



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Public Audit and Post-legislative Scrutiny Committee

**Thursday 21 December 2017**

**Session 5**



The Scottish Parliament  
Pàrlamaid na h-Alba

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website - [www.parliament.scot](http://www.parliament.scot) or by contacting Public Information on 0131 348 5000

---

**Thursday 21 December 2017**

**CONTENTS**

|  | <b>Col.</b> |
|--|-------------|
| <b>DECISION ON TAKING BUSINESS IN PRIVATE</b> .....        | 1           |
| <b>SECTION 22 REPORT</b> .....                             | 2           |
| “The 2016/17 audit of the Scottish Police Authority” ..... | 2           |
| <b>SETTLEMENT AGREEMENTS AND SEVERANCE POLICY</b> .....    | 30          |

---

**PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE**  
**32<sup>nd</sup> Meeting 2017, Session 5**

**CONVENER**

\*Jackie Baillie (Dumbarton) (Lab) (Acting Convener)  
Jenny Marra (North East Scotland) (Lab)

**DEPUTY CONVENER**

\*Liam Kerr (North East Scotland) (Con)

**COMMITTEE MEMBERS**

\*Colin Beattie (Midlothian North and Musselburgh) (SNP)  
\*Bill Bowman (North East Scotland) (Con)  
\*Willie Coffey (Kilmarnock and Irvine Valley) (SNP)  
\*Monica Lennon (Central Scotland) (Lab)  
\*Alex Neil (Airdrie and Shotts) (SNP)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Stephen Boyle (Audit Scotland)  
Caroline Gardner (Auditor General for Scotland)  
Carole Grant (Audit Scotland)  
Paul Gray (Scottish Government)  
Paul Johnston (Scottish Government)  
Mark Roberts (Audit Scotland)

**CLERK TO THE COMMITTEE**

Terry Shevlin

**LOCATION**

The Adam Smith Room (CR5)



## Scottish Parliament

### Public Audit and Post-legislative Scrutiny Committee

Thursday 21 December 2017

*[The Acting Convener opened the meeting at 09:00]*

### Decision on Taking Business in Private

**The Acting Convener (Jackie Baillie):** Good morning and welcome to the 32nd meeting of the Public Audit and Post-legislative Scrutiny Committee in 2017. I ask everybody in the public gallery to switch off their electronic devices so that they do not interfere with the committee's work.

This will be my last meeting as acting convener. I know that members, in particular, look forward to welcoming back the convener, Jenny Marra, in the new year.

Agenda item 1 is a decision on taking business in private. Do we agree to take item 4 in private?

**Members** *indicated agreement.*

## Section 22 Report

### “The 2016/17 audit of the Scottish Police Authority”

09:00

**The Acting Convener:** Item 2 is evidence on “The 2016/17 audit of the Scottish Police Authority”. I welcome to the meeting Caroline Gardner, Auditor General for Scotland, and, from Audit Scotland, Stephen Boyle, assistant director; Carole Grant, senior audit manager; and Mark Roberts, senior manager. I invite Caroline Gardner to make an opening statement.

**Caroline Gardner (Auditor General for Scotland):** Thank you, convener. I am presenting the report “The 2016/17 audit of the Scottish Police Authority” under section 22 of the Public Finance and Accountability (Scotland) Act 2000. I would like to draw the committee's attention to three issues that arise from the audit and are highlighted in my report.

The first issue is the auditor's opinion on the SPA's annual report and accounts. This is the fourth section 22 report on the SPA that I have prepared for the Parliament and it is the first time that the auditor has not expressed a modified opinion on the SPA's accounts. That reflects improvements in financial management and financial leadership within both the SPA and Police Scotland.

The second issue relates to financial sustainability. In 2016-17, the SPA overspent its budget by £16.9 million, which was accommodated by underspends elsewhere across the Scottish Government's budget. The overspend would have been larger if the SPA had not received £13.6 million as part of the negotiated settlement that terminated the i6 programme. I have been recommending for several years that the SPA and Police Scotland prepare a long-term financial strategy. It is encouraging that they have now done that, but this work confirms the scale of challenge that the two organisations face in achieving financial sustainability. The SPA does not anticipate achieving a balanced budget until 2020-21, and it expects to return to a deficit position after that. That financial context will make achieving the vision that is set out in the policing 2026 strategy very challenging.

The third issue relates to both governance and transparency and value for money. The report sets out instances of unacceptably poor governance and poor use of public money relating to the appointment of temporary staff, the approval of relocation expenses for a deputy chief constable and the decision to make the role of the chief

executive of the Scottish Police Authority redundant during 2017-18. We will examine the detail of that decision during the next annual audit of the SPA.

I welcome the progress that the SPA and Police Scotland have made in improving financial management and understanding their financial sustainability. However, the scale of the challenge facing the two organisations remains daunting in terms of the scale of the change that is required; the changes in leadership, which are continuing at the moment; the integration of the British Transport Police functions into Police Scotland; and the severe financial constraints that I have mentioned.

Alongside me are Stephen Boyle, who is the appointed auditor for the SPA, together with Carole Grant and Mark Roberts. Together, we are happy to answer the committee's questions.

**The Acting Convener:** Thank you, Auditor General. I hear what you say about exploring the chief executive's redundancy in a future audit but, given the significant public interest, I suspect that we will want to explore some of that with you now. I kick off by asking you to clarify paragraph 22 of your report by explaining exactly how the SPA "unnecessarily" incurred an extra three months' salary costs in respect of Mr Foley.

**Caroline Gardner:** Certainly, convener. I will ask Stephen Boyle to talk you through that in a moment. I want to clarify my comment about the 2017-18 audit. The decision was made during 2017-18 and the payments will not appear in the accounts until the end of that financial year, which finishes in March 2018. We have included the matter in our report because we recognise that it is of significant interest to the committee. We will do our best, but there will be some bits of it that are not yet closed off.

**Stephen Boyle (Audit Scotland):** Good morning. We set out at paragraph 22 and elsewhere in the report the decision-making process that the SPA went through in respect of the ultimate early retirement and associated payments for the now former chief executive.

If I may step back a few months, the decision that the SPA took was in respect of the critical Her Majesty's inspectorate of constabulary in Scotland report on the forensic services in the SPA and the recommendations that it included. At that stage, the SPA board decided to act on that report and, principally, it sought to amend the reporting line for the director of forensic services from reporting to the chief executive to reporting to the board. As a consequence, the board took the view that the scale and size of the chief executive's role was reduced and, in their minds, that led to a redundancy discussion. The SPA board

considered an options paper at a closed meeting on 7 June, and that was the point when it sought to recognise the change in reporting line and the change of the role. At that stage, it also sought to engage in a consultation process with Mr Foley.

There are two points about the judgment that we have made and the resulting decisions. The first is about the exchange of correspondence that took place that led to the decision making. We felt that, to reflect good governance standards, a decision of such magnitude should take place at a formal board meeting.

Secondly, as we conclude at paragraph 22, an additional three months' salary was incurred unnecessarily. Our judgment on that point is based on the fact that the SPA took a decision to pay Mr Foley's notice in full, for six months. What we have not seen is any evidence or any reflection of a discussion about whether it could reasonably have asked Mr Foley to work his notice period. The SPA board was very clear that it felt that it was very important to retain the services of an accountable officer and to retain access to Mr Foley's knowledge of the organisation in respect of the accounting arrangements, and it felt that that led to ambiguity about his potential leave date from the organisation.

In our judgment, we reflected on the previous history of the organisation. In every year of its operation—some of its difficulties in concluding year-end financial reporting matters are well known to the committee—it has always met the year-end statutory deadline of laying its accounts before Parliament by the end of December. In our view, the decision-making process was not in evidence as to whether it could have sought to conclude Mr Foley's employment with the organisation but allow him to work his notice period. We thought that there was some merit to that in gaining access for his interim successor to have some form of handover arrangement.

That led us to the judgment that we set out in the report regarding Mr Foley leaving the organisation on 30 November 2017. Had he worked his notice period, that would have taken him up to February 2018 at a point where the board reached a conclusion for Mr Foley to leave the organisation in August. Instead, six months forward from November takes us into May 2018. That is where we arrive at the difference of the unnecessary three months' additional salary costs.

**The Acting Convener:** That is a very helpful explanation, but it invites quite a number of other questions. Let me try to unpack some of this before moving on to bring in some of my colleagues. There are two separate issues here. One is the decision that is made in respect of Mr Foley's package and the other is some of the questionable financial decisions made, I believe,

by Mr Foley himself. Am I correct in saying that Mr Foley was the accountable officer?

**Caroline Gardner:** Yes.

**The Acting Convener:** Would some of the questionable financial decisions about paying for people's tax bills and so on, which you unpack in your report, have been taken by him?

**Caroline Gardner:** They were, and the report is clear about both the personal decision making and the fact that the accountable officer takes responsibility for those in any case.

**The Acting Convener:** Okay. Were none of them reported to the board?

**Caroline Gardner:** Certainly the payment of relocation expenses was not, and we say that in the report. I think that the others were not, but I ask Stephen Boyle and Carole Grant to confirm that.

**Carole Grant (Audit Scotland):** We did not see any evidence that the other examples were reported to the board.

**The Acting Convener:** Okay, so we can safely assume that Mr Foley took those decisions or was aware of them. Thank you—that is helpful. I am interested in who took the decision in the case of his own package if it was not taken in front of the full board. Mr Foley was the accountable officer, so it would be inappropriate for him to take that decision. Who took the decisions behind closed doors?

**Stephen Boyle:** The decisions were taken by the SPA board. We are clear that the decision was taken by correspondence. The decision-making around that point was initiated at a closed board meeting, so a board meeting was held but, from what we have seen from the papers for that meeting, it was more about the change in the role and in reporting lines as a result of the HMICS forensics report. Once the board was clear that it wanted to proceed with a change of accountable officer arrangements and the chief executive role, that led to a series of email exchanges with the chair and vice-chair. Once they had settled on the fact that they were going to proceed with a change in role, the decision making on Mr Foley's financial arrangements to leave the organisation was also taken by correspondence.

**The Acting Convener:** So this never went for a final decision before the full board. What you are telling me, if I have picked you up correctly, is that there was a series of emails between the chair and the vice-chair.

**Stephen Boyle:** I apologise, convener. It was not just the vice-chair and the chair, but all the board members. All the board members were invited to express their views. As we touch on, the

decision was taken over the summer months, when many of the board members and others would have been on holiday, but our judgment was that, nonetheless, a decision of this importance merited a full board meeting.

**The Acting Convener:** In all your experience as an auditor, have you ever seen anything like this before, where decisions of this magnitude and sensitivity are done by email?

**Stephen Boyle:** No, convener. I think that we would have expected a full board meeting to consider such a decision.

**Caroline Gardner:** May I add to that briefly, convener?

**The Acting Convener:** Of course.

**Caroline Gardner:** As well as the question of there being a full board meeting, on which I fully agree with Stephen Boyle, the other point that he makes in his annual audit report and that I make in the section 22 report is that part of the purpose of such a meeting would have been to consider all the options that were available to the board rather than simply the proposal that was finally agreed. We have not seen evidence that that occurred.

**The Acting Convener:** That is interesting. The matter is clearly sensitive. Under our next agenda item, we will move on to consider severance and settlement agreements. I am curious to know whether it is normal practice that something of this sensitivity would be reported to at least the sponsoring department. Did you find evidence of the Scottish Government being consulted on or advised of this whole process in any way?

