Misuse of Drugs Act the provision of needles is not a crime. It is lawful specifically under section 9A of the Misuse of Drugs Act. The provision of needles is not a statutory offence under the Misuse of Drugs Act. In the context of the needle exchange scheme it was recognised that there was, as it was put my predecessor, I think, that there was at least a remote possibility that provision of needles could in some circumstances be treated as a common law offence.

In those circumstances, my predecessor was willing to give a public commitment not to prosecute medical practitioners supplying needles reflecting on the one hand that that was a lawful activity, that giving that assurance helped to support that lawful activity, and that the potential criminality was really a remote possibility and was quite a well-defined case.

I am not going to give any commitment in advance to any particular view that I might or might not take in any particular circumstance. In the context of lawful activities, if one was looking at that kind of very limited type of situation, it would be open to those involved to approach me and I would give consideration to each such approach on its merits, as I did with the drugs consumption facility.

Q365 **John Lamont:** It would be a tolerance granted by you. Currently, if you are caught carrying heroin, that is illegal. Is that correct?

Lord Advocate: It is a possession offence.

Q366 **John Lamont:** And under the proposal that was put to you, you have a dispensation, a tolerance granted to the police, if the individual were able to demonstrate that they were going to a facility. I am not clear about whether that would be a legislative change that Parliament would have to make, or whether you can give out that tolerance in the event of the facility being legalised.

Lord Advocate: It would certainly be more appropriate for that to be addressed by legislators in looking at legislation. As you will appreciate, the subject matter of the Misuse of Drugs Act is a reserved matter. The question of who would pass such legislation is obviously to be determined.

Q367 **John Lamont:** It would still be the case that it is illegal to be in possession of that drug, but you could grant a tolerance to Scottish police.

Lord Advocate: Absolutely; that is precisely why it is appropriate for legislators to address the issue in the course of legislation going through. What I am saying is that, if one is looking, as in the case of a needle exchange, at some very limited and, I stress, appropriate response, which helps to support activity, that is something I will consider on its merits in any individual case.

Q368 **Ross Thomson:** Thank you Lord Advocate, for being with us. The reason why a drug consumption room is not happening in Glasgow is that you cannot give that immunity from prosecution. Throughout our inquiry, we have heard evidence from some that simply to deal with the issue, you just need to devolve the powers to the Scottish Parliament. Let us suppose that the power was devolved; would that make a difference to your advice, and if it was different, why would it be different and how would it be different?

Lord Advocate: The devolution of powers in itself would make no difference to my position. I exercise these functions independently of any other person, and I do so whether we are dealing with reserved or devolved matters.

I suppose the question would be whether, following devolution, there were legislative changes that then affect the legal context in which I am operating by changing the criminal law in a way that means either something that was formerly criminal is no longer criminal, or potentially, I suppose, the other way. From a prosecutorial point of view, it does not make a difference whether the powers are being exercised at Westminster or at Holyrood.

Q369 **Ged Killen:** This is similar to what Mr Lamont was asking, but I am interested in where the line is for these drug consumption rooms. In Canada, as the Chair said, I was struck by the fact that there is a licensing regime in place for those facilities that protects the staff and the council.

However, the people who are coming to use those services told us very clearly that legally, they could be arrested right inside one of those facilities, but the police locally have this arrangement where they are not interested in doing that; they want to go after the people who are higher up the chain, who are supplying these substances in the first place. If this Committee is going to be making recommendations to the UK Government, is it going to be enough to get some sort of licensing regime in place, short of full decriminalisation, in order for one of these facilities to be opened?

Lord Advocate: I suppose the first point is that I am really interested in that example. That illustrates why the whole issue of tolerance of those on their way to such a facility is something that you would want to see looked at as legislation is going through. You would want to look at international comparators, the way that that particular issue has been dealt with in other countries, and what would or would not be appropriate in our system. That is quite an important point.

Again, it is for others to design legislation to achieve a policy aim. However, just from my reading of the legislation in the jurisdictions that I have looked at, you typically will see a licensing regime with appropriate controls there in terms of protocols and procedures, and you will see a set of exemptions from the criminal law that go along with that licence. The licence then results in exemptions from the criminal law, and it would be a matter for legislators to consider what the scope of those exemptions should be. They also deal with questions of civil liability for those operating such schemes.

Chair: We have two questions left, Lord Advocate, and then we will let you go. David Duguid, then Christine Jardine.

Q370 **David Duguid:** I want to follow on from some of the things Mr Sheppard was asking about. What facilities are available, other than changing the Misuse of Drugs Act itself? Can you give any examples of where the exceptions that you describe under, I think, sections 7 and 21—

Lord Advocate: Section 22. Those are the principal regulations.

David Duguid: You were saying that exceptions could be made by regulation. Are there any examples where that has occurred with the Misuse of Drugs Act?

Lord Advocate: The 2001 regulations are quite extensive; they cover a whole range of circumstances. I do not pretend to be an expert in the detail of those regulations, but my understanding is that, for example, heroin-assisted treatment can be licensed using powers under regulations. There is a wide range of particular activities that are exempt using those powers, which rest with the Secretary of State.

Q371 **David Duguid:** As I was about to ask, that would be up to the legislature to agree democratically, whether Westminster or Holyrood—wherever the powers laid.

Lord Advocate: Indeed. The regulation-making powers currently sit under the Act with the Secretary of State, who is accountable to the UK Parliament. The regulation that he makes under the Act go through the normal process of statutory instruments, so there is a democratic process of accountability.

Q372 **David Duguid:** Whether it is through regulation, statutory instrument or changing the Act itself, do you agree that it is the responsibility of the legislature, be that Westminster or Holyrood, to make that change for you to work within, rather than for you to come up with loopholes to somehow be able to work around the law?

