OFFICIAL REPORT
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Criminal Justice Committee

Wednesday 25 January 2023

Session 6

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Pàrlamaid na h-Alba

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CRIMINAL JUSTICE COMMITTEE
3rd Meeting 2023, Session 6

CONVENER

*Audrey Nicoll (Aberdeen South and North Kincardine) (SNP)

DEPUTY CONVENER

*Russell Findlay (West Scotland) (Con)

COMMITTEE MEMBERS

*Katy Clark (West Scotland) (Lab)
*Jamie Greene (West Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Rona Mackay (Strathkelvin and Bearsden) (SNP)
*Pauline McNeill (Glasgow) (Lab)
*Collette Stevenson (East Kilbride) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Kenny Donnelly (Crown Office and Procurator Fiscal Service)
David Fraser (Scottish Courts and Tribunals Service)
Jim Kerr (Scottish Prison Service)
Mark McSherry (Risk Management Authority)
John Watt (Parole Board for Scotland)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Criminal Justice Committee

Wednesday 25 January 2023

[The Convener opened the meeting at 09:35]

Bail and Release from Custody (Scotland) Bill: Stage 1

The Convener (Audrey Nicoll): A very good morning to everybody and welcome to the third meeting in 2023 of the Criminal Justice Committee.

Before we start our meeting today, I want to pay tribute on behalf of the committee to the firefighters who were tackling the blaze earlier this week at the former Jenners store in Edinburgh. I wish all of those who have been injured a speedy recovery. Our thoughts are with them, their families and the staff of the Scottish Fire and Rescue Service.

Our first item of business is an oral evidence session on the Bail and Release from Custody (Scotland) Bill. We have two panels. On our first panel, we have John Watt from the Parole Board for Scotland; Mark McSherry from the Risk Management Authority; and Jim Kerr, interim deputy chief executive, Scottish Prison Service—welcome to you all.

I refer members to papers 1 and 2. I intend to allow up to 60 minutes for this evidence session. As time is tight, I will go straight to questions. As ever, I ask for questions and responses to be fairly succinct.

I will come to Mark McSherry first, on release from prison, which is covered in part 2 of the bill. In respect of certain higher-tariff offenders, risk assessment and risk management are already well established and in place through, for example, multi-agency public protection arrangements. What are your views on how the provisions in the bill may impact on existing risk management and risk assessment arrangements?

Mark McSherry (Risk Management Authority): Thank you for inviting us to the committee today. We work quite closely with our colleagues in the Scottish Prison Service in relation to how the integrated case management process and risk management process have developed over the years for the long-term population.

We have a particular interest in certain aspects of the provisions, particularly in relation to the release plan. As you may know, for the order for lifelong restriction, there is a requirement that any individual who is subject to that sentence must have an approved risk management plan, which must comply with our standards and guidelines for risk management.

From our perspective, there is an opportunity to look at some of the areas within risk management in prison to consider how we can streamline things. I think that one of your previous witnesses referenced one plan for one individual. It is about ensuring that there is a single plan for any individual who is being considered for release. We believe that that should be the risk management plan for those who pose a risk of serious harm, but the bill offers an opportunity to consider the application of other planning arrangements that might deal with other longer-term prisoners as well as some of the short-term cohort.

The Convener: Thanks very much for that. There is the potential for there to be a significant resource implication around that. What are your views on what that resource requirement may be? What consideration should the Scottish Government be giving to how that is put in place?

Mark McSherry: Our colleagues can speak to the resource requirement for the Scottish Prison Service and prison-based social work. In considering the resources required for the bill, there may be an opportunity for us to consider other areas of efficiency within the prison system.

I mentioned risk management planning. An individual can be subject to several different plans within the prison—up to seven different plans. There are opportunities there to consider not just how we could ensure that there is a single plan, but how those aspects of risk assessment in the prison that are duplicated could be streamlined in order that decision makers on the risk management teams have clear and meaningful information that describes the pattern, nature, seriousness and likelihood of behaviour and, where there is a risk of serious harm, the imminence of that behaviour.

The Convener: Thank you, Mark.

Jim Kerr, do you want to follow up on any points about the risk management and assessment procedures that are in place and any implications of the bill for those?

Jim Kerr (Scottish Prison Service): Thank you for the opportunity to provide evidence this morning. Mark McSherry has made the point that the provisions of the bill will not sit in isolation. There are standing arrangements in relation to progression through the prison system for people sentenced to long-term imprisonment. One of the things that we will have to do is to revise our risk management team guidelines and consider the application of a process that would be conducive

to ensuring that there is an amalgam between standing arrangements and the intention of the bill.

On the detailed resource implications, we are not yet at the stage of developing the operational protocols that would need to be in place to ensure that a suitable response is available.

The Convener: Thank you—that is helpful. John Watt, do you have anything to add on that?