**Stephen Boyle:** We did. We have seen email exchanges from the vice-chair to the justice department advising it of the progress. We are not clear that we have seen all of the email trail, and that is something that we will follow up on, but nonetheless we have seen evidence of the Scottish Government being consulted and made aware of the decisions that the SPA board was taking.

**The Acting Convener:** I am curious to know whether that information is in the public domain. You mentioned the justice department, which is a big department. Who was the email to? Was it to the director general of the department?

**Stephen Boyle:** I am not sure whether that information is in the public domain. If I can perhaps provide a bit more clarity, I think we would say that it was to senior civil servants in the policing division.

**The Acting Convener:** Okay. I do not know whether it is possible to have access to those emails. I think that the committee would be very interested in the source of the information you

have received, because that is central to exploring what actually happened in terms of decision-making.

You will be aware that the committee has had a number of section 22 reports on different organisations and, when we have come to question those who were responsible, they have either received settlement packages or taken early retirement, as is very much the case with the Scottish Police Authority. The committee has concluded that we do not want to see public bodies reward staff for failing. Given that that is the committee's view and that you identify poor governance and poor use of public funds, do you believe that Mr Foley should pay any of his settlement back?

09:15

**Caroline Gardner:** The first thing to say is that I entirely understand the committee's concern about this. These are significant amounts of public money and I say in my report that the governance failings are unacceptable.

It is hard for us to give you a clear answer to your specific question, not having seen the options that the SPA board considered. We know what it finally agreed but we do not know whether it considered alternatives and, without having that information available to us, I do not feel able to express a view at this point. The committee may want to follow up on that with the SPA and the Government.

**The Acting Convener:** Let me put this in a different way. Paragraph 22 of the report, which you have explained, suggests to me that at least three months' salary could have been saved. Never mind how the actual settlement was calculated, that three months is an overpayment.

**Caroline Gardner:** I have no doubt that the Scottish Police Authority board could have structured the agreement that it came to with Mr Foley in a way that avoided payment in lieu of notice that was not worked. That is very clear. Whether other options were available to it that might have saved the public purse money and fulfilled the governance concerns that I think you are alluding to is a different question.

**Colin Beattie (Midlothian North and Musselburgh) (SNP):** Let me start on a positive note. You said that there have been significant improvements in some aspects of SPA governance. Will you expand on that?

**Caroline Gardner:** My specific comments were about improvements in financial management and financial leadership, which have been at the core of the concerns in the previous section 22 reports over the past three years. I will ask Stephen Boyle

and Carole Grant to give you a flavour of the improvements that they have seen, which meant that they did not need to modify the auditor's opinion on the accounts this year.

**Stephen Boyle:** Last year's independent auditor's report on the annual report and accounts drew attention to weaknesses in the non-current assets, particularly the quality of records and associated explanations. We have seen a big improvement in that in this year's audit, a consequence of which has been investment in key skills in that area, while record keeping has also improved. Carole Grant, our colleagues and I have received the explanations that we requested for all of our inquiries. Over the year, in our engagement with the SPA, we have seen an improvement in the quality of the finance team. Notwithstanding some issues that we mention in the annual audit report, that meant that all of the opinions that we are required to provide were unmodified.

**Colin Beattie:** I turn to the issue of relocation expenses and so on, which has been highlighted in the report. One DCC received a payment of £18,000, which seems to have been to cover travel expenses and temporary accommodation. In the report, you say that it came under relocation expenses—presumably that is the correct place to put it.

**Caroline Gardner:** A payment of £18,000 was made in 2014-15 for travel expenses from the base from which the officer was moving, and temporary rental expenses. An additional payment in 2016-17 was for the sale and purchase of a permanent residence, plus the tax liability on it. The payments were all within the umbrella of relocation expenses under the policy for senior officers.

**Colin Beattie:** Was the £53,000 the tax liability on the officer's residence?

**Caroline Gardner:** It was the tax liability on the relocation expenses.

**Colin Beattie:** I am confused, because I have been through this in the private sector and tax never appeared. Could you elaborate on that?

**Caroline Gardner:** Certainly. Police Scotland's regulations for senior officers entitle officers who relocate to take up a post to claim reasonable expenses for relocation. That is not defined and it is not capped, which the SPA has since recognised as being a problem and has opened negotiations with the police—

**Colin Beattie:** Is it normal in the public sector for such expenses not to be capped?

**Caroline Gardner:** It is not normal. In most organisations there is a cap, which is generally about £8,000—significantly lower than the figures that we are seeing here. That is the level at which



Her Majesty's Revenue and Customs accepts that the benefit is non-taxable. Payments above £8,000 are taxable. The policies in place at the time provided that the SPA would cover the officer's tax liability on the relocation expenses that were incurred.

**Colin Beattie:** It sounds very generous. Is that a long-standing policy?

**Caroline Gardner:** It is. I will ask Stephen Boyle and Carole Grant to talk you through the detail.

**Carole Grant:** In the case that you are referring to, Strathclyde Police policy was used, because the SPA and Police Scotland did not have a policy at that point. The Strathclyde policy had been in place for a number of years.

**Colin Beattie:** Why did they pick the Strathclyde one? Was it more generous than the others?

**Carole Grant:** I do not know the justification behind the selection of that specific policy. It was deemed to be appropriate at the time.

**Stephen Boyle:** We think that it is likely that the Strathclyde Police policy was used in this example because, as Carole Grant said, the SPA did not have a policy. When the officer joined in 2012, the SPA was forming and setting up its policy arrangements. The Strathclyde policy did not have a cap on it, but it contained provisions about a timeline. One of the key points that we make in the report is that the policy has an 18-month time limit. As we have tried to capture in the report, we made the judgment that because the timeline, from the appointment through to payments being made as recently as 2017, exceeded the 18-month limit, it would have been better if there had been some governance of the decision making that accompanied the case.

**Colin Beattie:** A reason is given here for the claim exceeding 18 months. Does that mean that the expense was incurred all that time ago? Was the officer out of pocket during that period?

**Carole Grant:** No. The officer moved home at the start of 2017. The sale of the house went through in January and the purchase of the house shortly after, so there was no time limit on the payments.

**Colin Beattie:** There was a payment of £18,000 for travel and temporary accommodation. However, relocation expenses were £49,000. That seems an awful lot. What did it comprise?

**Carole Grant:** I can break it down a bit, if that would be helpful. Just under £15,000 related to the sale of a property in England. About £34,000 was related to the purchase, the largest element of which was the land and buildings transaction tax, which was about £30,000.

**Colin Beattie:** Was that all paid for?

**Carole Grant:** Yes.

**Colin Beattie:** Wow! I would not mind a job in the police service. That is very generous.

You have stated here that

"relocation payments of this magnitude do not represent a good use of public money."

Will you elaborate on that?

**Caroline Gardner:** I am not sure that there is much more to say, Mr Beattie. In many public bodies there is a provision for relocation expenses to recruit the best candidate for a job. That is appropriate. There is generally a cap on the amount that is available, which usually matches HMRC's cap for when taxable benefits come into play. The £120,000 is a significant amount of public money. As Stephen Boyle said, the transactions took place a long time after the officer had taken up post. Although the then chief executive felt that it was within his authority to authorise the payments, Stephen Boyle, as the auditor, and I, as the Auditor General, felt that that was at least questionable and should have been put to the board for decision; it was not.

**Colin Beattie:** Nothing went to the board on this officer's payments, despite the size of the payments.

**Caroline Gardner:** It was authorised by the then chief executive.

**Colin Beattie:** Do you consider that it was handled in a regular manner at the time?

**Caroline Gardner:** The policy did not contain a cap and there was not a definition of "reasonable expenses" within it, so it is not possible on those grounds to say that the make-up of the payment was wrong, but the policy that was being applied included an 18-month time limit that was exceeded by some margin. Given that and the amount of money involved, it would have been appropriate to have gone to the board for authorisation of the payments. That did not happen.

**Colin Beattie:** Given that it did not, and there seems to be a history of this, did the chief executive's delegated powers give him the authority to approve the payments?

**Caroline Gardner:** He believed that they did. The scale of the payment and the fact that the timescales applied were outside the limits of the policy are at best questionable. That is why I brought the matter to the attention of the committee in the report and why Stephen Boyle raised it in his annual audit report to the SPA.

**Colin Beattie:** You have made it clear that none of that went to the board prior to the payments and

so on being approved. Was there any subsequent reference to the board?

**Caroline Gardner:** Stephen Boyle will want to talk through that.

**Stephen Boyle:** There have been board and SPA audit committee discussions about the payments but, from what we have seen, they have been generated by our own annual audit reporting. I think that the SPA's audit committee recognised in its discussion of the matter that there is some scope to tighten up the arrangements in that regard. We welcome that process but, specifically, we have not seen any evidence that there has been a discussion yet at the SPA board or, more directly, at the SPA's people committee, which would be the best place for that. I imagine that that is where the SPA intends to take its revised arrangements in 2018.

**Colin Beattie:** The report states:

"The 2016/17 relocation expenses payment was processed as a BACS payment rather than through the payroll system. It had been coded incorrectly ... as childcare vouchers."

Obviously, there was a tax implication there. Was all the tax paid by the SPA?

**Caroline Gardner:** The tax was eventually paid but, as you said, the payment was miscoded originally and paid through the Bacs system rather than through the payroll system. Stephen Boyle and Carole Grant can talk members through the detail of what they found.

**Colin Beattie:** Was that cost met by the SPA?

**Caroline Gardner:** Yes.

**Carole Grant:** When we drew the SPA's attention to the relocation payment that we had recognised, it built that into the tax and national insurance return that it was doing. That was built into those calculations.

**Colin Beattie:** Just to clarify, was it Audit Scotland that found the error?

**Carole Grant:** The payment had not been included in the tax and national insurance calculations until we drew it to the SPA's attention.

**Colin Beattie:** I do not know whether it is included in the tax figure that we have or whether it is an additional tax payment that is not evident.

**Caroline Gardner:** It is the figure of £53,000 that is included in our report.

**Colin Beattie:** It is included in that.

**Caroline Gardner:** That is the figure. Yes.

**Colin Beattie:** Were there any penalties?

**Carole Grant:** No, there have been no penalties.

**Colin Beattie:** Obviously, it is a concern that those errors take place. The report says that Mr Foley

"and the chief financial officer of Police Scotland ... made insufficient efforts to ensure that the remuneration report in the annual report and accounts were free from error and omission."

Will you expand a little bit on that?

**Stephen Boyle:** The committee will recall that my predecessor drew attention to the fact that compliance with the financial reporting manual had been an issue for the SPA and that that triggered reporting to the committee previously on the need to improve financial leadership in the organisation. In the report, we commented that we think that that has happened.

One of the key points in the year is the audit committee receiving the unaudited annual report and accounts before they are presented to the external auditors for us to commence our detailed testing of the accounts before the conclusion of the audit process. Both the accountable officer and the chief financial officer expressed to their audit committee in their meeting that they had gone through the annual report and accounts and were content that they were complete and represented a significant improvement on previous years. We subsequently discovered that they had been familiar with those transactions and that those transactions would very clearly have to feature in the remuneration report in the annual report and accounts. That led us to the judgment that "insufficient efforts" had been made to ensure that

"the annual report and accounts were free from error and omission."

09:30

**Monica Lennon (Central Scotland) (Lab):** Good morning. Colin Beattie covered quite a lot of that issue, but I want to pick up on it. I am struggling to understand the point about the Strathclyde policies. From the report, it looks like the Scottish Police Authority had no policy in place that covered those payments or expenses or that would have allowed them to be met. Was it legitimate to refer back to Strathclyde police authority policies, given that Strathclyde police authority no longer exists?