Lord Advocate: Absolutely. It is fair to say that this is a not uncontroversial subject. Regardless of that, the process of putting legislation through, whether by regulation or primary legislation, ensures a process of democratic accountability. It provides a framework within which the policy issues can be properly thought through with full ramifications, and that can be scrutinised by legislators such as yourself. In a sense, the starting point for me is that I work within the current legal regime. If

legislators change the regime, I will work within that regime and exercise my functions appropriately.

Q373 **Christine Jardine:** Much of this session has centred on what you can and cannot do by law, and whether it would be different if it were devolved. Would it be fair to say that the bigger question is whether Parliament should change drug legislation? That is not dependent on whether it is devolved. The issue is whether Parliament decriminalises and regulates drugs, which would lead to a change in your own policies.

Lord Advocate: I work within the law, whether it has been made by this Parliament or by Holyrood. From the perspective of my prosecutorial functions, I look at the law wherever it has come from. I suppose if one takes the drug consumption facility as an example, if a view was taken that it was, from a general policy point of view, the right way forward, the next question is how to deliver that. What is the best way to achieve that: is it better done by this Parliament, or by Holyrood?

The Scottish Government's position, as you will be aware, is that the Misuse of Drugs Act should be devolved. It sits at the intersection of health, social policy and justice, of all of which are devolved, non-reserved matters. From a prosecutorial point of view, where the law is changed is not so important—it is whether the law is changed.

Christine Jardine: It is the actual law.

Chair: I think we have detained the Lord Advocate more than long enough. Thank you for your patience in answering all our questions. I think we have asked a couple of things of you, particularly numbers; if that could be supplied, we would be very grateful, and anything else that you feel might usefully advise us as we go through this inquiry. Thank you very much for attending this morning.

Examination of witnesses

Witnesses: Joe FitzPatrick MSP and Beverley Francis.

Q374 **Chair:** Minister, thank you ever so much for joining us this morning in our inquiry into problem drug use in Scotland. I believe that this is your first time in front of the Scottish Affairs Committee, so a warm welcome to you.

Could you say who you are and who you represent and give us anything by way of a short introductory statement? In the process, could you introduce your colleague, please?

Joe FitzPatrick: Thank you, Convener. I am Joe FitzPatrick, Minister for Public Health, Sport and Wellbeing in the Scottish Government. Thanks very much for inviting me along today; I will not take up too much of your time with opening remarks, but I would just like to say that I really welcome the work that you have done. Your inquiry has pulled together a

huge wealth of evidence, which is really useful in the debate that is ongoing here in this Committee, but also across Scotland.

Addressing drug-related harm is a public health priority for me personally and for the Scottish Government. We know that last year over 900 people died of a drug overdose, and this year we are expecting that to be in excess of 1,000. I have heard some figures to suggest that it may be as high as 1,200 when the figures are released in the coming days. I hope that that and the evidence that this Committee has taken are a wake-up call to the UK Government.

My ask is that we should work together on this to save lives—I think we can save lives. I have taken steps in my role in Scotland to establish the Drug Deaths Taskforce to look at what we can do to change the law, either within the powers that we currently have or in a wider context, but also in terms of what changes we can make on a health and social care aspect in Scotland to save lives and take people forward.

As members will be aware, I recently appointed Professor Catriona Matheson to chair the Drug Deaths Taskforce. I know that the Committee has taken evidence from her; I think she is perhaps also advising the Committee. I was not aware of that at the time, but I guess we came to the same conclusion that having someone with a wealth of experience will, I hope, help us to take an evidence-based approach to tackling the harm of drugs, including the drug deaths.

Again, thank you very much for inviting me here today. I hope that the UK Government will listen to the evidence. I think that devolving powers to the Scottish Parliament would be the best way for us to have a more joined-up approach in the interface between the health and social care systems and the justice systems, which are already devolved under the Act. But if that is a step too far for the UK Government, I am absolutely happy to sit down and work with them—with your help, I hope—to work out how we can take a public health approach to save lives in Scotland.

Beverley Francis: I am Beverley Francis; I am a civil servant supporting the Minister in the health improvement division in the Scottish Government. I am currently responsible for some work on doing some thinking around drug harm and drug law, which has come at the end of a period when I was attached to the substance misuse unit within Government.

Q375 **Chair:** You announced the Drug Deaths Taskforce in just the last few days. Obviously the Committee is more than familiar with Catriona Matheson—you are right to note that she has been advising us very helpfully in the past few weeks. What are you hoping to achieve with the taskforce? I presume that it accounts to you. What have you asked it specifically to look at?

Joe FitzPatrick: My starting point is that the drug deaths that we see in Scotland are unacceptable and avoidable. On that basis, I want to look at all approaches that we can take to turn that around. We have seen

evidence from this Committee that it is possible for us to make a difference there. I have said to Professor Matheson that I do not want to put boundaries on that. The full taskforce membership has not yet been announced—I will announce that through the proper channels to the nation and to the Health and Sport Committee in the Scottish Parliament—but you can rest assured that it will contain a range of expertise across the health and social care spectrum. I would envisage it doing periods of work when it is looking at how we can ask our services in Scotland better to support people.

Someone mentioned earlier—Mr Gaffney, I think—that a number of people in Scotland already receive some treatment and yet still find themselves appearing in those tragic statistics. Clearly, we need to look at how we can better support people in those circumstances. I also want to understand how we can challenge our services better to reach out to those people who are not in services at all. That is one aspect of the safer consumption facility in Glasgow, which would be intended to be a first step, a reaching out to some of those most vulnerable individuals who are not in any support as yet.

One big barriers that we hear is about is the stigma, and the criminalisation is part of that stigma that I think we need to turn around. That then brings us to the justice aspects, with two sides that I hope the taskforce will look at: first, what more can be done within the framework as it stands; and, secondly, what we would want to do if we were able to make changes to the Act.