John Watt (Parole Board for Scotland): Thank you for inviting me to the committee. I have nothing to add on that, but I have some separate observations.

From our point of view, the significant provision in the bill relates to release on temporary licence. That can happen in two circumstances: where the board has recommended release on parole licence; and where it has not.

Where the power lies with Scottish ministers to direct temporary release, we see no problems with the bill and there no implications for us other than that we will have to provide some advice to ministers. We are happy to do that. It is not a new principle and, given the board's expertise, it is well placed to do that.

However, we see problems in relation to the other temporary release, which is where the board recommends release on parole licence and then recommends release on temporary licence in the interim. When the board makes the decision to make a recommendation to release someone on temporary licence, that could easily be done about six weeks before the parole qualifying date, which is the halfway point in the sentence when the release would take place. Having made that decision, there is no provision for the board to review or revoke it—at the moment.

If the board were to make a temporary release decision and if the prisoner were to misbehave in the community sufficiently badly that the board recommended revocation of that temporary licence and recall to custody, the Scottish ministers would normally act on that—I have never come across a situation where they did not—and would then be obliged to refer the case back to the board to consider rerelease on parole licence. Now, if the board were to consider rerelease on parole licence and decide not to recommend it, there would be two live decisions of the board extant: the original decision to recommend release and the new decision not to recommend release. That happens because the board cannot revisit its original decision. There is no statutory power and nothing in the bill that would allow us to do that.

We suggest that the bill should include a provision to allow the board to revisit a recommendation to release on parole licence where there are changes in material circumstances between the recommendation and the release date. Otherwise, we will have the major problem of having two live decisions.

Now, it is less significant after the parole qualifying date because, if the board declines to recommend release, it will fix a review period of, say, 12 months and will look at the case again 12 months down the line.

09:45

Let us assume for a minute that, when it comes to the review, the board recommends release on parole licence and that takes place on the Wednesday before a long weekend. There are sensible provisions in the bill that would delay the release until the following Tuesday. If, in the interim, a prisoner who had not yet been released from prison misbehaved sufficiently badly that the SPS thought it relevant to report that to the board, the board can do nothing about it. If that was a serious piece of misbehaviour, such as an assault, drug use, introducing drugs into the prison or misuse of a phone, there is no way in which the board can revisit the release decision, even though it really should. That is a second example of the need for some provision in the bill to allow the board to revisit and revoke its decision when there have been material changes in the interim. At the moment, there is nothing to allow for that.

Those are my major concerns. Otherwise, I have nothing to say about the provisions, because they should all work well. There are no enormous resource implications for the board. I think that we can weave it into our day-to-day work. There might be some minor qualms, but nothing major. Those are the two big issues that I see, and they impact on public safety.

The Convener: Thank you very much. Members will probably come back to you with more questions. Jamie Greene, would you like to come in?

Jamie Greene (West Scotland) (Con): Good morning. I am happy to come back in later with substantive questions, but, timing wise, this question might follow on nicely.

I heard every word that you said, but I struggled to follow the flow chart of it in my head, because it was a verbal flow chart. I wonder whether you might help the committee by illustrating that in writing to us. I hear where you are coming from and I am trying to follow the flow chart of where you make decisions and where the cut-off times are.

John Watt: I will certainly do that if that is what the committee wants.

Jamie Greene: I would really appreciate that and I am that sure other members would as well. If

you have spotted a gap in the proposed legislation, and we can help to fill that gap, I am sure that the committee would be willing to do so in some way. That is very useful and helpful feedback.

I wanted to put a wider question to the Parole Board. You say that the ministers already have the power to effectively overrule decisions that the board makes or to decide that a prisoner may be released. There is a perception that the bill goes a little further than that. For example, measures arose during the Covid pandemic, through which decisions were made at a ministerial level to release prisoners. An explanation was provided and there was an understanding around that, although whether you agreed with it or not is another matter. However, the new rules bake that into the system. What are your wider views around that issue? Do you feel that it is appropriate? Are you comfortable with it?

John Watt: Are you talking about what I might describe as administrative release during a period of emergency?

Jamie Greene: No. I am willing to be corrected by our wise adviser, but my understanding is that the provisions in the bill are nothing to do with emergency legislation or pandemics.

John Watt: I think that there is some provision in relation to that.

Jamie Greene: Okay, but the wider question is whether those decisions are best made by the Parole Board, prison governors or ministers in St Andrew's house?

John Watt: There are a number of questions in there. My first position would have to be that the board applies the law, and the Government drafts bills in accordance with its policies and sets them before Parliament. Parliament makes the decisions, and the board applies the law.

I have no problem with temporary release from custody, because Scottish ministers do that on a regular basis for indeterminate sentence prisoners, who are released into the community so that they can be tested in the community. Evidence can be gathered and presented to a future board—hopefully, to justify their release but, very often, not to do that.