**Caroline Gardner:** That is primarily a matter of timing. The Scottish Police Authority came into being on 1 April 2013 and the deputy chief constable concerned took up post at the end of 2012. At that point, there was no SPA to have policies, and the offer of appointment included a standard provision that said that reasonable expenses for relocation would be available.

Does Mark Roberts want to talk through how the different regulations interact with one another?

**Mark Roberts (Audit Scotland):** The overarching piece of legislation is the Police Service of Scotland Regulations 2013, which set out the terms and conditions for senior police officers in a general sense. Beneath that are the standard operating procedures. In this case, they were the old Strathclyde police authority's operating procedures. When the deputy chief constable was appointed, those procedures were in operation, and it would have made sense to use one of those standard operating procedures, as the SPA could not have existed or have had its own procedures in any sensible way at that point.

**Monica Lennon:** What is the status of those Strathclyde policies now? Can they be picked off the shelf and applied to other situations?

**Mark Roberts:** The SPA has been in existence for a number of years, and it now has its own policies in place for senior officers, officers and civilian staff, which it works to. As the Auditor General has said, the SPA is looking at revising its own policies on senior officers' relocation expenses in light of what we reported in the audit.

**Monica Lennon:** Okay. I appreciate the timing issue in respect of DCC Fitzpatrick's appointment. Would the SPA have been in breach of contract if it had not met those expenses?

**Caroline Gardner:** There are two elements to that. One is that the policy is clear that reasonable relocation expenses would be reimbursed. There was neither a cap on that nor a definition of what "reasonable" would include. That seems to me to be quite a loose policy, although it is commonly applied to senior officers in the police service. As Mark Roberts has said, the SPA has said that it will revisit that and look to renegotiate it with the police negotiating board.

The second issue is the timescale. The Strathclyde standard operating procedure that was used had an 18-month time limit in it, which was disregarded by the then accountable officer on grounds that we do not think are strong enough to justify making a payment of such a scale outside the time that the policy lays down.

**Monica Lennon:** Is it correct that the relocation expenses add up to £67,000?

**Caroline Gardner:** Plus the tax liability of £53,000.

**Monica Lennon:** Is that considered to be reasonable?

**Caroline Gardner:** As I said in response to an earlier question from Colin Beattie, I think, many public bodies have a policy that allows the repayment of relocation expenses, and most of

them have a cap, which is generally about the level of £8,000. That is the same level at which the HMRC starts to regard the amount as a taxable benefit. In that context, £120,000 feels like a large sum of public money.

**Monica Lennon:** Given the cap that applies elsewhere, is this the first time that you have seen a payment of that scale? Is it exceptional?

**Caroline Gardner:** It is exceptional. I think that Stephen Boyle said in response to an earlier question that he has not seen a payment of that size. There is the caveat that the same policy applies to senior police officers across the United Kingdom, I think; it certainly has done in Scotland elsewhere. Does Stephen Boyle want to add anything to that?

**Stephen Boyle:** As the Auditor General has suggested, we know from our preparation and research that there are examples in other parts of the UK of significant relocation payments having been made for senior officers, but I have not seen anything of that scale outside a police setting.

**Monica Lennon:** Okay. I think that many people will be quite shocked that the former chief executive made that decision in isolation and signed off very large expenses at the stroke of a pen. Colin Beattie asked about the board's involvement in looking back at the decision. Is the board concerned about the delegated powers that are afforded to the chief executive? What other powers did the chief executive have that perhaps we do not know about?

**Caroline Gardner:** You would need to ask the board that question. We know that it is committed to reviewing that particular policy. You would need to explore with it the question about what view it has taken of the chief executive's actions. In some ways, that question fits with the convener's previous questions about the options that it considered in agreeing his early retirement.

**The Acting Convener:** We have heard evidence today that the accountable officer clearly demonstrated poor financial judgment in signing off some of these packages. However, I am conscious that your report is for 2016-17. Did he exercise poor financial judgment before that?

**Caroline Gardner:** This is the first time that the audit has identified issues of this scale. As you know, we have in previous reports highlighted different examples of poor governance in the way in which board meetings were being held and so on, but payments of this type have not come through in the audit work. A caveat that I need to give is that an audit is not designed to uncover every possible element of bad decision making that might have taken place; it is a risk-based approach that uses professional concepts of materiality to give assurance in specific terms. I

cannot absolutely confirm that what you have referred to has not happened, but it has not been identified in previous years' audit work.

**The Acting Convener:** Given what we know from the audit work for 2016-17 and the clear risk with regard to previous behaviour, will you now go back and look at this issue?

**Caroline Gardner:** I expect the SPA to do so on the basis of the audit report that it has received from Stephen Boyle and his team this year, and I think that that will form part of what Stephen Boyle and the team will look for in the 2017-18 audit.

**The Acting Convener:** That was helpful. Up to now, the SPA has not been proactive; instead, it has addressed any of this only in reaction to your reports. Given the behaviour of the chief executive as the accountable officer in 2016-17, I am very keen that it looks back at this.

**Liam Kerr (North East Scotland) (Con):** Throughout this process, the terms "redundancy" and "early retirement" have been used interchangeably, but they are two very different animals. Can someone explain to me why those terms are being used interchangeably?

**Caroline Gardner:** They should not be; as you have said, they are very different things. Our broad understanding is that there were two elements to the agreement reached between the chief executive and the SPA; first, departure under the terms of the SPA's normal early retirement scheme, which entitles him to a sum of money that has been reported by the SPA but which has not yet audited by us, plus a cost for the strain on the pension fund; and secondly, a separate payment for six months in lieu of notice, which was triggered when he left at the end of November this year. With the caveat that we have not audited those figures yet, those were the two elements that we understand made up the agreement.

**Liam Kerr:** So what was the reason for the chief executive's employment being ended? After all, redundancy is something that is done to him, while early retirement is something that is done by him.

**Stephen Boyle:** I would refer you to the earlier answer about the board's decision to change the status of Mr Foley's role. It came to the view that because forensic services would no longer be part of the chief executive's remit, that represented a significant diminution in responsibilities and led to a change in circumstances. It is very clear that, in the consultation that it went through with Mr Foley, his subsequent departure was in the context of an existing approved early retirement scheme, and his departure costs are partly in respect of that. On top of that was the board's decision to allow Mr Foley to leave the organisation on a given fixed date instead of his working a six-month notice

period, which resulted in a six-months' payment in lieu of notice.

**Liam Kerr:** I do not quite understand that. Let us say that the board started from the position that the role was redundant—on best case, we will give it that. There was a diminution in responsibility, which meant a redundancy situation; at some point, the role was going to change, the post would be redundant and there would be payments associated with that. However, it sounds as though what has happened is that, at some point, there was a discussion and someone said, "If we change the reason for dismissal to early retirement, we can manipulate the payments." Is that a fair statement?

**Stephen Boyle:** I am not sure that I would recognise all of that. We would look to clarify whether by virtue of Mr Foley's membership of whichever pension scheme—I assume that, because he was a civil member, it will have been the local government pension scheme—and his age, the circumstances leading to his departure would have allowed him to gain access to his pension arrangements. I might need to come back to the committee in writing on the specifics of the distinction between redundancy and early retirement.

**Liam Kerr:** I would like you to do that, if you do not mind, because the distinction seems quite important.

You said that the decision was taken through correspondence among the board. Has there been any explanation as to why it was done that way? Is that usual?

**Stephen Boyle:** The explanation provided to us was that the board was keen to expedite the process. As the HMICS report came out in June and no board meetings were planned over the summer months, it felt that it was appropriate to proceed and provide organisational clarity. On that basis, it came to the judgment—though not, we think, an appropriate judgment—that it was able to take this decision by correspondence led by the chair and the vice-chair among all the board members.

**Liam Kerr:** Is there any indication as to why it was keen to expedite the process?

**Stephen Boyle:** From the discussions that we have had with the SPA's vice-chair, who led the process on the board's behalf, it appears that the board was keen to provide organisational clarity—I think that that was the phrase that was used. In choosing to do that, it had two options: it could, with Mr Foley's consent, put in place an accelerated process to allow it, in its judgment, to complete the process by August, or it could engage in a 12 to 14.5-week consultation period, which as it has set out is typical and the right of

any affected employee. However, that would have gone for a much longer period. That led the board to the second driver behind its decision: clarity and value for money.

**Liam Kerr:** Leaving aside the payment in lieu of notice, I note that there was a payment—an ex gratia payment, if you like—of £43,470 for early retirement, as I think it is called in the report. Do you have any idea how that is broken down? What elements form that payment?

**Stephen Boyle:** I apologise, Mr Kerr—we do not have that detail. However, that is the work that we intend to focus on when we report on 2017-18.

**Liam Kerr:** I understand.

In summary, we apparently have an individual for whom a process to get him out of the organisation has been, for whatever reason, expedited; however, you have discovered that this individual appears to have breached the procurement rules with regard to the financial position; has approved expenses out of policy and out of date; and appears to have paid personal tax but, for whatever reason, has failed to log it properly. Is there any evidence that the board—or, indeed, anyone else—looked at this and asked why a performance management process was not being run?

09:45

**Stephen Boyle:** As we were coming towards the audit's conclusion, I inquired of the vice-chair whether there were any other avenues that the SPA could go down in respect of these matters and drew to her attention what we were intending to report to the SPA in the annual audit report on the matters that you have referred to. She made it clear that there were no other alternatives or avenues that it was able to pursue other than what it had pursued.

**Liam Kerr:** What do you mean when you say that there were no other avenues that it was able to pursue? There are always other avenues that one can pursue.

**Stephen Boyle:** Quite, but in its judgment there was no evidence or records to support an alternative approach.

**Liam Kerr:** Forgive me, but I would suggest that there was an awful lot of evidence to say that another option might have been considered by the board. Was the board not aware of any of this, or did it take a decision that it was not actionable?

**Stephen Boyle:** I am not sure that I was sighted on all of the decision making in the board. I have referred to my conversation with the vice-chair about what we were intending to report in our annual audit report and whether there was

anything that might cause it to pause and consider alternatives. She was clear that there was not.

**Liam Kerr:** For the avoidance of doubt, is it correct to say that, during this process and while the early retirement package was being built, the Scottish Government was fully apprised and aware of what was going on and allowed it to go through without pulling it back?

**Stephen Boyle:** We were in receipt of some correspondence between the SPA and the Scottish Government that, from the SPA's perspective, alerted Government to its progress with the process of Mr Foley's departure.

**Liam Kerr:** Which suggests that the Scottish Government was apprised of what was going on.

**Stephen Boyle:** Yes.

**Willie Coffey (Kilmarnock and Irvine Valley) (SNP):** I would like to shift the focus slightly to one element in your report on information and communications technology and the policing 2026 strategy. In paragraph 28, you quote the Scott-Moncrieff report from September this year, which said:

“conditions do not yet exist within Police Scotland to provide a satisfactory level of comfort that sufficient technology delivery capability is in place to support the delivery of Policing 2026.”

Could you give us a bit more background on that and on where you see the ICT strategy in Police Scotland?

**Caroline Gardner:** As the committee knows from its previous work, the policing 2026 strategy vision is heavily reliant on ICT to transform the way policing is carried out, and we have therefore tried to keep a close eye on progress. I will ask Mark Roberts to pick up on where we are with that now.