Q376 **Chair:** I am glad that you touched on this. The most notable difference in how the Scottish and UK Governments approach this is you being here: you are a Health Minister, and drugs issues are clearly within the health portfolio, whereas in the UK, they are very much still in the Home Office and criminal justice. I am wondering whether for your health approach—the fact that those issues are placed within your Department—the criminal justice or Home Office part gets in the way of your operation and of what you are able to do. Will you just talk us through that a little? Are there any tensions or anything that restricts you in your ability to address some of the issues?

Joe FitzPatrick: Absolutely. One of the first meetings that I had in my current role was with the UK Minister. I have no doubt that the Minister is compassionate and feels the deaths in the same way as every one of us around the table here does, and this is the one thing that keeps me awake at night: are we doing everything we can to save these lives? In spite of those avoidable deaths, it was clear that the current framework within the UK Government does not allow the UK Minister to move beyond the very focused criminal justice aspect of the Act. It is illegal, and therefore the UK Government cannot be seen to be doing anything that could in any way be interpreted as that.

Q377 **Chair:** One of the things that we hear is that stigma is a big issue when it comes to some of the problems with drug use in Scotland. The stigma is obviously in being outside the law, and seeking assistance or the support

people require would mean making themselves possibly open to prosecution—is that anything you have encountered with your focus on a health-related approach to this?

Joe FitzPatrick: Stigma is one of the biggest barriers to treatment. It might explain some of the reason why so many people are not in treatment and, even if they are, why they might not go quite as often as they should. When you speak to people in the recovery movement—Scotland has an amazing recovery movement, which is becoming more and more powerful, and more supportive of people who have yet to take that journey—you hear that the criminalisation is, absolutely, a barrier to treatment, as is that stigma. We need to get rid of it. The idea that someone should feel guilty because they have an illness—surely we have to get beyond that.

That is part of our responsibility as politicians. When we talk about drugs issues, we must be very careful of the language we use. I recently saw one report, which—without saying where it came from—was an attempt to take a more public health approach, but the cover of the document had a person in a hoodie on it, absolutely reinforcing this stigma that drives people away from treatment. We all have a responsibility, wherever we stand on these issues, to be very careful about the language we use. There is still a journey there.

Chair: We have a couple of supplementary questions before we move on. First Christine Jardine and then Paul Masterton.

Q378 **Christine Jardine:** So far, the thrust of the questions and the comments has been that the UK Government are somehow, as the BBC said this morning, stifling drugs policy in Scotland and that the UK Government are somehow at fault in this. Surely, rather than having yet another constitutional argument, this time about drugs, we should be looking at the problem and trying to persuade the UK Government to change their policy. Rather than simply saying, "Let's have a constitutional argument about it and take it to Scotland," there is a bigger issue we should be approaching.

Joe FitzPatrick: Absolutely. This is far more important; people's lives are at stake. I think we would be better if the Act was devolved to the Scottish Parliament, so that we can look at how that Act interfaces with our criminal justice system, which is devolved, and our health system, which is devolved. However, as I said, if that is too difficult then I am happy to sit down and work with the UK Government about other changes.

The Lord Advocate mentioned the changes there have been around heroin-assisted treatment, for instance. Members will be aware that there are plans afoot to bring heroin-assisted treatment to Glasgow. It won't do everything that the safer consumption facility would have done, in terms of saving lives, but it will help some individuals. The point is that it is possible within the legal framework for changes to be made and I would absolutely be happy for us to meet, in order to sit down and work.

The biggest challenge we have is right now. I know that Nick Hurd MP made some comments last week in Parliament suggesting that the UK Government's position on these matters might change—if they did that would be good—but right now this is not looked at as a public health issue by the UK Government. I think it should be. If we look at the figures, over 3,000 people died in England from drug-related harm. Clearly, it is not of the same significance or the particular issue that it is in Scotland—there are different issues—but I think a public health response to drugs in England would save lives there too. I don't want to have an argument about the constitution, but can we please work out how to make the changes?

Q379 **Christine Jardine:** But do you see the danger? You talked about being careful about the language we use about drugs; I absolutely agree and I absolutely agree about the need for change. But I am concerned it would get deflected into a constitutional argument about where the decisions are made, rather than about what the right decisions might be.

Joe FitzPatrick: I think that is one of the things that this Committee can help us with. In Scotland, the debate in the Scottish Parliament has not gone down constitutional lines or party lines. The recent vote in the Scottish Parliament, where a public health approach and support for the facility in Glasgow was discussed, crossed party lines and crossed the constitutional divide. In Glasgow, where there has been a huge amount of work done looking at the specific proposal there, I understand that the decision to go that road was unanimous across all the parties in Glasgow, in terms of their specific requirements and proposals, which they are hoping to take forward in Glasgow.

Q380 **Paul Masterton:** Thank you for coming. I am really sorry that I need to nip off shortly, but I want to pick up on something that came through in the evidence we heard last week from David Liddell, who is CEO of the Scottish Drugs Forum. He said, "We certainly do have a frustration that the Misuse of Drugs Act is being used as a means for delaying responses." He and the other witnesses laid out a series of things that could be done within the current legislative framework.

Do you accept the suggestion—not accusation—that the Scottish Government were effectively hiding behind the Misuse of Drugs Act to not take other steps within their capability, which might be politically difficult or expensive? We know you have had to deal with significant cuts within your budget on alcohol and drugs partnerships. What is your response to the suggestion that the legislation being reserved was effectively being used as a deflective tool?

Joe FitzPatrick: First, I should emphasise that the drugs budget has been increased by £20 million for the remainder of this Parliament. That money is there and being spent now.

I think you are right. If I were to sit here and say that safer consumption facilities were the be all and end all, I would not be entirely honest with the Committee. It is important that we look at other things. That is one solution, and the evidence that I have received and seen when I have

visited Glasgow, and the evidence that this Committee has received, shows overwhelmingly that that is one of the tools that we should have in our array of tools to tackle these problems.