If I remember rightly, in its response to the consultation—although it might have been an earlier consultation—the board suggested that decisions on early release could competently be taken by the board. Of course, there would need to be a change in the law, but there might be some benefit in an independent judicial body making that judgment, which would—if you like—depoliticise it.

The board also suggested that it might be involved in temporary release decisions in relation to, for example, first grant of temporary release. That is a requirement on the Scottish ministers to approve a Scottish Prison Service application—I might be corrected here—to release a prisoner on home leave, for example. As the chair of the board, I can see benefits in a judicial body making those decisions. It happens in other parts of the world, and perhaps some research can be carried out into that.

That is a policy decision. My personal view is that the board is well placed to make all those decisions, because that is its business—it makes risk assessments and decisions on release. Equally, however, the Scottish ministers are a body of expertise also.

It is a political decision. To that extent, as a judicial appointee, those are my views, but I will leave it to the politicians to come up with an answer.

Jamie Greene: Is that not the inherent problem, though? When you leave it open to politics, there is a risk. Whatever one's politics, the judiciary and the executive should be at arm's length and politicians should not be interfering in those decisions, or indeed overruling decisions, if we are to ensure the sanctity of the independence of the board.

John Watt: Politicians cannot interfere with the board. The board is an independent judicial body—it is a court for parole purposes—and nobody can interfere with us, except the Supreme Court or the Court of Session. Our decisions cannot be overridden by a politician, subject to one minor exception, which is probably reasonable, and that is where the Scottish ministers consider that it would be unlawful to follow a recommendation of the board. For example, if we recommended release of a prisoner two weeks before the parole qualifying date, it would be unlawful for the Scottish ministers to comply with that recommendation. That is a minor thing, and it never happens. However, politicians cannot interfere with the decisions of the court.

Jamie Greene: I will come back in later, convener. I will let other members ask their questions.

Rona Mackay (Strathkelvin and Bearsden) (SNP): My question is very much along the same line as Jamie Greene's. I seek a wee bit of clarification, because the issue is quite difficult to follow. I thank John Watt for the explanation, but I am trying to get my head round how the process works, and it is quite difficult. Are you saying that, at the moment, the board basically has the ability to change its mind and revoke a decision on temporary release and that, if the bill comes into force, you will not have that?

John Watt: The explanatory notes say explicitly that, if the board wishes to recommend revocation of a licence, it has to use provisions that have been in existence for many years. The board does not revoke the licence; the board makes a recommendation to the Scottish ministers that the licence should be revoked and the prisoner recalled to custody. I have never come across a situation where that has not been complied with. There is an argument that, in the absence of unlawfulness, it is a binding recommendation, which is a nonsense, but there you go.

That is the way it works—the board recommends and the Scottish ministers revoke and recall. What happens then is that the Scottish ministers are obliged to refer the case back to the board now that the prisoner is back in jail, so that it can make a decision on whether the prisoner ought to be rereleased. That will depend on a whole range of factors.

I have tried to keep the explanation simple, and I have reduced it substantially, but it is a complex area of law. I have forgotten what your question was now.

Rona Mackay: I am trying to establish what difference the bill will make to the current process for that.

John Watt: The difference that the bill will make is that it will allow the board to direct temporary release on certain conditions, if it recommends release on parole licence. It does not have that power just now.

Rona Mackay: Right. Are you in agreement with that?

John Watt: Yes, I am content that that is a reasonable proposal, because it allows for much better integration into the community if a prisoner can talk to social work, addiction support, their general practitioner or whoever in the community before we get to the point of release on parole licence. However, as I tried to explain earlier, the same problem arises. If the prisoner does not take advantage of that and if we have to recall and revoke the licence, the decision to release cannot be reviewed—that is where the nonsense comes. It is a good provision, subject to the board's ability to be able to recall its decision on parole release, because if it cannot do that, we will have substantial problems and public safety could well be in danger because of it.

Rona Mackay: What is the average length of time—if there is one—for temporary release?

John Watt: It is likely to be about the six-week mark. We reckon that we will consider release decisions about six weeks before the halfway point of the sentence—the parole qualifying date—which means that six weeks will elapse between the decision being made and the release date. That is not a long time to release someone on temporary licence, but it is worth while because it allows the prisoner to hit the ground running when it comes to the release and parole licence.

Sometimes, the period is much shorter, in which case the board might say, "Well, we are prepared to recommend release on parole licence, but we do not see any point in also directing release on temporary licence." In that case, the prisoner would be released when the time came, subject to my comment about material changes in the interim. As long as there is a gap between the decision and the release, things can go wrong and, in my experience, they probably will.

Rona Mackay: Does the bill change any of the information that you get from the Scottish Prison Service? Will that interaction be the same?