**Mark Roberts:** The current intention, as we understand it, is that the new ICT strategy will be brought to the SPA in March 2018, and Police Scotland has brought in external support to complement the existing ICT function in developing that. We see that as very much a critical step in implementing and realising the vision in the policing 2026 strategy, but that strategy is only the first step. Implementing it and making it real and meaningful is the critical next step, and that will require a significant amount of investment and additional resourcing to be put into the capacity of that function. The next key milestone will be the presentation of that strategy in March 2018.

**Willie Coffey:** The i6 programme was not a particularly pleasant experience for anybody. What assurance do you have, if any, that we have the capability and skills at the top of the organisation

to develop a sound new ICT strategy to deliver that in the future?

**Mark Roberts:** Over the past year, there has been investment at a senior level in bringing in experience from outside for major change programmes. I think that the lesson has very much been learned that it has to be much more of a modular activity, rather than trying to do one major ICT programme that encompasses 80 per cent of policing activity. We have seen over the past year the rollout of a national custody system as a discrete part of that. I think that there is progress in doing that. The evidence of external support being brought in to help with the development and implementation of strategy is also encouraging.

**Willie Coffey:** You have not made any recommendations specifically about that in the report. We will see the strategy presumably next year, but will you be having a look at that, particularly because of the experience that we had with i6?

**Mark Roberts:** One element of the annual audit process will be to look at ICT. There will be a component that discusses the progress in ICT in the report that Stephen Boyle will make to the SPA next year

**The Acting Convener:** Can I go back to the question of Mr Foley for one minute? You talked about the options being considered on 7 June. Was there a paper? Was the matter considered verbally? Do you have access to that paper?

**Stephen Boyle:** Yes, convener. A tabled presentation was made to the SPA board on that date.

**The Acting Convener:** Listening to the evidence here that I assume the board would have been aware of to some degree, I wonder whether one of the options considered was to dismiss John Foley on the grounds of incompetence.

**Stephen Boyle:** No, I do not think that it was.

**The Acting Convener:** Interesting.

**Alex Neil (Airdrie and Shotts) (SNP):** Can I clarify the timeline in all of this? Am I right in saying that the first decision was the one by the SPA board effectively to downgrade the job of chief executive because it no longer carried the additional responsibility for forensics? Is that right?

**Stephen Boyle:** That is correct.

**Alex Neil:** Having taken that decision, the board entered into discussion with John Foley about his departure.

**Stephen Boyle:** Yes.

**Alex Neil:** Before I go into the John Foley thing, which I have a couple of questions about, I note

that Mr Foley has been replaced by Kenneth Hogg but I do not know what his job title is.

**Stephen Boyle:** If I remember correctly, it is interim chief officer.

**Alex Neil:** What salary was Mr Foley on?

**Stephen Boyle:** I will tell you exactly. It is reported in the annual report and accounts. It was a salary of between £115,000 and £120,000 per annum.

**Alex Neil:** According to the press, Mr Hogg is on £120,000. Is that being paid for by the SPA or by the Scottish Government?

**Stephen Boyle:** That would be met by the SPA.

**Alex Neil:** Where is the logic in replacing a chief executive whose position is downgraded and is on £120,000 with somebody with far less responsibility—which you would think would mean far less remuneration—on £120,000?

**Stephen Boyle:** We will turn our attention to the specifics of the payment arrangements in looking at 2017-18 and come back to the reporting of those at that stage.

**Alex Neil:** It seems highly illogical to me.

**Caroline Gardner:** It is another reason why we would expect to see a series of options being considered by the SPA board.

**Alex Neil:** My second question is to get the timeline right on the decision about retirement, redundancy or whatever. Presumably, the first option was retirement and a date was agreed with Mr Foley for his retirement.

**Stephen Boyle:** Mr Foley's leave date from the organisation was ambiguous because the board was very keen to retain Mr Foley's service through to the conclusion of the audit of the annual report and accounts. It was provisionally scheduled in the expectation that the audit and the annual report and accounts would be laid before Parliament by the end of October. Subsequently, due to the complexity of some of the issues before you today, the audit was completed at the end of November. As we say in the report, in our judgment, given that the annual report and accounts had always been laid before the statutory deadline of the end of December, we felt that the decision to pay Mr Foley's notice period in full was not a robust judgment to make.

**Alex Neil:** Was he paid for both retirement and payment in lieu?

**Stephen Boyle:** Can you repeat the question?

**Alex Neil:** Was he paid both his retirement lump sum and, on top of that, payment in lieu?

**Stephen Boyle:** Payment in lieu of notice was triggered in full and it was agreed that that would be enacted on the actual date that Mr Foley left the organisation. That payment will happen with effect from 30 November and, as I understand, will be paid this month.

**Alex Neil:** When did he physically leave the organisation?

**Stephen Boyle:** He physically left on 30 November.

**Alex Neil:** So he is getting six months in lieu after his retirement.

**Stephen Boyle:** That is exactly the judgment that we make in the report. We have not seen any evidence why the timeline for Mr Foley physically working his notice period should not have started in August, when the decision was made formally by the board, rather than starting with effect from the end of November.

**Alex Neil:** All the decisions that Mr Foley appears to have taken in relation to the deputy chief constable and other matters were taken by him under delegated powers, and that is a contentious issue. Did he consult the chair or the vice-chair or the chair of audit before making any of those decisions?

**Stephen Boyle:** We are not clear that Mr Foley consulted the chair of the audit committee or the vice-chair. In respect of the relocation payments, Mr Foley has advised that he consulted both the now former chair and the chair before that, given the length of time involved. Regardless of that consultation, it was still our view that the decision would have been better served if it had taken place either in a formal committee environment or at the full board.

**Alex Neil:** The concentration has been on the chair and the chief executive, but this is quite a big board. I think that I am right in saying there were about a dozen or 14 members of the board at the time all this was happening. Has any non-executive director complained about the governance arrangements and about having major decisions made by correspondence instead of at a board meeting?

**Stephen Boyle:** We have not seen any evidence of complaints to that effect.

**Alex Neil:** It does not surprise me, unfortunately. I think that the role of the non-executive directors needs to be called into question as well. They have sat and allowed all this to happen and not done their job. Did the Scottish Government at any point raise concerns about the governance and the way in which these decisions were being reached?

**Stephen Boyle:** Not to my knowledge, but that may be a question for the SPA and the Government.

**Liam Kerr:** How often is the chief executive position in a public company redundant?

**Caroline Gardner:** It is unusual, for very obvious reasons. Public bodies require a chief executive; that person is usually the accountable officer. I recall many years ago when I was controller of audit reporting on a case in local government where exactly the same thing had happened and different but serious governance concerns were raised. It can sometimes happen where the scope of the job changes significantly, but we would expect to see a full options appraisal with proper costings and then proper board approval before it happened.

**Liam Kerr:** For the avoidance of doubt, are you saying that that has not happened here?

**Caroline Gardner:** Not in this case.

**Liam Kerr:** This was not clear to me from the report and it is something we will be looking at later: was the early retirement enshrined in a settlement agreement?

**Stephen Boyle:** No, we do not think that it was. We think that the early retirement component of Mr Foley's payments is in respect of an already approved voluntary redundancy/early retirement scheme, and the payment in lieu of notice is with reference to one of the standard operating procedures of the SPA, which gives the board the option to terminate an employee's employment with immediate effect, which is in effect what happened here, rather than having them work the notice period.

**Liam Kerr:** I understand. There is no settlement agreement and therefore no confidentiality clause. For the avoidance of doubt, I have one other question on the payment in lieu of notice: are you aware whether this was a taxable payment and whether tax was paid in full on it?

**Stephen Boyle:** We have not audited the payment yet; it is something that we will return to in relation to 2017-18.

**Liam Kerr:** Grand. Thank you.

**Bill Bowman (North East Scotland) (Con):** For clarity, can you confirm that in your work you did not find any fraud or illegal act?

10:00

**Stephen Boyle:** Correct. We have not discovered that.

**Bill Bowman:** Given what Liam Kerr was saying about breached procurement rules and out-of-

policy payments, how close to being a fraud or an illegal act did you consider those payments to be?

**Stephen Boyle:** We gave full consideration to that and we took the advice of senior colleagues. Our audit is subject to a peer review to test some of the key judgments, including on those payments, and it came to the judgment that the payments were regular and did not represent fraud. We are clear that the relocation payments were, as Mark Roberts said, consistent with the Police Scotland regulations and with the DCC's letter of appointment to the organisation.

**Bill Bowman:** You give an opinion on regularity. These sound like irregular situations, given that you have raised them here and we have discussed them. I think perhaps that the term "irregular" might be in common use here. Why is your opinion not qualified?

**Stephen Boyle:** As you say, a key part of our opinion is on the regularity of expenditure. We were satisfied that the relocation payments, in particular, were regular and that they were consistent with the laws and regulations governing those in respect of the Police Scotland regulations. In respect of the other elements that are captured, there are two components. First, it is important that they are key matters emerging from the audit and we have reported them through the Auditor General's section 22 report and my own annual audit report. Also, the concept of materiality applies within this frame. The materiality for the audit—forgive me one second—is—

**Bill Bowman:** While you are finding that, I will say that materiality, of course, is not just a number.

**Stephen Boyle:** Quite.

**Bill Bowman:** Whether it is omission would be of interest, shall we say.

**Stephen Boyle:** The overall materiality for the audit is £14.1 million. Nonetheless, as you quite rightly say, Mr Bowman, a specific element of our work is to capture the accuracy and completeness of the remuneration report, for example. As we referenced, the annual report and accounts that were presented to the SPA's audit committee excluded the relocation payments from the remuneration report. Had they not been subsequently included, that most likely would have had an impact on our audit opinion. However, the fact that, as we see from the annual report and accounts, the amounts were subsequently corrected and properly disclosed allowed us to come to that judgment—and one that we tested to make sure that we were satisfied in its completeness and soundness.

**Bill Bowman:** In paragraph 8, you talk about something not being

"value for money in the use of public funds"

and in paragraph 12 you talk about something not being

"a good use of public money".

Do those terms mean the same thing?

**Stephen Boyle:** Essentially, yes. Those are judgments on those points. We are saying that we are not satisfied that something has been a good use of public funds, not that it ought to have led to a qualification of the audit.

**Bill Bowman:** So it is just a slight variation in the wording.

**Stephen Boyle:** Yes, that is correct.

**Bill Bowman:** How do you make that judgment? It is not a technical term, is it? There is no set rule as to what is good or not good?

**Stephen Boyle:** That is correct. It is a judgment from our collective experience and what we see across the public sector and is based on the importance of the good use of funds. In those examples, I think that we referenced what is the norm for payment to directors within the organisation and the fact that such amounts should be disclosed. In particular, we did not consider the £106,000 that was paid to the interim director of people and development for four months' work to represent a good use of public money. Equally, the payment of nearly £200,000 to the interim chief financial officer for Police Scotland for 10 months' work, in the context of the other senior finance officers in the organisation being paid considerably less than that on an annual basis, led us to the judgment that that did not represent value for money.

**Bill Bowman:** Putting yourself in the place of management at the time and what was facing them, you would have done something different.

**Stephen Boyle:** Not necessarily. We recognise the importance of financial leadership. Particularly in the case of the interim chief financial officer for Police Scotland, when the organisation sought to procure those services and ended up with a secondment from PricewaterhouseCoopers, the terms of engagement suggested that the salary would be around an annual figure of £100,000. The amount that was paid ended up considerably more than that and led us to the view that it was not good value for money.