As I said in response to the Convenor, I am absolutely clear that in relation to the justice aspects, I would expect the taskforce to look not just at what we would do if there were changes to the Act, but at what more can be done within the legal framework as it stands. That is why it is really important that the Crown are part of that taskforce—I am really pleased that they have agreed to be part of it and about the Lord Advocate's support for the taskforce.

Q381 **John Lamont:** Good morning, Minister; it is good to see you again. To pick up on the point that Ms Jardine made about removing the tackling of drugs from the constitutional debate, the Scottish Drugs Forum was before the Committee last week and said that the Scottish Government could be "braver" in its drugs policy. One of your colleagues here, an SNP MP, respond on Twitter by saying, "Maybe the charity in question needs to be 'braver' in support for Scottish independence to sort the issue?" I wanted to give you the opportunity to put on the record that the way to tackle drugs is not necessarily by Scotland leaving the United Kingdom.

Joe FitzPatrick: I think that it is better to talk about this issue rather than the constitution. Clearly, we have a difference of opinion on the constitution. Obviously, I think that we would be able to better join up our policies if we were independent. I understand that you disagree with that. On this particular issue, I think that there is a strong argument—supported across the parties—that being able to take all of the decisions on this in the Scottish Parliament would be better.

However, if that is not something that we can get agreement on from this place, particularly in the shorter term, I would absolutely be up for having a conversation with the UK Government about how we can make the changes, whether that is using regulations or primary legislation in Westminster to allow us to take a proper public health approach to those drug deaths in Scotland.

We can have the argument about the constitution. I am never going to persuade you and you will never persuade me, but surely we can come together on the fact that next week we expect the figures from last year to show that over 1,000 people have died in Scotland. This is an emergency. We need to act, and I hope that this Committee can help me take that forward.

John Lamont: I am pleased that you have clarified that because clearly the comments from your colleague were not particularly helpful. I strongly believe that both Governments can work together, but comments like that on Twitter do not help.

Chair: We are grateful for your appearance today Minister—thank you for the way that you answered the question. We want to hear from the UK Government but they have not agreed to appear before the Committee.

Hopefully, progress will be made but you are right; we need everybody to be involved in this. I appeal again to the UK Government to send a Minister before the Committee to answer questions on a cross-party basis, as you suggest—leaving the constitution out of it and just answering questions about drugs policy. Hopefully we will get a UK Minister before the Committee.

Q382 **David Duguid:** Welcome, Minister. I am a little bit confused. I am trying to look at this objectively, taking the constitutional argument out of it, which, as you have identified, might be difficult for us to do. Your position seems to be to, "Let's devolve the powers to the Scottish Government and we will make a better job of it, and if that doesn't work and we cannot do that, then let's try and work with the UK Government as a last resort." Assuming that the UK Government made changes to their own legislation, that would be of benefit to problem drug users across the United Kingdom, so why do you not start from that position?

Joe FitzPatrick: That was my start. My first meeting with Victoria Atkins was to say, "Can we work to get a dispensation to allow the facility in Glasgow to go ahead? If you won't do that, can you just give us the power?" I know that that would generally take longer in terms of devolution—

Q383 **David Duguid:** Forgive me, but you are still talking about a dispensation for a specific facility in Glasgow that you have requested from the Minister. If you believe, as I assume you do, that the Misuse of Drugs Act 1971 needs to be reviewed, why not start with that and push for that, so that everyone across the UK can benefit?

Joe FitzPatrick: I would not have a problem with that, but people are dying in Scotland now, so I need some action now. We need action to save lives now. The review of the Act is likely to be something that would effectively kick this into the long grass, although not necessarily—if there was a shift in the UK Government's approach towards looking at these matters through a health lens rather than a justice one, that would be fantastic. That is the approach that has worked across the world, and we have seen where that shift toward looking at these aspects through a health lens has saved lives. There are some particularly good examples that this Committee has looked at.

That would be great, but I have not sensed that that is something that the UK Government want to do right now on a UK-wide basis. I know that a number of Members in the UK Parliament who think that approach should be taken, and I would be supportive of that because it would save lives across the United Kingdom, but we have an emergency in Scotland, so we need to act urgently.

Chair: Again, just to reiterate, we want to hear from the UK Government. There was a debate last week, which I think you refer to, which gave an impression that perhaps somewhere down the line they were prepared to look at this, but they have given no indication that they are prepared to do it, other than reiterating the line that was reiterated last week: they do

not want to send a message about drugs. That seems to be the line we have got on that. I know Ross Thomson wants to come in on that, but first we have Tommy Sheppard and Christine Jardine.

Q384 **Tommy Sheppard:** I presume that part of the case for arguing for devolution of this framework is that, if the Home Office does not for whatever reason wish as a matter of policy to make these changes, but were to recognise that public and political opinion in Scotland differs, it could devolve that function to Scotland and allow that. That may be what the argument is. Clearly it would be preferable if the Home Office would just make the change itself. Is there not another argument for devolution, which is to have all aspects of public policy relating to this problem located in one legislature rather than in two different ones that have the potential—not the necessity, but the potential—to contradict each other? I suppose that could equally be achieved by reserving health and policing in Scotland to Westminster; that would make it consistent as well, but I don't think there would be much of a public appetite for that. If that is your case, Minister, could you exemplify how that would change your ability to intervene in this problem? If you had control of the legal framework of drugs in Scotland, what could you do that you cannot do at the moment?

Joe FitzPatrick: That is one of the questions that I have asked the taskforce to look at, so that we can have some more examples. One example is the facility in Glasgow; that is a particularly good example, because it has been so well thought out and so much effort has been put into building the case for the safer consumption facility in Glasgow that the evidence is second to none. That is one example of how we could save lives very quickly. One of the areas I have asked the taskforce to look at is what, if we had all those powers, we would do with them, because the safer consumption room is not the only game in town. There is evidence from across the globe, particularly in Europe, that there are other things we can do and other aspects where we can make a change and save lives.