John Watt: The interaction will be broadly the same. I suspect that social inquiry reports may change slightly, although I do not see any huge problems with that. Fundamentally, the interaction will be the same: it will all be aimed at risk.

Pauline McNeill (Glasgow) (Lab): My first question is for Mark McSherry. The committee has heard a lot about the provisions that would allow sheriffs to remand fewer people, and various views have been expressed about whether we need a definition of public safety. I would like to give you a chance to talk about that, given that the body that you represent is, I presume, the expert on risk management of offenders.

I will put it more succinctly. We know that public safety is already a factor that is considered by the courts when they are deciding who should be released on bail and who should be remanded. Will the bill give the consideration of public safety a more central role in those decisions?

Is there a need to define what public safety is more clearly? Some sheriffs are saying that they already make decisions that are in the public interest and consider harm to communities. For example, a housebreaker may not cause physical harm, but there could be harm to the community as a result of their actions. On the other hand, some of the judiciary are saying that they want the Government to define what it means by public safety, because otherwise they will not know what the Parliament intends.

It would be helpful if you could speak to those issues.

Mark McSherry: I should qualify my input by saying that I never use the term "expert" when I refer to myself, because my dad would always disabuse me of that.

We welcome the public safety test. We believe that there is a precedent for it and that we can

work to address some of the questions that arise about the issue during the passage of the bill. Currently in the system, at the higher end, there is the order for lifelong restriction, which was introduced by the Criminal Justice (Scotland) Act 2003. That requires that, when a judge is considering issuing a risk assessment order, they must consider the risk criteria—I would be happy to send those criteria to the committee—which define what public safety means in terms of pervasive serious offending at a high level.

We also operate in other areas that are outwith legislation. Within MAPPA, there are clear definitions of what we mean by public safety. I have had many debates about that with John Watt over the years, but one of the definitions is the risk of serious harm test—again, I will send that to the committee—that is applied within MAPPA. That is the gateway for someone to be considered for entry into MAPPA level 2 and level 3, which was reinforced when MAPPA was extended a few years ago to consider other offenders who pose a risk of serious harm. We are well used to doing that.

John Watt will have a view on that, because the release provisions involve the consideration of the parole test and the various aspects of that that relate to public safety. The process could be improved, and consideration could be given to some of the definitions. It is not beyond the wit of the agencies to be able to provide more clarity, which would address some of the judiciary's understandable concerns.

Pauline McNeill: That is helpful. Does that mean that you think that there is a need for a definition in the bill, or would it be more appropriate in guidance?

Mark McSherry: It is perhaps for guidance. There is a test in relation to harm in the legislation. Our general business focuses on those who pose a risk of serious harm and undertaking a scrutiny level of assessment that allows someone to make a decision on the basis of that assessment. Other guidance, such as the MAPPA guidance, contains those definitions, as do our standards and guidelines for risk management. That replicates what happens in other jurisdictions such as England and Wales.

10:00

Pauline McNeill: My second question is for Jim Kerr. We have previously had an exchange with the SPS on remand figures and so on. As I understand it, the bill came about when the committee raised questions about those figures. I want to give you a chance to talk about your general sense of why we are here. I presume that you see the figures and the profile of the remand population regularly and can see it more clearly.

We went to the custody court in Glasgow and, although it was only a snapshot, we saw that, in the summary cases, there was a lot of bail supervision, so we can assume that most of those in the remand population are involved in solemn proceedings. Last week, the remand population was at 29 per cent of the overall population, which looks high, although I know that it changes. Is there a sense in the SPS that that is a crisis? What is the profile of the remand figures? It would be helpful to know what your sense is of why we are here.

Jim Kerr: I had a look at the figures before I came in this morning, as you would expect. This morning, we unlocked a population of just over 1,900 people who are held on remand, which is just over 26 per cent of today's overall population. For women in custody, the figure is around 36 per cent, and for young people it is even higher than that.

There is a spectrum of reasons why people are held on remand. The decision on who is held on remand is one for the courts.

It is fair to say that our experience is that the past two or three years have disproportionately affected the number of people who are being held on remand in Scotland. Having said that, the historical trend in our use of remand as a justice disposal has been upwards. As an indicator, in 2019, we peaked at 1,600 people or thereabouts being held on remand.

Notwithstanding the Covid experience, the average time for which people are held on remand is short, at around 30 days or thereabouts. That would be insufficient time for us if we were to apply a case management ideology. At the moment, we do not do that for people who are being held on remand. To use a crass definition, it would be insufficient time for us to get underneath the rug and deal with the aggravating factors. Those factors might not be related to offending behaviour—as members will be aware, people who are held on remand are accused but not guilty of any offence—but, if we had time with someone who is homeless or has a substance misuse issue or has difficulties with their employability or education, we could help them to make choices that would improve their prospects. However, 30 days is insufficient time for that.