**Caroline Gardner:** Can I put this in context? At the point that these decisions were being made, the SPA had been in existence for more than three years and was still operating with interim senior officers in key financial positions. The fact that permanent staff had not been appointed over that period had led to problems with financial management and financial leadership and were



still leading to the incurring of significant amounts of expenditure, which is why I took the view that I did in my section 22 report.

**Bill Bowman:** When you decide whether you have a modified opinion or even any opinion, you tend to rely on board representations and you have trust and faith in the board. Given what we have heard about your concerns about the board, you do not seem to have had that, yet you gave a clean opinion.

**Stephen Boyle:** That is correct. We considered the need to keep that under review in setting our audit plan at the start of the year. In the annual audit report, we draw attention to some of the weaknesses in the control environment in the organisation and—

**Bill Bowman:** Is that in the financial statements?

**Stephen Boyle:** It is in the annual audit report.

**Bill Bowman:** But I am talking specifically about the financial statements and, from those, it seems that everything is fine.

**Stephen Boyle:** In terms of how that report led to the opinion and the work that we needed to do to gain an assurance, it led to a considerable increase in the volume of substantive testing. Carole Grant may wish to say more about how that manifested itself.

**Carole Grant:** On the financial statements, obviously, the governance statement picks up on the control weaknesses in the environment. We built in significant audit testing, which was needed to give the required assurance that the accounts were not materially misstated.

**Bill Bowman:** Do you have faith in the board?

**Stephen Boyle:** We are clear that, with some of the judgments that we have reported on today, it would have been better if they had been visible to the board so that it could test them. Specifically on Mr Foley's departure, we report that the board's decision to make that decision by correspondence was not a good one.

**Bill Bowman:** I have one final question. What board representations have you replied on? We hear that perhaps the board was not fully aware of all matters.

**Stephen Boyle:** One of the audit procedures that we undertake is to receive representations from the accountable officer, notwithstanding the issues that we have discussed today. We also take the representations of the audit committee and those charged with governance about the completeness and accuracy of the financial statements. As Carole Grant mentioned, that takes us only so far. The main thing that we did was to extend our detailed sample testing to derive the

assurances that we felt were necessary to produce the opinion on the accounts.

**Bill Bowman:** I am sure that, next time, you will take account of Mr Neil's comment on some of the board members.

**The Acting Convener:** Before I bring in Colin Beattie, I want to pick up on something that Mr Boyle said. If I picked him up correctly, he seemed to suggest that some of Mr Foley's package has been paid but some remains to be paid. Could payment be stopped if the SPA chose to do so, or is it part of a contractual agreement?

**Stephen Boyle:** To take those issues in reverse order, we understand that the payment is part of a contractual agreement. As of today, we do not know whether the payment has been made. We know that Mr Foley left the organisation on 30 November and that the payment in lieu of notice was due to be paid in December. I am not sure whether that physically has now left the organisation.

**The Acting Convener:** Thank you.

**Colin Beattie:** I want to quickly touch on something that has already been talked about: the appointment of temporary senior staff, which is a fairly substantial budget item. Looking at the governance over that, to what extent was the board involved in the appointment of those people? For example, I see that the charge for the interim director of people and development was £1,000 a day, which is a lot of money. I presume that that would have been a board appointment.

**Stephen Boyle:** I may not have all the detail on the appointment of the interim director of people and development, so I may need to follow up on that with the committee. The main judgment that we made was on the value for money and the extent of the costs for four months' work rather than the specifics of the decision-making process.

**Colin Beattie:** Obviously, there was a concern about governance—it keeps coming out—and about decisions being made that were perhaps not properly discussed and assessed by the board. I am keen to know whether it was simply Mr Foley that made that decision or whether it was a board decision.

**Stephen Boyle:** The interim people director was a Police Scotland appointment rather than an SPA appointment. We understand that the process was led by the deputy chief officer of Police Scotland through a recruitment agency to produce candidates and make the resultant appointment.

**Colin Beattie:** I highlighted that example because it involved was £1,000 a day. The Police Scotland interim chief financial officer was a little cheaper—although not much—at £950 a day, and

the figure was £350 a day for the SPA interim chief financial officer.

I have another quick question. For the post of interim SPA chief financial officer, John Foley made someone an offer, but it was retracted. Do we know why? Was the board involved in that? Was there transparency around how that came about?

**Stephen Boyle:** We understand that Mr Foley led that recruitment and appointment process, working with the procurement department in Police Scotland. We highlight it because of the non-compliance with policies and the importance of such things that we would typically expect. The SPA's policy is that a number of employees would be charged with scoring any tender process but, in this instance, from what we have seen, only Mr Foley scored the interim chief financial officer's appointment.

**Colin Beattie:** So the appointment process was flawed in the first place.

**Stephen Boyle:** We are saying that the issue is compliance with the policies. The policies are not in any doubt; the issue is the associated compliance with those policies.

**Colin Beattie:** Do we know the reasons why the offer was retracted?

**Stephen Boyle:** I do not know the position on that. That might be a question for the SPA to confirm.

**Colin Beattie:** Do we know whether the issue was referred to the SPA board?

**Stephen Boyle:** I apologise, but again I would need to get back to the committee on that point.

**Colin Beattie:** Thank you.

**The Acting Convener:** Willie Coffey has a small supplementary.

**Willie Coffey:** Maybe I have missed this during the discussion, but where was the SPA's internal audit in the process? Did the SPA have an internal audit team and, if so, did that team give all this a clean bill of health?

**Stephen Boyle:** Scott-Moncrieff is the internal auditor for the SPA and its work covers a number of areas across the SPA and Police Scotland's business. We rely on Scott-Moncrieff's work, which is of a high standard. We have noted that it, too, has produced some very critical reports of the SPA's and Police Scotland's arrangements. To refer to one of the other questions, as a consequence of Scott-Moncrieff's work, we were led to the judgment about some of our own approach, particularly the increase in substantive testing.

**Willie Coffey:** Was Scott-Moncrieff critical of the whole approach and were its comments, recommendations or otherwise ignored by the board?

**Stephen Boyle:** The internal auditors produce an annual report on the organisation, and that too highlighted significant weaknesses.

**Willie Coffey:** But those points were not actioned, taken up or accepted by the board.

**Stephen Boyle:** The arrangements that the SPA and Police Scotland have for monitoring and following up audit actions have improved and are improving. There is a detailed discussion and log of any matters that are brought to the attention through audit reports and those are subject to detailed discussion at the audit committee. As the Auditor General suggested in response to a previous question, auditors will report what they find based on the scope of the work and the planned programme of activities. Certainly, we are clear that Scott-Moncrieff's reports are full and complete and we continue to place reliance on them.

**Willie Coffey:** Thank you.

**The Acting Convener:** Before I wrap up the discussion, I have one further point of clarification. When the SPA announced on 24 August that Mr Foley had opted to take early retirement, it stated:

"Although the CEO role becomes redundant from 1 September 2017, the Board has given consideration to the most appropriate point for the accountable officer responsibilities to transition, including seeking the view of Audit Scotland."

What did the board ask you, what did you say and did it listen to you?

**Caroline Gardner:** We will take that between us, and I will kick off.

I took a phone call from the vice-chair of the SPA board on 24 July, in which she told me that the board was reviewing the scope of the chief executive's post on the basis of Her Majesty's inspectorate of constabulary's recommendation about forensic services. I thanked her for letting me know, I said that of course we would need to audit that and I asked her to liaise with Stephen Boyle as the appointed auditor of the SPA.

Stephen, do you want to pick that up?

10:15

**Stephen Boyle:** I met the vice-chair in August, when she talked us through the timeline and process that had been gone through to date. We asked her to provide us with some of the evidence to support the decision-making process and she provided us with some emails and more

information on the timeline. That was provided to us in mid-September.

**The Acting Convener:** At that point, did you question the information that you were provided with?

**Stephen Boyle:** We went through the evidence and used that in the compilation of our report. I then had a further phone call with the vice-chair in mid-October.

**The Acting Convener:** As well as being the recipient of the information, what did you say back to the vice-chair of the SPA?

**Stephen Boyle:** In that discussion in October, in light of what we had seen, we particularly brought in the other matters that are before you today and considered whether that prompted the board to pause and reflect on any of that before making its final decision. The vice-chair was clear that it did not.

**The Acting Convener:** So you made recommendations to the board and it did not stop and think about what was happening. Is that a fair comment?

**Stephen Boyle:** Yes.

**The Acting Convener:** Thank you very much—that is helpful.

I have been around in politics for a long time, but this is probably the most shocking example that I have seen of financial mismanagement and poor judgment—poor judgment about accountability and poor financial judgment—by an accountable officer, in this case Mr Foley. We have heard about eye-watering sums of money and extraordinary expenditure signed off by him without reference to the board. I very much look forward to Audit Scotland's 2017-18 report, which I hope will be robust and will look back at whether such practice happened before 2016-17, because I am sure that it did not just arise in one financial year alone.

Given that the Scottish Police Authority and Police Scotland face huge deficits of £47 million in the coming year and £35 million the year after, and in the long-term financial projections, I find the situation frankly shocking and incredible. The committee will of course reflect on the evidence that we have had today, for which I thank the witnesses very much.

We will take a short break before we hear from our next witnesses.

10:18

*Meeting suspended.*

10:22

*On resuming—*

## **Settlement Agreements and Severance Policy**

**The Acting Convener:** Under agenda item 3, we will take evidence from the Scottish Government on the related topics of settlement agreements and severance policy.

I welcome to the committee Paul Gray, director general of health and social care and chief executive of NHS Scotland, and Paul Johnston, director general of education, communities and justice.

I understand that neither of you wishes to make an opening statement so it may be helpful to set some context. The Scottish Government prepares an annual report on settlement agreements, which are legally binding contracts between employers and employees to resolve employment disputes.

Separately, we recently wrote to the Scottish Government to highlight some instances where people who may have been at least partly responsible for a performance issue at a public body were no longer in post by the time we came to consider the Auditor General's report. The committee noted our frustration about how such individuals could be held to account and said that the award of agreements should be very carefully considered. In short, our concern was that failure should not be rewarded. In his response, the Cabinet Secretary for Finance and the Constitution noted our frustration and said:

"I fully agree with the Committee's view that failure in public bodies should not be rewarded".

The cabinet secretary also said that the Scottish Government's recent consultation on a severance policy for Scotland did not set out to respond to the committee's concerns. However, he added that our raising issues about exit payments

"provides increased focus on the opportunities to claw-back exit payments, especially where failures are apparent".

We will hear from officials about the progress that the Scottish Government is making with its policy, how the Parliament and its committees will be kept informed, and how taxpayers can be reassured that money is being well spent.

Before I move to a gentle opening question, I think that both the witnesses will be aware that the committee has taken evidence this morning on the Auditor General's report on the Scottish Police Authority. I would not be surprised if members wanted to explore some of those issues with you in relation to payments made to public sector employees.

First, though, I will ask a question on settlement agreements that we have previously asked but which was not answered fully. The Scottish Government said that it would adopt, across wider public bodies, the NHS Scotland approach to the use of confidentiality clauses—that is, a presumption against their use unless

“there were clear and transparent reasons for their inclusion”.

Despite that, the use of confidentiality clauses by the Scottish Government and public bodies increased from 21 to 36 between 2014-15 and 2015-16. The question is, therefore, can the Scottish Government influence the number of confidentiality clauses that are used in a particular year or not?

**Paul Johnston (Scottish Government):**

Convener, I heard the earlier discussion and I anticipate the committee’s interest in the issues around the Scottish Police Authority, in particular what role the Government exercised in that matter. I will seek to ensure that the committee is furnished with all relevant correspondence between the Government and the SPA. I appreciate that you may wish to come on to that in more detail later on.