Q385 **Tommy Sheppard:** We will await the views of the taskforce, but can I ask whether the Scottish Government have a view on one particular aspect of policy: will the taskforce consider arguments for decriminalisation?

Joe FitzPatrick: I fully expect the taskforce to look at all those sorts of options. One of the challenges with the concept of decriminalisation is that it perhaps means different things to different people, and there is a range of views on what it might actually look like. There are some good examples in Europe where a journey to decriminalisation has been made, Portugal being one example. Had Portugal not made the changes it made about 20 years ago, then all the trajectories suggest it would have been in a similar position to Scotland now. But they did make what was, at that time, a particularly bold move and it does look like it has saved many, many lives.

I do not think we are ever going to want to say, "There's a model from this country. Let's lift it and plop it here in Scotland." We would want to

look at the best evidence from around the world and see how that can be adapted to our frameworks. That is why my taskforce has a range of experts that, I hope, will be able to do that. Hopefully, this Committee's evidence will help us as well.

Q386 **Christine Jardine:** Thank you very much. I think it is only fair to warn you, having said that you would support us pressing the UK Government to change their drug laws, that we may come back to you looking for that support at some point. I absolutely agree that we are dealing with an emergency, which is a social problem and a health problem, but can you confirm that the drug problem in Scotland is much worse than in the rest of the United Kingdom? Is that the case?

Joe FitzPatrick: There is absolutely no question. The level of deaths in Scotland is, I think, higher than in any other country in the world. That is why we have to deal with it as the emergency that it is.

Q387 **Christine Jardine:** I absolutely agree, but that brings me back to Mr Masterton's earlier point. Is there not a danger that this will be perceived by a lot of people as putting up a smokescreen or diverting attention from the fact that the Scottish Government have failed on a number of occasions and in a number of areas to deal with social policies, which has actually exacerbated the drug problem in Scotland? The answer is not simply to devolve a specific power; it is to deal with it on the ground in Scotland.

Joe FitzPatrick: There is no question that this is a very complex issue. It is a deep-rooted issue. The most extensive piece of research to try to explain why the deaths are so high in Scotland was carried out in 2017 by NHS Health Scotland, and it suggests that this goes back to policies from 30 years ago.

Q388 **Christine Jardine:** So it is somebody else's fault again.

Joe FitzPatrick: That is not what I am saying at all. The roots were there. In the main, the group dying are a group of people born between 1960 and 1980—not an old group by any means. I think there used to be some language used to talk about an older cohort; these are not old people by any means. The point is that we do need to be careful—our social policies can have very long-term impacts.

In dealing with that, it is important that we look at the aspect in the round, which is why one of the central parts of the drug and alcohol strategy we launched last November was to challenge our services across Scotland to look at how they can properly support people not just in terms of their addiction, but in terms of housing issues and mental health. That is one of the first aspects of the challenge I have set out to them. The next aspect is to look at how we put that into action across Scotland, but I am in no way saying that this is all going to be solved by devolving powers or by a safer consumption facility in Glasgow. This is a much wider and deeper issue. We need to say, "It is urgent and we want to take action."

Q389 **Christine Jardine:** Basically, we agree that arguing about one devolved

power is not the solution to the problem. The solution is much wider and much more complex, and it is about health and social things categorically.

Joe FitzPatrick: That is why the remit of the taskforce is to look at the health and social care aspects as well as at the justice aspects, because we have a duty there. There have been some fantastic successes in the last decade. If you look across Scotland, we have a growing recovery community which is becoming more and more empowered. I recently announced some funding to make them able to be even more effective. There are some great examples which I think will save lives in the long term, but we need to do this as a package. Right now, I am fighting with one hand tied behind my back.

Q390 **Chair:** You mentioned an NHS report about why there might have been a bigger number of drugs deaths. We would be keen to get our hands on that. The Committee is particularly interested in why Scotland has a particular issue. We have some evidence that the trauma of deindustrialisation was perhaps more severely felt in Scotland. If you have anything else on that to share with the Committee, Minister, we would be very grateful.

Joe FitzPatrick: The report was published on 26 July 2017, which shows—

Chair: We may have that one already, but just to make sure that we have—

Joe FitzPatrick: You may already have it.

Chair: I can see officials saying that they will make sure we get it.

Q391 **Ross Thomson:** Thank you, Convener. Mr Sheppard actually asked the question I was going to ask about what could be done differently. However, I was struck by the answers. For clarity, at the end of your opening statement, you called for powers to be devolved, so that we could deal with this emergency quickly, but in answer to Mr Sheppard's question, I heard that you have set up the taskforce to look at what you could do should powers be devolved. Is that not a case of your asking for powers to be devolved right now but not knowing how you would use them?

Joe FitzPatrick: What I have done is pull together a taskforce of experts to look at all aspects of how we can make a difference here. I think if I was to ask the taskforce simply to look at what we could do with more powers, your point might be stronger and might go into the point that Christine Jardine made about this just being an excuse. I am also asking the taskforce to look at what more we can do on the health and social care support that we provide and what more we can do within the current legal framework. Basically, I asked the taskforce to look at this in the round, and I am hopeful that they will come forward with some solutions, for the short term as well as the longer term.

Q392 **Ross Thomson:** On the taskforce's remit, are you looking at drug

treatment, prevention and enforcement as well?

Joe FitzPatrick: The whole of it, yes.

Chair: Thank you. We have Danielle Rowley, and then David Duguid wants to come in. We are only on question two of this session. I am aware that some subsequent questions have already been asked, so Committee members who feel that their question has been addressed should not feel the need to ask it again. We will see if we can make some progress.

Q393 **Danielle Rowley:** Minister, I was pleased to hear that the taskforce will look across all policy. I will highlight two areas and ask if they are being considered. The first is the methadone programme. Up to around half of users are on too low a dose. We heard evidence that, when that happens, users will top up by using heroin, often creating bigger health problems for them. Is that being addressed? When we have spoken to drug users, that has been a really big issue for them.