The reverse is that imprisonment can cause harm through the separation from prosocial citizenship that is a consequence of imprisonment. People become detached from the things that would convey their personal identity such as being a father or mother, being employed, being a tenant and so on. All those ties are severed as a

consequence of even a 30-day period of imprisonment.

It is a difficult position for us. I cannot comment on individual cases and whether it is appropriate to send an individual to prison on remand, but it is right that we, as a nation, reflect on our use of that disposal. We do not compare favourably with other nations, in that we use it much more. Perhaps there is an inherent issue with us as a nation using remand as a disposal and it being sufficient, but there might be a better way of doing things.

Pauline McNeill: That is really helpful. The committee would find it helpful to pore over the profile. I note what you said about the upward trend from 2016. It is important for us to know who you have in the prison estate so that we can see what is going on as well as how the proposed legislation would apply. Can we get that data?

Jim Kerr: I am happy to provide that in writing at a later date. I will set that in motion after this morning, if that would be helpful.

Pauline McNeill: Will that show that a high percentage of prisoners who are on remand are involved in solemn proceedings, or is that too general a statement?

Jim Kerr: I do not have that figure in front of me, but I am happy to provide the committee with that detail.

Collette Stevenson (East Kilbride) (SNP): I have a supplementary question. Is it also possible to have details on the geographical spread, to see whether there is a trend in certain areas or regions? That would be really helpful.

Jim Kerr: We can provide that in two ways. The issue of the percentage of people who we hold on remand has affected just about every prison in our estate, so we can provide the committee with details on where people are held but also on their postcodes—what community in Scotland they come from. I can ensure that that detail is included in my letter.

When I was answering the first question, I should have said—it is an interesting point and I am not the first to say this—that we still face the situation that the majority of people who are held on remand do not go on to serve a custodial sentence. That is worth noting.

Collette Stevenson: Can you provide percentages or numbers in relation to that?

Jim Kerr: I will look at that data profile and provide it as part of the written submission.

Collette Stevenson: That is really helpful. Thank you.

The Convener: Katy Clark and Fulton MacGregor want to come in on that, but I will first pick up on the issue of unexpected release from remand, which has been flagged up to me recently. In that situation, there is potentially little or no provision in place for the person when they walk out of the prison gate. That has implications for them, which we have highlighted this morning. With regard to the bill's provisions, what needs to be put in place when release from remand is unexpected?

Jim Kerr: We hold many people on remand for a number of months. The intention of the bill is that we would develop a structure that would, in effect, be a case management model for those people—it is not just about immediate assessment. I have to say that, in the majority of cases, for the very short time that we look after people on remand, we are dealing with health and welfare issues that present immediately. However, if we have someone long enough, we can dig a bit deeper and provide support, access to services and direction towards services in the community post custody. That is the ideal scenario.

However, as you described, there are, unfortunately, many circumstances whereby release from demand is unpredictable with very short, if any, notice. The systems outcome that we are looking for is that, in those circumstances, wherever possible, we create a wraparound service that provides a plan or at least an indication of a plan for that person with regard to where they might go next in order to access services post prison.

The Convener: Realistically, how easy or practical would it be to put that in place through the bill's provisions?

Jim Kerr: With regard to the parts of our estate where we hold people on remand, the application of a case management model would be a change to our operating model, and there would be resource implications therein. However, we welcome the bill's intention, and it is something that we would propose to do.

I am not sure whether, as a single organisation, we are best placed to say how we would get over the challenge with regard to the lack of predictability. In many circumstances, the lack of predictability is a consequence of the actions of the individual on remand. It is a systems requirement, and we might want to consider it as part of the operational protocol consideration, so that we get into the detail of how that would work in practice. It is an issue for system consideration rather than for us as a single organisation.

Katy Clark (West Scotland) (Lab): The committee would find more data really helpful, as we have struggled to obtain it. Is it also possible to get data for each sheriff court, because it would be interesting to see whether there are different

practices in different courts? Historically, that was definitely the case, but I do not know whether it remains the case. It would also be helpful to have data on offences, whether they fall under the summary or the solemn procedure. I appreciate that you may not be able to provide everything that we ask for, but more detail on either of those topics would also be appreciated.

Jim Kerr: Okay. I shall try.

The Convener: Sorry, I beg your pardon—I was distracted for a moment. I will bring in Fulton MacGregor and then Russell Findlay.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I think that Katy Clark wanted to ask a question, convener.

Katy Clark: I did not want to ask a question; I just wanted to explain that we have really struggled with obtaining data.

Fulton MacGregor: I think that a temporary moment of confusion came over the whole committee, so apologies for that.

Katy Clark: I have thrown everybody off—sorry.