On your specific point about the number of confidentiality clauses that have been inserted, the numbers are all set out in the report that you have in front of you. Our position is that confidentiality clauses will not be inserted automatically. Indeed, there is a presumption against their use. However, there are situations where either the employee or the employer wishes to, and has reason to, include a confidentiality clause. The role of the Government will be to consider and advise on the use of those clauses.

One point that I know has concerned the committee is whether, in any cases, the use of a confidentiality clause might get in the way of an individual making a protected disclosure under whistleblowing legislation. We can be very clear that there are no circumstances in which an individual could be prevented from making such a disclosure.

**Liam Kerr:** I do not understand why there is a presumption against using confidentiality clauses. In the Scottish Government report, you quite clearly say that confidentiality clauses are used

“At the request of the employee or their legal representative”.

I do not understand that either, because as an employer, I would want the confidentiality. It is more important to me as an employer to secure confidentiality than it is for the employee or their legal representative. Why is there that presumption?

**Paul Johnston:** At one point, confidentiality clauses were inserted as a matter of routine. Previous committees have expressed concern about that routine practice around the use of confidentiality clauses. Having reflected on those concerns, the decision was made that they should not be inserted as a matter of routine. Rather, the presumption would be that there would not be a confidentiality clause. Instead, consideration would be given on a case-by-case basis as to whether there was a desire for such a clause to be inserted. My understanding is that the employer can request a confidentiality clause as well as the employee.

**Liam Kerr:** That is slightly different from the report. The public is the employer in this situation and I would have said that the confidentiality clause, or the agreement, is about protecting the employer and making a payment to buy the rights of the employee, if you like. There is a list in the appendix of the report of payments that have been made. Of the top three agreements in terms of the overall cost that have been concluded, two of them do not have a confidentiality clause, including one where the payment is more than £200,000. I find that extraordinary, but is that just the way it is?

10:30

**Paul Johnston:** I think that that reflects the fact that consideration is given on a case-by-case basis as to whether a confidentiality clause is needed and is requested by either of the parties.

**Alex Neil:** My question is for Paul Johnston. A number of Police Scotland staff are suspended: the chief constable has been on special leave since September, I believe, and four other fairly senior officers are suspended, one of whom has indicated that he is taking retirement in the meantime. What is the status—I realise that you cannot comment on the detail—of those investigations? Have they been completed? When are they due to be completed and when will this be brought to a conclusion?

**Paul Johnston:** In a number of the cases to which you refer, the investigations are being conducted by the Police Investigations and Review Commissioner, who is acting as an independent person and I do not have information today for the committee about the time period for the investigations that she is conducting. I can certainly seek to obtain further information about that and provide it to the committee, but I do not have it today.

**Alex Neil:** Has the PIRC concluded her investigations into the allegations against the chief constable?

**Paul Johnston:** No, my understanding is that those investigations are on-going.

**Alex Neil:** Do you have any idea of when they are likely to be concluded?

**Paul Johnston:** As I say, as of today I do not have information about the timescale that I can provide to the committee.

**Alex Neil:** Right. Is there no indication from the SPA? Is it involved in the investigation?

**Paul Johnston:** I know that the SPA, having first passed the matters on to the Police Investigations and Review Commissioner, is certainly engaging with her on the issue. I am afraid that I do not have details as to the timeframe for the completion of the investigation.

**Alex Neil:** Is it not true that the former chair of the SPA, Andrew Flanagan, wanted the chief constable reinstated?

**Paul Johnston:** The understanding that I have is that the Scottish Police Authority gives consideration to whether or not the period of leave will be brought to an end and that it does so on a regular basis. It is my understanding that the last time that that was considered, the board agreed that the period of leave would be continued.

**Alex Neil:** Has there been any representation from Andrew Flanagan to have the chief constable reinstated?

**Paul Johnston:** I know that there have been discussions about whether or not the chief constable should return. My understanding is that at present, as I say, he is not suspended but on a period of leave. Absolutely, these matters have been discussed and considered carefully, but the most recent position is that the chief constable's leave continues for the time being.

**Alex Neil:** Just to be clear, in any of these discussions did Andrew Flanagan ask that the chief constable be reinstated?

**Paul Johnston:** There have been points at which the view of the former chair was that it may be suitable for the chief constable to return.

**Alex Neil:** How long ago was that?

**Paul Johnston:** I do not have the specific dates although again I could—

**Alex Neil:** October? November?

**Paul Johnston:** Certainly in recent weeks.

**Alex Neil:** What is the procedure? Does the chair make that request to the cabinet secretary or the Government or to you as the accountable officer? What happened? Did Andrew Flanagan come to you and say that he wanted the chief constable reinstated? What was the procedure?

**Paul Johnston:** It is a decision for the board as to whether or not the chief constable's leave should be continued. Indeed, the chief constable clearly also has a role in terms of the arrangements.

There have been discussions with Government on the issues. The position of Government is that in all these considerations it is important that the board considers the full range of circumstances, which include the need for the board to engage with the Police Investigations and Review Commissioner on whether or not reinstatement should take place.

**Alex Neil:** There is a very strong rumour going around, and I do not believe rumours until I hear the facts. Can I clarify whether Mr Flanagan wanted to reinstate the chief constable because the investigations found that the chief constable had done nothing wrong? Is that true?

**Paul Johnston:** I would be very loth to comment on any rumours. All that I would say is that the investigation, to the best of my knowledge, has not been concluded and is on-going. The board has decided most recently that the chief constable's period of leave should be continued.

**Alex Neil:** To be clear, did the previous chairman make representations that the chief constable should be reinstated?

**Paul Johnston:** I can confirm that I understand that at certain points over recent months the former chair of the SPA was of the view that reinstatement may have been appropriate.

**Alex Neil:** Why did that not happen? Is that a Government decision?

**Paul Johnston:** No, that is a decision for the board. From the point of view of Government, I can certainly confirm that our interest has been in ensuring that proper processes and procedures are followed at all times, as you would expect, and we have certainly wanted to ensure that the Police Investigations and Review Commissioner would be involved and would have a say in terms of her view of the return or otherwise of the chief constable.

**Alex Neil:** What you are saying is that, when the former chair made it clear that he wanted the chief constable reinstated, the Scottish Government's position was that that was a matter for the board and that the Scottish Government would have no view on the matter.

**Paul Johnston:** The view from Government, certainly the view that I would take, is that while it is a decision for the board, there is an interest on the part of the Government in ensuring that due process has been followed at all times. We would certainly seek assurances that due process was being followed.

**Alex Neil:** Due process had been followed and, presumably, by the time that the former chair said that he wanted the chief constable to be reinstated, he was satisfied that due process had been complied with. Presumably, if he made that request the response from Government would be, "That is a matter for the board." Or would the Government express a view as to whether the chief constable should or should not be reinstated?

**Paul Johnston:** It is not for the Government to make a decision at this stage on whether or not the chief constable should or should not be reinstated.

**Alex Neil:** I did not quite ask that.

**Paul Johnston:** No. Let me be clear. Discussions that we have had with the Police Authority on these matters have focused on the need to ensure that due process is followed and that those with an interest, in particular the Police Investigations and Review Commissioner, are consulted.

**Alex Neil:** Finally, to be absolutely clear, when Andrew Flanagan asked that the chief constable be reinstated, the Scottish Government's response was not to refuse to allow that to happen.

**Paul Johnston:** Well, in the course of discussions about whether or not the chief constable should be reinstated, the Government's concern, and the point that the Government has emphasised, has been around the need for due process to be followed in that matter.

**Alex Neil:** That is not my question. You confirm that Andrew Flanagan did request or did say a number of weeks ago that the chief constable should be reinstated. My question is, why has he not been reinstated?

**Paul Johnston:** At least in part, that is likely to be because of the point that I have emphasised: the need for full process to be followed, the need for those with an interest and a locus in this issue to be consulted and for proper consideration to be given to the issues. My understanding is that that having happened and with parties having been consulted, the decision has been taken to continue the period of leave.

**Alex Neil:** Who is consulted?

**Paul Johnston:** My expectation, given that the Police Investigations and Review Commissioner is the body with possession of all the facts, is that she should be consulted before decisions are made.

**Alex Neil:** Presumably, before Andrew Flanagan made this request he must have been aware of the outcome of the investigations into the allegations against the chief constable. One

presumes that the chair of the SPA did not express the view that the chief constable should be reinstated without the chief constable first of all being cleared by the PIRC. Given that that would be the situation—unless you are telling me that that was not the situation—he has expressed a view that the chief constable should be reinstated. Was that discussed at an SPA board meeting?

**Paul Johnston:** The SPA board has certainly given consideration to those issues, yes.

**Alex Neil:** Specifically, was the chair's view that the chief constable should be reinstated considered by the board?

**Paul Johnston:** I am sorry, I do not have details as to—I think these are issues that will have been discussed in part by the board meeting privately and I was not a party to those discussions.

**Alex Neil:** I know that you were not party to them, but you see the agenda in advance.

I think that you need to be a bit straighter with us here, Paul. Remember that you are in effect under oath. I will ask you again. Has the SPA board discussed the view of the then chair that the chief constable should be reinstated? Yes or no?

**Paul Johnston:** I think that the SPA board will have discussed that. I am not sure that it would have been on a formal agenda—it certainly was not on an agenda that I have seen—on the basis that such matters would be discussed privately. I am certainly clear that the role for Government here is around due process and we have made clear our expectations that due process will be followed.

**Alex Neil:** Are you telling me that the SPA board discussed an item of absolutely top importance to the whole police service in Scotland—we have the chief constable, on £210,000 a year and presumably on full salary while he is on special leave—and that that was not done at a formal board meeting, that it is part of the underhand activity that we heard about earlier?

**Paul Johnston:** Well, there is provision for the board to meet in private. My understanding is that those decisions were made privately.

**Alex Neil:** So there was a private board meeting that discussed whether the chairman was right in wanting the chief constable reinstated. That was a private meeting. You obviously had advance notice that it was going to be discussed, even though the discussion was in private and you were not part of the discussion. What was the outcome of the board meeting?

**Paul Johnston:** We would not necessarily have notice of a private board—

**Alex Neil:** Come on, Paul, we are talking about the chief executive. Are you, as the accountable officer, telling me that the SPA board meets in private to discuss the then chairman's view that the chief constable should be reinstated and you, as the accountable officer, do not know the outcome of that meeting? I do not believe you.

**Paul Johnston:** I am confirming that I am not sighted on all the private meetings of the Scottish Police Authority. I have confirmed to you that there have been discussions with the chair—the former chair, rather—about whether or not the chief constable should return and the concern of Government is that that decision be taken properly and with full regard to due process. That has been the extent of our involvement. The extent of our involvement has been to require that due process to be followed.

**Alex Neil:** You are saying that, as the accountable officer, you were aware of a private meeting of the SPA board to discuss the former chairman's view that the chief constable should be reinstated. You cannot tell me when that meeting took place, you rightly tell me that you were not involved in those discussions, but you cannot tell me the outcome of the meeting. Surely the chair, at the very least, would have phoned you and said, "Look, we have had this discussion and this is the view of the board"? What you are saying is quite frankly not credible.

**Paul Johnston:** I was not called after meetings to be told about the outcome of the meeting.

**Alex Neil:** They had this meeting a number of weeks ago and you do not know the outcome and you are the accountable officer.

**Paul Johnston:** I am the accountable officer for the justice portfolio, I am not the accountable officer for the Scottish Police Authority. The Scottish Police Authority itself is responsible for ensuring that it complies with its obligations as the employer.