The second is transport. We heard that transport is a huge issue. Often when people stay in, perhaps, temporary accommodation and have to travel into a city centre environment, to their pharmacy or perhaps to a jobcentre, they don't have the money to do that and have to walk. However, they often street beg to get money for the transport back, which leads to all sorts of other problems. One suggestion we heard was to have a travel pass for people. Is that something that you would consider?

Joe FitzPatrick: One thing we need to understand is why some people go into services and then leave, and what some of the answers are around that. One stark fact is that the current social security system makes it very difficult for people who have chaotic lives and then find themselves sanctioned, for instance, which then creates a whole new cycle. That is one thing that perhaps sometimes pulls people away from treatment. We need to understand all the drivers of why some people fall out of services.

Part of that will be stigmatisation. You mentioned the methadone programme. Some of the language that has been used around the methadone programme is very stigmatising. You are absolutely not using stigmatising language in talking about it, but sometimes people do—I hope inadvertently—use stigmatising language around the methadone programme that makes people feel like the bottom of the pile because they are in methadone treatment.

There are a lot of interactions here that we need to understand, and we have a huge responsibility as politicians. Obviously, the treatment an individual gets is ultimately a clinical decision, but we need to look at whether we have got all that correct. That is something that I imagine the taskforce will look at within the framework, recognising that ultimately it is clinicians, not politicians, who decide what treatment an individual receives. Clearly, I have heard people say, "If only I had a little bit more methadone, I wouldn't need to top up with something else." If we look at the figures for drug deaths, the rise in poly drug use is a particular issue in

Scotland, particularly in some areas of Scotland, so those points are absolutely ones that we need to look at and understand.

Q394 **Danielle Rowley:** I am glad that you mentioned people dropping out of the programme and coming back in. It strikes me that if somebody was on quite a high level and it had been clinically decided that that was the right level for them, and then they dropped out and came back in perhaps a week or two later on the bottom level and had to work their way back up again, that decision could be quite dangerous for some people.

Joe FitzPatrick: As I say, I am not a clinician, but we need to make sure we are providing the correct support for people both clinically and in terms of wraparound support. Sometimes, the interventions we have taken have fallen down because we have not provided the full wraparound support that someone needs to change their life, or something happens, such as their being sanctioned, that just breaks that down.

Chair: David, do you still want to come in?

Q395 **David Duguid:** Just briefly. Following on from Mr Thomson's questions about the taskforce, we have heard witnesses suggest that the Scottish Government do have power within the current devolution settlement to liberalise drug laws further or to shift further away from the so-called criminal justice approach. Is that something that the taskforce will look at, to see what can be done within the current settlement that perhaps has been missed up to now?

Joe FitzPatrick: I think I said in terms of the justice aspects that we should look at what can be done within the existing framework, but I would ask the Committee to go back to the Lord Advocate's evidence, in which he made the point that he acts independently of anyone. It is not for me as Minister or for this Committee to instruct the Lord Advocate in that way. If we, as politicians, believe there are changes required in law, it is our responsibility to look at how we can make those changes so there is a proper legal framework. Elsewhere in the world where changes have been made—I visited a facility in Paris and colleagues have visited facilities in Canada—there was a proper legal framework. Let's not shirk our responsibility as politicians in terms of how take this forward.

Q396 **David Duguid:** But to go back to what witnesses have told us, or at least suggested—that there are existing powers within the devolution settlement that can be explored further—is it part of the remit of this taskforce to look at that, just in case something has been missed?

Joe FitzPatrick: It is absolutely in the remit of the taskforce to look at how the justice system operates within the current framework. That is why I am really pleased that the Crown are part of the taskforce, to make sure that there is a joined-up examination of the law as it stands.

Q397 **Deidre Brock:** I have to say that the suggestion that it makes no difference whether the legal framework is changed to address this issue through Westminster or through Holyrood would, if it were not so serious,

be almost laughable. Certainly in my experience in this place, any change in existing drug laws for Scotland—or for anywhere else in the UK, for that matter—would be extremely difficult to get through, particularly at the moment, with Brexit snarling up legislation. We have many very large Bills out there circling, waiting for a space in the legislative programme. If this is an emergency, surely we have to treat it as such and look at where we can make the most difference most quickly.

I wonder whether we can return to safe consumption facilities. You mentioned the discussions you have had with the Home Office about allowing the facility to open. Can you tell us a little more about those discussions?

Joe FitzPatrick: Towards the end of last year, I came down to Westminster with Susanne Millar from Glasgow to present to Victoria Atkins. The challenge, certainly at that time—as I say, from what was said by Nick Hurd last week, it looks like there is potential for some change within the UK Government's position in the future—was that, irrespective of the ability to save lives and irrespective of the human suffering, it appeared to be impossible for the Minister to look at this through a public health lens.

I think part of the problem is that, unusually in the world, in the UK Government's set-up this is a justice issue and not a public health issue. I think most parts of the world have moved on and now look at this as a public health issue, and I guess that is one of the challenges. Of course it is not for me to tell the UK Government how to frame their policy, but clearly that is having an impact on Scotland, in the inability to get beyond looking at this through a criminal lens. I think it is really important that we all look at this through a public health lens.

Q398 **Deidre Brock:** If the Home Office eventually chooses to grant some sort of legal exemption for a safe consumption facility, have there been discussions about what sort of assurances the Home Office might require in order for the Scottish Government to allow that to be run?

Joe FitzPatrick: Unfortunately, discussions have never got past the starting block.

Q399 **Deidre Brock:** So there has just been no attempt even to imagine what this might be like if it was permitted to happen?

Joe FitzPatrick: No, absolutely not. And people are dying. There is a policy here that the evidence that I have seen and the evidence that this Committee has seen suggests would save lives. I am not for a second suggesting that it is the be-all and end-all, and will end the drug deaths, but all the evidence points to this as being one of the tools that will save lives. I just cannot understand how anyone with an ounce of humanity will not be prepared to take what I know will be difficult decisions to help save those lives.