Fulton MacGregor: I want to ask about the provision in the bill that gives powers to social work. I was thinking about what I might ask, given each of your positions in the criminal justice system, and I have decided that I would like to focus on the area that Jim Kerr spoke about. He said something that we have heard before: that most people who are held on remand do not go on to serve a custodial sentence, which is a hugely important point.

Is there any part of the system in which an assessment could be done of the likelihood of a custodial sentence? It is hard to say, because obviously people have to defend themselves and they are innocent until proven guilty, but I think that it could be done through the social work input that the bill provides for, in which social workers provide assessments on bail. As part of that assessment, could there also be an assessment of the likelihood of custody should the person be found guilty, or am I making this too confusing?

Mark McSherry: In the past, we have worked with justice social work to look at bail assessment guidelines. We recognise that aspects of risk assessment are undertaken as part of that process—some of the committee's previous witnesses referred to those aspects—but the process is not a risk assessment, so it does not follow the risk assessment process, which includes identifying the risk factors using an evidence-based tool, analysing that to different degrees, acknowledging the limitations and the time and resources that are available at that point and then evaluating against criteria.

However, we have experience of doing that, and some of the conversations that we have had with officials have been about how we develop the risk assessment process. That is not only about those in justice social work. The committee heard evidence last week about the assessment that police undertake, and you will hear from the Crown after hearing from us. There are opportunities to look at those three processes to consider how we can best put across information to people who are making decisions. That would consider the pattern, nature, seriousness and likelihood of offending, and the recommendation against certain criteria.

I should declare an interest because, many moons ago, I was a long-haired social worker, so I know, as Fulton MacGregor will know, that there is a triage system of assessment in place. At the court report stage, social workers undertake an initial assessment and scan for risk, which uses a screening version of a risk tool. When someone goes on to supervision, they then undertake a more intensive level of assessment and, where there are indicators that an individual may pose a risk of serious harm, they undertake an in-depth formulation. At the bail assessment stage, we are talking about almost a triage within that triage system. Our area of interest is what defensible decision-making process could be undertaken and what training would be required to support the different professionals.

Fulton MacGregor: I understand what you said about risk assessments, as I have a background in that area. Those risk assessments are generally well recognised as being about the risk of offending. However, given that the purpose of the bill is to tackle the issues of remand, which Jim Kerr has spoken eloquently about and on which we have heard from other witnesses, could the risk assessment also include assessing the risk that remand poses for the person?

10:15

It is clear that this provision in the bill is all about giving sheriffs more information to make decisions and more leeway to steer people away from remand. I understand that no risk assessments are carried out specifically on those areas. The risk of future offending is crucial and key, and there would be no change in that respect. What do you think about my suggestion?

John Watt: I might be speaking out of turn here but, before I took up my current job, I spent 35 years as a procurator fiscal. What frustrated me was the binary choice between bail and custody. There was no way of finding a restriction on liberty that was proportionate to the risk posed by the prisoner. I am prepared to bet that there are

people in jail who do not need to be there, but they are there for the want of an alternative.

I do not know what a proportionate restriction on liberty might be. It might involve some kind of halfway house, or some form of detention in the community, curfew in the community or oversight in the community, or it might involve the use of GPS or remote monitoring of computers. There is a whole dose of things through which you could proportionately restrict risk without keeping somebody in prison.

It is a bit like the situation with hospitals, is it not? Hospitals are full of people who should be out in the community, but there is nowhere for them to go in the community, so the hospitals are full. I suspect that prisons have too many people in them because there is no real alternative that provides a proportionate restriction of liberty. Having alternatives along those lines would be expensive and would require a lot of work in the community, which is probably why it has never happened.

The same is true of parole. When it comes to parole, there is basically a binary choice. The fact that someone is too risky to be in the community with the resources that are available there at the moment means that they have to be in prison. Often, I do not want to make that decision, but it is difficult to find a halfway house whereby you can create a plan that reduces the level of the risk and therefore makes it manageable, if you see what I mean.

As I said, I might be speaking out of turn, because it is almost 12 years since I spent many happy afternoons in the summary criminal court in Glasgow. That was in the good old days, when it really was a summary criminal court.

That is my view, for what it is worth. There are different views. I get frustrated by two things. Oddly enough, Ms McNeill's observation about statutory tests for release on bail also applies to release on parole licence, because there is no statutory test for release of a prisoner on a determinate sentence. We still apply a test that was devised many years ago. In the past, the board has suggested that it might be a good idea to have a range of statutory tests, because that would mean that the higher courts could develop those tests—for example, in relation to appeals against refusal of bail—in such a way that they became well understood.