**Alex Neil:** Nobody has told the cabinet secretary that the chair wants to reinstate the chief constable. The SPA board has discussed it in private and nobody has told the cabinet secretary that they are discussing it or what the outcome is. Is that what you are telling me?

**Paul Johnston:** I am saying that the SPA is able to meet privately. On an issue such as the reinstatement of the chief constable, I am absolutely clear that the role of Government would be around ensuring that all due process was followed. I think if we look at the situation as at present, you can see that the chief constable remains on leave.

10:45

**Alex Neil:** Has the chief constable refused to come back to work?

**Paul Johnston:** Not as far as I am aware.

**The Acting Convener:** I have two follow-up questions. I am very clear that you did not receive a call from the SPA chair. Did anybody in the justice department receive a call about the outcome of that meeting?

**Paul Johnston:** Not to the best of my knowledge.

**The Acting Convener:** Okay. No call was received and the SPA did not tell you anything. Given the sensitivities, it did not report to anybody in the department.

**Paul Johnston:** To the best of my knowledge, there were no discussions with officials on the particular matter to which you refer.

**The Acting Convener:** Was there discussion with any ministers?

**Paul Johnston:** As I said, there have been discussions with the Cabinet Secretary for Justice about the issue of the return of the chief constable, and the emphasis in those discussions has been on the need for proper process to be followed.

**Alex Neil:** What part of the process was not followed?

**The Acting Convener:** Was the outcome of those meetings—or that final meeting—reported to the cabinet secretary?

**Paul Johnston:** It is my understanding that the matter is one that now receives on-going consideration.

**The Acting Convener:** Sure. I am asking—

**Paul Johnston:** My expectation is that there is full engagement with Government to ensure that we are aware of when the consideration is taking place, the matters that are being considered and the outcome of those discussions.

**The Acting Convener:** I will shorten that: you did not receive the phone call, but the cabinet secretary did, as part of the on-going engagement that you talk about.

**Paul Johnston:** There have been those on-going discussions with the cabinet secretary.

**The Acting Convener:** That is fine.

I am slightly confused about something. Why did the board meet to discuss this? What happened that caused it to meet to discuss the issue?

**Paul Johnston:** I think that the position that the board arrived at when it agreed to the special

leave was that it was a matter that it would keep under regular review.

**The Acting Convener:** Why did the board meet to discuss the issue at that point?

**Paul Johnston:** It agreed to keep the matter under review every few weeks.

**Alex Neil:** The chair wanted the chief constable to be brought back.

**The Acting Convener:** I will bring in Alex Neil in a minute.

I cannot get my head round why such a discussion would be held unless something triggered it—in other words, unless the board had been briefed or advised in some way that the likely outcome of the investigation was that there was no case to answer. If that was the case, I could have understood why the board met to discuss the issue and why the chair placed such an emphasis on reinstatement of the chief constable. That would not be part of a regular review. The board heard something, which is why it adopted that approach and reached a conclusion. I do not know whether you want to comment on that before I bring Mr Neil back in.

**Paul Johnston:** My comment is that the SPA agreed that it would keep the matter under regular review, so it had on-going deliberations on the issue.

**The Acting Convener:** Did it decide that it wanted to reinstate the chief constable at any point before that final meeting?

**Paul Johnston:** As has been discussed already, I have acknowledged that, at points, the view of the former chair was that it might be justifiable to reinstate the chief constable—or rather, for his period of leave to be brought to an end.

**Alex Neil:** You said that the Scottish Government would be concerned only if due process had not been followed. Is that correct?

**Paul Johnston:** Yes.

**Alex Neil:** Has due process been followed? Is there any part of the process outstanding that has given you cause for concern and led you to believe that due process has not been followed?

**Paul Johnston:** My understanding is that, at certain points—including when the former chair expressed the view that it might be appropriate for the chief constable to return—there had not been proper or full consultation with the Police Investigations and Review Commissioner. That explains the wish on the part of the Government for that to take place.

**Alex Neil:** When was that? Was that in November?

**Paul Johnston:** I think that it would have been in November. I can furnish the committee with more information on precise dates; I do not have them in front of me.

**Alex Neil:** It is now 21 December. We have a chief constable who is on special leave—whatever that means—whose reputation has been tarnished because of events, rightly or wrongly; obviously, I do not know the outcome of the investigations. Surely it is a matter of natural justice to him that these matters are cleared up as soon as possible. You are saying that it is still not clear whether due process has been followed, or that you have still not had the discussions with the chair of PIRC to establish whether that is the case.

**Paul Johnston:** I agree that it is important that a proper investigation is taken forward as speedily as possible, and my understanding is that that investigation has not yet been concluded.

**Alex Neil:** So why did the former chair recommend reinstatement?

**Paul Johnston:** What I understand from the SPA is that the chief constable was on leave partly to enable him to prepare his full case and to engage with the Police Investigations and Review Commissioner.

**Alex Neil:** Quite frankly, I find a lot of this not credible. I think that we ought to call the chief constable, Andrew Flanagan and probably the new chair to appear before us at our next meeting.

**The Acting Convener:** The committee will consider that in private session.

I want to bring in Liam Ewing.

**Liam Kerr:** Liam who?

**The Acting Convener:** Oh my goodness! Liam Ewing is an old friend. I meant to say Liam Kerr.

**Liam Kerr:** You are saying that I am not an old friend. Oh, Jackie. [*Laughter.*]

**The Acting Convener:** You are a new friend.

**Liam Kerr:** I will begin with a couple of questions about the “Scottish Public Finance Manual”, which contains a section on settlement agreements. There are a couple of terms on which I seek clarity. The term “voluntary resignation”—as opposed to “involuntary resignation”, which I would have thought would be more like a dismissal—caught my eye. The SPFM talks about the making of a proposal by a relevant body

“to offer a financial consideration to secure the voluntary resignation of an employee”.



That sounds like an offer that one cannot refuse. Can you explain what the process of securing a voluntary resignation is?

**Paul Johnston:** I think that we have provided to the clerk a definition of the various terms that are set out in the SPFM. We acknowledge that there are a lot of different terms and that we therefore need to proceed with caution in relation to them.

My understanding of the provisions of the manual is that “voluntary resignation” is an overarching term and that it is possible to have specific schemes for voluntary exit—either voluntary release or voluntary early retirement—approved by a particular body. On a case-by-case basis, it is possible to have unique schemes or, indeed, settlement agreements. If there is remaining doubt about terminology and definitions, I agree that it is very important that that is clarified, and I suggest that we should do that in writing.

**Liam Kerr:** I think that that is important. I will come back to early retirement shortly.

We should not have to proceed with caution in relation to terms—we should be absolutely clear what terms mean. I want to press you on something else that caught my eye, because a distinction is made between severance agreements and a settlement agreement. Somewhere in the document—I forget exactly where—a severance agreement is defined as a subset of a settlement agreement. Can you explain that to me, because I am not familiar with the difference between a severance agreement and a settlement agreement?

**Paul Johnston:** I do not think that what the “Scottish Public Finance Manual” says is quite the way that you put it. “Severance arrangements” is the overarching term that captures a number of different arrangements that are set out in the SPFM, and “settlement agreements” are a subset of those arrangements. A settlement agreement is the document that is used in cases in which there has been some breakdown in the relationship between the employee and the employer. The report that has been submitted to the Parliament that the committee is considering today focuses on cases in which settlement agreements have been put in place. The SPFM makes it clear that, where there is a settlement agreement, it is important that there is prior consultation with Government, but there are other situations of severance or departure that are not caught by the term “settlement agreements”. As I said, they might be covered by a severance scheme.

**Liam Kerr:** I was with you until the last thing that you said.

**Paul Johnston:** Sorry.

**Liam Kerr:** You mentioned situations that might be covered by a severance scheme.

**Paul Johnston:** Yes. I will try to find the right part of the guidance. The relevant section of the SPFM includes a number of references to existing or new schemes. Those are schemes to enable the early departure of employees in an organisation. If a public body is going to set up such a scheme, that will require the approval of Government. What we have in the case of the Scottish Police Authority is an agreed scheme that has existed for a number of years but which is reviewed and approved by ministers. The committee will appreciate that, given the significant change that was brought about by police reform, which involved a number of organisations merging into one, it has been necessary and appropriate to have in place a scheme. The scheme is approved, and it is then for the public body to make individual decisions once the scheme is in place. Those are not settlement agreements.

**Liam Kerr:** I understand. Let us look at the scheme. You will have heard about the events that the committee looked at earlier. Annex A of your submission is the annual report on the use of settlement agreements. Paragraph 1 says:

“The Scottish Public Finance Manual (SPFM) states that in considering terms for settlement agreements, severance, early retirement or redundancy packages public bodies should ensure that issues of regularity, propriety and value for money are fully taken into account.”

Given what you have heard this morning, how obligatory is what I have just read out?

**Paul Johnston:** I do not think that I can add to what that paragraph says. It is important that public bodies take such matters into account.

**Liam Kerr:** But, from this morning’s consideration, it does not appear that that is what has happened. There seems to have been a breakdown between what is stated about the SPFM and what has actually happened in practice. Do you accept that?

**Paul Johnston:** My understanding is that the SPA’s view—this is certainly the view that has been expressed to me by the SPA—is that, in the circumstances of Mr Foley’s departure, it considers that the options that it exercised met the tests.

**Liam Kerr:** You are talking about the board of the public body in question, whichever body that might be. It is an issue for the board. Therefore, the board is accountable if it has failed to do what is required by the SPFM.

**Paul Johnston:** Ordinarily, it will be for the accountable officer to ensure that those requirements are met, but when matters relate to

the accountable officer him or herself, the board needs to consider those issues.

**Liam Kerr:** I want to move on. Let us say that we have a severance package that you would presumably say would be embodied under a settlement agreement. Once individuals have left an organisation, how can they be held to account by this committee and by the public if they have gone away with a package under a settlement agreement?

**Paul Johnston:** I am not sure whether it is helpful to again make the distinction and to emphasise that there was no settlement agreement in the case that the committee has considered this morning. My assumption is that the committee could invite an individual who has received an agreement to come and give evidence even though they are no longer employed by the public body in question.

**Liam Kerr:** Of course the committee could invite them to give evidence, but if the committee or anyone else finds that there has been mismanagement, impropriety or whatever it might be, how is that individual held to account and how is the public recompensed if there has been a settlement agreement?

**Paul Johnston:** Clearly, if it was concluded that the settlement agreement had been issued and there had been a clear failure to meet some of the required tests and standards, I would absolutely want consideration to be given to whether there was any possibility of recovery, but many of these things will depend on the individual contractual arrangements that are in place and the specifics of the contract between the employee and the employer. I am sorry that I do not have a complete answer to your question, given the need to look at what the contract would say in specific cases.

**Liam Kerr:** Are you aware of any cases in which an individual who has underperformed—a section 22 report might have been presented to the committee or they might have left an organisation under a settlement agreement—might have been re-employed in the public sector?

11:00

**Paul Johnston:** Since 2015, the Scottish Government has operated a five-year no-return policy. Therefore, if an individual receives payment, whether under a settlement agreement or not, they may not be re-employed in the Scottish Government or by any of our associated agencies or bodies for that five-year period.

**Liam Kerr:** Do the associated bodies include all those that are listed in the appendix to your submission?

**Paul Johnston:** Yes.

**The Acting Convener:** I want to pursue that. Is it the case that no such people are brought back as consultants?

**Paul Johnston:** That would be one of the circumstances that would breach the five-year no-return rule.

**The Acting Convener:** That is interesting, because I understand that some such people have been brought back as consultants.