Deidre Brock: Certainly our visit to Ottawa suggested that many lives have been saved as a result of that facility.

Q400 **Chair:** I thought there was a consensus in the Scottish Parliament. Is this the view of the Parliament? I know it is the view of the Government, but—

Joe FitzPatrick: Absolutely; it is the view of the Parliament, yes.

Chair: Okay. Is that expressed in any sort of—

Joe FitzPatrick: It has been expressed on numerous occasions and certainly in a vote last year.

Q401 **Chair:** I just heard some stuff on the radio this morning. I thought that was the view, but—

Joe FitzPatrick: I don't think it's the view of everyone in the Scottish Parliament, just as I don't think the current position of the UK Government is the view of everyone in the Conservative party.

Q402 **Chair:** I am just trying to get the degree of consensus that exists.

Joe FitzPatrick: The Parliament in Scotland is clear, and in terms of the decisions in Glasgow, as I understand it that was unanimous.

Q403 **Hugh Gaffney:** Did I pick it up right that the Home Office is blocking this? Where are we with the Home Office on this?

Joe FitzPatrick: The Home Office has refused to discuss it in any detail.

Q404 **Hugh Gaffney:** How long has that been going on?

Joe FitzPatrick: Since 2017.

Hugh Gaffney: That answers the whole thing. You talk about an emergency—well!

Danielle Rowley: We heard last week from police officers from around the country of different projects that they have been running. In particular, I remember that there was a police officer from Durham, I think, who had some really interesting local schemes. If they are managing to try different things within the UK framework or legal system, what potential is there to do something like that in Scotland? And are there things that we can be doing in Scotland without the permission of the UK Government?

Joe FitzPatrick: That is one of the things that we have asked the taskforce to look at specifically. Again, I refer you back to the Lord Advocate's evidence, where he pointed out the slightly different frameworks in the legal systems in England and Scotland, in terms of prosecution and so on.

There are some really good examples, like Durham, of actions that are being taken. Clearly the drug problem in England is a different problem—there is not the same opioids issue that we have in Scotland—but there are examples that we need to look at from across the world. That would include some of the examples that police commissioners in particular have

managed to take forward, in terms of the particular powers that they have been given in an English context.

Q405 **Christine Jardine:** Just to follow up on that, although I think you may have answered this, the problem—not the whole problem, but an aspect of it—therefore lies within the Scottish legal system. Although you have had a lack of communication from the Home Office, there is more that could be done—to take up Mr Duguid's point—within the Scottish legal system, is there not?

Joe FitzPatrick: That is one of the challenges that we have put to the taskforce: "Are there more things that we could do? Let's look at the evidence." Clearly if we had all the powers so we could interface in terms of policy, that would be better, but let us look none the less at whether there are things that are working out.

As I understand it, most of these actions are pilots that are being tested; it is absolutely appropriate that if somebody does a pilot, we look to see whether it has worked and is having the outcomes that we would have hoped for. Whether all those actions are fully supported by the Home Office, I am not sure.

Q406 **Chair:** One thing struck me about last week's session, which was fascinating. I am glad that the Durham example has been referenced again, because I think we were all particularly impressed by the way in which it had been executed and progressed.

From listening to the senior police officers, they were all at the very edges of what was permissible under the Misuse of Drugs Act. They were looking for inventive and creative ways to keep people safe, but they were always up against the barrier of the 1971 Act, which seemed to almost get in the way of what they were trying to achieve. From listening to the Lord Advocate, I was struck by what is happening in Scotland: they are trying to push it as far as they can to have positive health outcomes and keep people safe. Does that not frustrate you as a Minister?

Joe FitzPatrick: It is hugely frustrating. Maybe it goes back to the point that Christine Jardine made earlier: the Act was brought in 50 years ago to deal with a particular set of circumstances, but things have changed. Irrespective of everything else, including the emergency that we have in Scotland, it is probably time the UK Government looked at updating the Act in any case.

Q407 **Chair:** What I am hearing very clearly from you is that you want the UK Government to do something about the Act to allow you the opportunity for the public health measures that you feel that Scotland requires. Is that roughly what you are saying to us today?

Joe FitzPatrick: I think there are actions short of a radical overhaul of the Act, which I know will take time, that the UK Government can take to support us in taking a public health approach in Scotland. I would be absolutely over the moon if after this Committee appearance I got an invitation from the UK Government—whether it was from Victoria Atkins or

somebody else—to sit down and discuss how we can do that, working together.

Q408 **Chair:** Would that be your first preference: to get the UK to do something that would allow you to do what you feel you need to do as a Public Health Minister in Scotland? And if that could not be achieved, and the UK Government decided for whatever reason—possibly for the best possible reasons—to stick to a criminal justice approach with the Misuse of Drugs Act as the bedrock of our approach to drug issues, you would say, "If that is their view, let us do something different by devolving this to Scotland." Are those roughly the lines along the route that we are in just now?

Joe FitzPatrick: I think that is fair.

Chair: Okay. That helps to clarify it for me.

Q409 **Ged Killen:** Some of my questions have been covered in various discussions, but I want to try to bring this together a little. I am personally very open-minded on the issues of devolution and decriminalisation and whatever is necessary to tackle this problem. What I am interested in is what works, so I want to understand why—as has been asked before—Durham and Cleveland are diverting resources away from criminal justice activity and towards health. They are setting up these contracts with people, and that is working to get them into treatment.

Is this just a question of resources? Why are we not doing this in Scotland? Is it because of the Lord Advocate? If you could give one reason, what would it be?

Joe FitzPatrick: The Lord Advocate made it clear that these things are happening in Scotland, but I have asked the taskforce to look at whether there is more that we can do in terms of particular examples that some of the police commissioners in England are taking forward. That is one of the things that I have specifically asked the taskforce to look at.