For example, the test for release of a life prisoner is that the board can direct the release when it is

"satisfied that it is no longer necessary for the protection of the public"

that the prisoner remain in jail. That has been looked at by the courts over the years. What that means is that there must be a substantial risk of serious offending—that is, offending that is so serious that that risk outweighs the hardship of keeping the prisoner in jail. That is a well-recognised and well-hashed-out test. I have been out of the game for a long time, but I am not conscious that bail rules have been looked at in that kind of way or have been devised in such a way that the courts can revise and refine them. Quantum valeat—for what it is worth.

Mark McSherry: I have two brief points, which I hope will address some of the questions that the committee has been considering. There is evidence available that would be useful to the committee, which we can send on to you. We have looked at assessments of the long-term prison population. Back in 2018, we evaluated more than 5,000 assessments that had been undertaken on that population. We would be able to provide you with information on what that means in terms of the profile of those prisoners.

One of the headlines is that, of those 5,000 assessments, which follow the process of going into more depth as concern rises, 609 were indicated as potentially posing a risk of serious harm. Of that overall cohort—he says, trying to read without his glasses—more than 580 of the individuals were considered low risk, and 2 per cent were considered very low risk.

To go back to my earlier point, there are opportunities to use that evidence to consider the current regime. We have had some initial discussions with the Scottish Prison Service about the intervention level being based on sentence length rather than the risk profile, and we should be using that evidence to inform what the best level of intervention is for those in custody.

I will keep my second point very brief. Similarly, on the court report stage, we have looked at the initial analysis and scan for risk, as I spoke about earlier. The outcome of that is that the professional will consider whether the individual requires minimum, medium or high-intensity intervention levels. Of the 35,000 assessments that we looked at, 33 per cent concluded that the individuals who had appeared in court required minimal intervention. We could use some of that information to consider what the risk profile of the bail population is, and we would certainly be interested in looking at how to develop the decision-making model based on that evidence.

The Convener: Does anybody else want to come in?

Russell Findlay (West Scotland) (Con): It is worth getting on the record that we have been asked not to ask certain questions about a

particular case that is being reported on today because we are discussing the Bail and Release from Custody (Scotland) Bill. I will therefore ask about that.

So far, we have heard from 21 witnesses, and the vast majority, but not all, of them believe that there is a fundamental problem around this issue. If you look at the statistics on crimes that are committed by people while on bail, the general public might wonder what we are trying to fix, given that, for example, in the past five years, there have been 49 rape convictions, 54 homicide convictions and 962 attempted murder convictions of people on bail.

I suppose that my question is a broad, overarching one: do the witnesses have a view on whether the bill is necessary and whether the task of keeping the public safe is being done adequately under the current model?

Mark McSherry: I will give that a bash. From our perspective, we believe that the bill is an improvement, but we also think that, as mentioned earlier, risk has to be central to considerations throughout the process. There are significant limitations based on the resources that are available at certain stages for us to consider full, in-depth risk assessments. Our view is that we need to develop defensible decision-making models that are based on some of those contextual differences.

In our submission to the original consultation, we indicated that, similar to the model that exists in the community, if there are indicators that an individual poses a risk of serious harm, we ultimately have confidence in the models that have been developed in the community and in prison that look at the scrutiny of that risk. That goes into in-depth consideration of what the functional risk factors are in relation to episodes of offending, including looking at offending cycles and considering contingency planning. From that perspective, we work day in, day out with agencies on public protection arrangements. It is interesting that a number of other jurisdictions are looking to emulate elements of those public protection arrangements, which we are keen to also be part of.

Russell Findlay: In essence, the Scottish Police Federation and Victim Support Scotland say that the more people are bailed, the more they will offend. A significant proportion of crimes are already committed by people who are on bail. If resources are not put into managing those people and more people are bailed, is the inevitable consequence that there will be more crime and more victims?

John Watt: Phew—I would need more detail on that, and it is not really my place to come to a conclusion on that issue. However, I will say that article 5 of the European convention on human rights protects the right to liberty and security. If liberty and security are to be taken away, that must be done in a way that is lawful, necessary and proportionate in each individual case.

Therefore, rather than look at the big picture and say that, because people who are on bail commit crimes, we will just keep them locked up, it is necessary to look at each individual case and decide not so much the lawfulness but the necessity and proportionality of locking up that person. That will be linked directly to assessments of just how risky an individual would be if they were released into the community.

You cannot just say that people will not be released because they might offend. That would be unlawful. To be frank, it would be a breach of article 5. You have to decide on necessity and proportionality in individual cases so, in each case, you make the assessment based on the individual circumstances of the person involved. That is what the court must do.

Russell Findlay: Indeed, but that applies now and no one is suggesting otherwise. No one is suggesting that people are getting locked up willy-nilly because of some vague idea that they might offend. From what we have seen, each case is based on a pretty robust process. Do you disagree with that?

John Watt: I do not disagree. I suppose that I am saying that there can be lawful release on bail but that you can never eliminate risk entirely. You just cannot do that. There will be people who offend on bail. Usually, the offending is relatively minor; sometimes, it will be serious. You just cannot avoid that.