**Paul Johnston:** That is certainly something that I would be happy to look into.

**The Acting Convener:** Excellent. Can I continue the line of discussion? Let me be very open here. You heard the evidence that we took from the Auditor General on the 2016-17 audit of the Scottish Police Authority. You also heard the evidence that we received about very poor financial judgment and very poor accountability and governance arrangements—frankly, I think that the committee found them to be quite shocking. Can I explore with you both the package that was arrived at for the accountable officer—in this case, the former chief executive John Foley—and some of the decisions that he made in his capacity as accountable officer? To be clear about the terminology, by the Scottish Government's own definition, a severance package can include payments for early retirement and redundancy, both of which seem to have come into play in Mr Foley's case. We have heard that payment might not have been completely made at this point. Is there an opportunity to pause that payment so that you can go away and investigate whether that should be allowed under whatever contractual agreements you have with Mr Foley?

**Paul Johnston:** I start by emphasising that there is no contract between Mr Foley and the Scottish Government on this issue. My clear understanding is that the contractual arrangement is between the Scottish Police Authority, as his employer, and him, and that a contract for his release was entered into in August. I do not have all the information about exactly when payments have been made and whether other payments may yet be made. In light of the committee's deliberations today, I can certainly ask the Police Authority to confirm whether payments are outstanding and, if they are, whether they could be paused.

**The Acting Convener:** That would be enormously helpful. Although I recognise that the contract may not be with the Scottish Government, your department is the sponsoring department and therefore you have some responsibility, in my view, to ensure that these things happen.

We are interested in pursuing who knew what and when they knew it—we are interested in people's involvement in all of this. We understood

that the decision about Mr Foley's package was taken by the board via email, and that at some point between 7 June, when the options were considered, and more recently, the Scottish Government was most certainly advised—I think that emails were exchanged with senior civil servants. Could you tell us who those civil servants were and whether the on-going discussions were brought to your attention?

**Paul Johnston:** I emphasise that at no point was the Scottish Government consulted, and at no point was the approval of the Scottish Government sought, on the payment that was offered. I also emphasise that at no point was the Scottish Government's approval required, given that an existing scheme was in place. That is not to say that the case has not thrown up issues that require to be looked at very carefully with a view to considering whether changes might be needed in future, but at no point was the Scottish Government's specific approval sought. As you would expect, a number of engagements take place between officials in the justice and safer communities directorates and the Scottish Police Authority about a range of on-going issues, and I am aware that some conversations took place over the summer about the proposed arrangements for Mr Foley's departure. As I said at the outset, I can see that there is an interest in the precise chronology of those arrangements, and I can seek to provide the committee with further information about exactly what communication took place, by whom and when. I wrote more formally to the chair of the Scottish Police Authority about the payment in November, when I was aware of the concerns that existed both on the part of colleagues in my team and on the part of Audit Scotland. Again, I can furnish the committee with that correspondence.

**The Acting Convener:** That would be very helpful. I would be keen to capture not just the email exchanges but any verbal exchanges, as those would have been noted in a matter of such importance. It is customary for civil servants to note such conversations, so we would be interested to see that information as well.

I am very clear that, although neither your nor the Government's approval was sought, you knew about the on-going discussions, you knew about the options and you would have, in the course of those conversations, given guidance as to what the Scottish Government's view would be. Is that a fair summary of what you have said?

**Paul Johnston:** It is fair. I would add that I expressed reservations or concerns about the issues around payment in lieu of notice that the committee has considered today.

**The Acting Convener:** It is very helpful to have that on the record.

Turning to interpretation of your severance policy, it is very clear that notification needs to be given to the sponsoring department in the Scottish Government, which seems to have happened. However, sensitive issues are escalated to ministerial level. I am curious to know whether the cabinet secretary knew about the on-going discussions, given how active he was in relation to the previous issue that Alex Neil explored with you.

**Paul Johnston:** Let me clear. Under the terms of the severance policy that is set out in the public finance manual, the need to consult ministers applies in the case of settlement agreements. It does not apply specifically in cases where exit is agreed as part of a scheme that has already been subject to ministerial approval. However, I absolutely recognise the high-profile nature of this particular exit under the approved scheme. Although we did not need to approve it or have the opportunity to approve it, on being made aware of it we would have briefed the cabinet secretary on what was proposed.

**The Acting Convener:** Okay, so the cabinet secretary knew. Again, it is helpful to have that on the record.

I am conscious of time, so let me put to you two very quick points, which I will wrap into one. You are responsible for conducting Andrew Flanagan's annual review, and, in turn, Andrew Flanagan is responsible for conducting John Foley's annual performance review.

**Paul Johnston:** That is correct.

**The Acting Convener:** In your discussions with Andrew Flanagan as part of his annual performance review, was there anything that highlighted the serious concerns we are now considering? How did you rate his performance?

**Paul Johnston:** Some—in fact, all, I think—of the issues that the committee is considering today have arisen in the context of the audit that has been done in recent months by Audit Scotland. Since the chair's appointment, I have been in regular engagement with him and formal performance appraisals have been conducted. Those are discussions between two individuals, and I do not think that the committee would expect me to go into the details of those. However, I have been in front of the committee before when other issues around governance in the Scottish Police Authority have been raised and I can confirm that they absolutely have been discussed between me and the chair.

**The Acting Convener:** It is just that it appears to me that he was not really listening when you were making some of those comments to him.

Liam Kerr would like to come in at this juncture.

**Liam Kerr:** I will be very brief.

Paul Johnston talked about the contract that was entered into for the release of Mr Foley. At least in the early stages, that was styled as a redundancy. If there is a redundancy, there is a dismissal. If there is a dismissal, it is capable of being an unfair dismissal; therefore, there is a risk, including the risk of some kickback, absent a settlement agreement. In such circumstances, I would struggle to think of an employer that would not at least consider a settlement agreement. Who took the decision not to use a settlement agreement, and why?

**Paul Johnston:** Again, I can confirm this as part of providing the detailed timeline to the committee, but my understanding is that there were some informal discussions with the Government about whether we would be likely to support a settlement agreement. You will be aware that individual settlement agreements must come to ministers for comment.

**Liam Kerr:** Who were those discussions between? Were they individual discussions between Government ministers?

**Paul Johnston:** No. The discussions would have taken place with officials in the teams for which I have responsibility, as part of their ongoing, regular engagement with the Scottish Police Authority. I am aware that discussions took place about whether the Government would support a settlement agreement, and we were not inclined to support a settlement agreement.

**Liam Kerr:** Are you able to tell me why?

**Paul Johnston:** I am absolutely mindful of concerns that the committee has raised, and of the need to ensure proper and effective use of public money in all cases. I will always look very carefully at any proposal to pay money that perhaps goes beyond what an individual is contractually entitled to receive.

**Liam Kerr:** Forgive me, but a settlement agreement simply embodies the deal that is made. In this case, the deal that was struck was a payment in lieu of notice, which would be a contractual payment, but then there is an early retirement payment, at least some element of which—we will find that out next year—will be non-contractual. It will be some kind of ex gratia payment, one would have thought. I do not understand why you would not put a settlement agreement in place to protect the employer going forward.

**Paul Johnston:** My understanding is that the payments that are being made are consistent with the requirements of the agreed severance scheme that is in place. A number of individuals are departing from the SPA and Police Scotland, and

they are doing so on a consistent basis—that is, on the basis of the approved severance scheme, without any settlement agreement. Having considered the matter, I could not see why a settlement agreement would be needed in this case and that the already approved scheme was the scheme that should operate.

**The Acting Convener:** Okay. I have had no indication that members want to ask questions, although perhaps Mr Coafey—

**Willie Coffey:** It is pronounced “Coffee”. I have some questions relating to the paper route that we have in front of us today. I would also like the chance to bring Mr Gray into the discussion. He has been sitting very patiently and has not been able to contribute.

What is the Scottish Government’s specific role in the management and monitoring of all the various arrangements?

**Paul Johnston:** The role includes consultation on any proposed settlement agreement and, importantly, reporting to the Parliament. A fundamental aspect of the Government’s role is that we are consulted on any proposed agreements. As part of that consultation we will consider a range of issues, such as whether there should be a confidentiality clause and whether we think that value for money would be achieved in the settlement agreement, and then we will report to Parliament. Ministers have a responsibility for the overall policy framework for severance and settlement agreements; as the committee is aware, a consultation on those issues took place earlier in the year.

**Willie Coffey:** I note the breadth of such arrangements throughout the public sector and elsewhere. How long have they been in place? Has anything changed about them in the previous or current session of Parliament?

11:15

**Paul Gray (Scottish Government):** Confidentiality clauses used to be arranged such that it was not even possible to disclose the fact that a settlement agreement had been entered into. In other words, people would neither confirm nor deny that such an agreement had been entered into. A member of your predecessor committee made very strong representations that he thought that that was an inappropriate use of public funds. We agreed and we removed that form of settlement agreement from the options that were available.

I know that members have expressed differing views on the matter, but when I came into my role, it was the case that of 148 settlement agreements in the national health service, 147 included

confidentiality clauses. There was concern on the committee, elsewhere in Parliament and in public discourse that somehow confidentiality agreements were inhibiting people from raising concerns that they may have had.

As Paul Johnston said, no confidentiality agreement or clause can stop someone making a public interest disclosure. However, the then Cabinet Secretary for Health and Wellbeing, Mr Neil, concluded that the best approach was to remove the presumption in favour. Up to that point, all health service settlement agreements that were drafted included a confidentiality clause—it was there automatically. We removed that automatic inclusion. A draft clause is available if required—similarly, a draft derogatory statements clause is available if required—but those are matters for negotiation. Such clauses are not automatically included, so there have been some changes as a result of Parliament's interventions and the views of ministers.

**Willie Coffey:** Would you say that the direction of change has been towards more openness, more accountability and greater scrutiny?

**Paul Gray:** That has certainly been the intention. As I know my colleagues do, I firmly subscribe to the view that the expenditure of public funds must be transparent.

**Willie Coffey:** Some tables in the report show figures across various sectors, including the NHS. Is there anything that stands out as unusually high or low—anything that breaks trends—in relation to the NHS? It is hard for the committee to see whether there is anything significant. Is the issue part and parcel of what happens within a service the size of the NHS?

**Paul Gray:** In a service the size of the NHS, which employs more than 150,000 staff, it would not be regarded as a disproportionate use of the approach to have 36 settlement agreements in a year. Many relate to relatively junior members of staff. The committee has the report, so I will not read them out, but the points that are made in paragraphs 5 to 8 are important in defining the areas in which a settlement agreement might be used. Quite often a settlement agreement is used because the costs of pursuing other approaches would be higher, so in fact it reduces the cost to the public purse. That would be the normal, value-for-money basis for taking that approach.

**The Acting Convener:** I thank both the witnesses for coming along this morning and for their evidence.

11:18

*Meeting continued in private until 11:30.*



This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

---

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

---

All documents are available on  
the Scottish Parliament website at:

[www.parliament.scot](http://www.parliament.scot)

Information on non-endorsed print suppliers  
is available here:

[www.parliament.scot/documents](http://www.parliament.scot/documents)

For information on the Scottish Parliament contact  
Public Information on:

Telephone: 0131 348 5000

Textphone: 0800 092 7100

Email: [sp.info@parliament.scot](mailto:sp.info@parliament.scot)

---



The Scottish Parliament  
Pàrlamaid na h-Alba