Q410 **Ged Killen:** When might we hear the outcome of the taskforce?

Joe FitzPatrick: I have said to the chair of the taskforce that I am not looking for a shiny report at the end of two years. I hope that they can do work and present the results of that work on an ongoing basis because this is an emergency. If we can take actions in Scotland, I want to take those actions.

Chair: Thank you. Danielle Rowley.

Danielle Rowley: I think my questions have probably been mostly covered. I will let that one go.

Chair: That tends to happen on these sorts of inquiries.

Joe FitzPatrick: Does that mean that I have been rambling too much?

Chair: Christine Jardine.

Christine Jardine: No—I'm fine. Mine was asked.

Chair: We are making very good progress. David Duguid, has your question been satisfactorily answered?

Q411 **David Duguid:** No, I don't think we have covered this. My question was going to be on the Equality Act 2010 and NHS Scotland's recommendation that the current exclusion of alcohol and drugs be included within the definition of disability. I was wondering whether you could tell us what you think of that. Do you agree with the recommendation and, if so, what would that mean for how services are delivered differently in Scotland?

Joe FitzPatrick: That is an interesting point. I think that Act is entirely reserved, so that would be one of the challenges. There are probably some underlying conditions through which somebody who uses drugs might already be covered by the Act—not because they are using drugs, but because of other factors. But I think it is reserved.

Beverley Francis: That is correct, yes.

Q412 **David Duguid:** The UK Government's response to that recommendation officially was that the response should be on the impact rather than the cause. Just being on drugs, or having an alcohol problem, should not lead you to be regarded as having a disability, but it could lead on to other things that could be a public health issue. So you agree with that stance, but have you had any conversations with the UK Government specifically on the Equality Act and drugs and alcohol?

Joe FitzPatrick: No. My focus has been in relation to specifically taking a public health approach in general in terms of discussions. If the UK Government are up for a discussion on any of these matters, I would be absolutely happy to have that discussion, but in the main this is a reserved area.

Q413 **Hugh Gaffney:** I think this is the last question. Are there other things that both Governments could be doing to address the stigma around drug use? Beverley, one of the questions that I was going to ask you—I think we have touched on it—was about the Misuse of Drugs Act 1971. Is it time that we ripped it up and started again? I am asking that because you deal with that in the Scottish Government.

Beverley Francis: As the Minister suggested, it is quite an old piece of legislation. It would be unusual, I think, for legislation of that length to be on the statute without some method of reform or review. I guess what I have observed as a policy adviser to Government over the years is that, before the road to recovery, we had a general approach to people who used drugs that they needed to be managed and contained, and the impact that they were having on society needed to be contained and managed.

Through the road to recovery and our policy progression, we started to treat people with hope and see that people could have a life free from drugs, or managed on a drug programme like methadone. Our policy

developed very much towards taking a different attitude—believing that people could change and recover. I think this latest policy iteration in terms of rights, respect and recovery is taking that even further and saying that we believe that people who use drugs and have problems with that should be treated as people who are unwell.

Essentially, as we have become more progressive in looking through that health lens we are continually coming more in conflict with a piece of legislation that was designed for a criminal justice problem. The Misuse of Drugs Act might deal with that criminal justice problem quite well—I would not want to take a view on that—but I think our proposition is that, in terms of Scottish public policy in relation to people who use drugs, it is certainly not supportive and does not create the environment in which we can do what we need to do.

Q414 **Chair:** Can I just ask a couple of brief final questions? You are the Public Health Minister, so obviously you talk to many individuals and organisations about the drugs situation in Scotland. I am looking at some of the campaigns that have been championed by national newspapers. Is there any sense that the debate and the public view of drugs issues is a few steps ahead of Government? Would that be a rough characterisation?

Joe FitzPatrick: I think that is absolutely fair. Just think back 20 years; the campaign that the *Daily Record*—I am not sure I am allowed to mention newspapers—has run and its conclusion would not have been imaginable.

The first time I ever heard a serious proposition to move to a more decriminalised system on drugs was from the then Tayside police force—John Vine was the chief constable. I have to say that 20 years ago I was not comfortable with that proposal—I have come some distance. I was overly concerned about perception. When you speak to people who have been impacted by drugs and who have lost a loved one, you really understand the urgency with which we need to look at this through a public health lens.

Q415 **Chair:** We are closing this inquiry, and have just one or two sessions left. The overwhelming consensus that seems to be presented to us, whether from police forces, families affected by drug death or the agencies involved, all seem to come to the same sort of conclusion: it has to be public health, and we have to do something radically different to address it. Have you noticed any sort of divergence in that consensus in Scotland when you have looked at the issue?

Joe FitzPatrick: All the evidence that I have seen points to that public health point, from a range of groups. Sometimes, people have different views about what the best thing is that we can spend money on or the best action the Government can take, but from all the groups I have interacted with, whether families, the recovery movement or other organisations that are working on a daily basis to support people, they all concur that this needs to be looked at as a matter of urgency, as a public health issue.

Q416 **Chair:** You have said a "public health emergency" on a couple of occasions throughout this exchange. Is it a public health emergency now? If it is, other than the taskforce, what things are the Scottish Government doing?

Joe FitzPatrick: It absolutely is an emergency. One thousand people die in a year—that has to be an emergency. The powers for an emergency are reserved to the UK Government, so I ask them to respond to that emergency. We are responding by taking forward the taskforce; we responded in relation to our new drug and alcohol strategy, which supports that broader rights-based health approach in terms of taking this forward. But we are fighting with one arm behind our backs, so I really call on the Committee to help us and persuade the UK Government—rather than fighting against us—to support us in saving lives in Scotland.

Chair: Minister, thank you ever so much. Again, we have asked you for a couple of things; if you could supply that and anything else that could usefully help in this inquiry, we would be grateful. Thank you for your attendance.