Russell Findlay: Last week, the witness from Howard League Scotland gave a fascinating insight. He used the phrase “risk appetite” when he was making a comparison with another country—Finland—where, at some point, the authorities decided that they would stop remanding and imprisoning so many people. That has radically changed the proportion of people who are imprisoned. I think that, by “risk appetite”, he meant trying to persuade the public that that direction of travel is the right one. Are the public agreeable to that? If they are not, how can you go about convincing them with those statistics that that approach is the right one?

John Watt: I am not sure whether any of us—I will speak for myself, though—is qualified to answer that question. I am not even sure whether it is an appropriate one in relation to the bill, although that is for the convener to decide, of course. Those broader, more general questions have to be debated and answers have to be given.

I might have personal views, but I am not minded to share personal views today.

Russell Findlay: There is a huge amount of detail. We have had 21 witnesses so far, with many more to come, and there will be lots of talking in future. However, it is helpful to understand that there is a direction of travel in the criminal justice community.

If the other witnesses want to come in on that, they can, but I have a specific question about prison.

Mark McSherry: I will make one offer. From our perspective, there is evidence on how public protection works. There are also exceptional cases in which it does not. When significant case reviews are undertaken, we and other agencies collectively review those. We have a lot of experience of developing subsequent work that looks to grow confidence not only among practitioners but among the public. We have trained more than 1,000 police officers and justice social workers in how to assess and manage the risk of serious harm. It is important that we use evidence in that.

Some of the discussions in the committee have focused on broad categorisations of offences. There has been discussion of sexual offending and we do a lot of work on that broad spectrum of behaviour. If it is useful, we can share with the committee the evidence on the relatively low risk of reconviction for people who commit sexual offences and on particular sub-groups. Part of the remand population is people who commit online offending. We are currently piloting an assessment framework, which is about giving the courts confidence in being able to identify those who pose a risk of serious harm.

Russell Findlay: The Scottish Police Federation says that Police Scotland is

"struggling with the management of high-risk offenders and cannot safely manage this within current resourcing arrangements".

Police Scotland disagreed with that. You are on the front line and at the sharp end. You deal with those cases. Who is right? What is the real picture?

Mark McSherry: If you look at how multi-agency public protection arrangements have evolved over the past 12 years, you will see that we have taken quite a different path from other jurisdictions that introduced them at a similar time.

There is a lot to be considered. When the risk of serious harm category was introduced a few years ago, a lot of care and attention was given to defining what was meant by that population. That partly relates to the definition to which I referred earlier, but it also reinforces the risk level of the individual. There are clear criteria for that.

These are not exact figures, but if you look at MAPPA in Scotland, you will see that around 30 individuals have been brought in as part of that category, compared with nearly 6,000 registered sex offenders, which is based on the index offence. From our perspective, risk and the consideration of that risk are key, not just the type of offence.

10:30

Russell Findlay: Just quickly, in response to something that John Watt said—

The Convener: We are just coming up to our end time for this panel, and Jamie and Rona want to come in. We will come back to you if we have time, if you do not mind.

Russell Findlay: Yes—sure.

Jamie Greene: I have a question for Mr Watt. You said that one of the frustrations that you felt as a fiscal was the binary choice between remand or release. However, is it not the case that there is a middle ground in which a sheriff can release someone either with enhanced conditions or on supervised bail, which seems to be a more popular option these days? Is that the middle ground?

John Watt: That is kind of a middle ground, but the issue is the effectiveness of that middle ground and how it becomes institutionalised. I am not sure whether it is effectively available everywhere—I just do not know any more.

My fundamental position is that there needs to be a proportionate response to the risk, and that the restriction of liberty must be proportionate, too. That might well be the middle ground.

I read something about Sheriff Crowe recently, in which he was lamenting his inability to sentence people to drug treatment and testing orders because they were no longer available in a particular part of the community. I suppose that having such orders consistently available across the country is the only issue that I would raise.

There might well be halfway houses and there might well be a middle ground, but whether that is enough to justify or to allow for a substantial reduction in the remand population, I just do not know any more. I am prepared to defer to sheriffs and fiscals, who understand the problems that exist today.

Jamie Greene: They are very unwilling to go on the record and share their views with us, which is unfortunate because they are on the front line.

We went to see some custody courts in action. My personal impression—other members will have their own thoughts—is that remand is very much a last resort in those scenarios and that sheriffs explore all options. However, that does not tally with 26 per cent of our prison population being prisoners on remand. Is that because too many people are being sent to prison on remand? Are the appropriate number of people being sent to prison on remand—the public safety test has already taken place—but the length of time that cases are taking to come to fruition is such that the prison population is burgeoning? As other members have said, the problem is that we do not have the right data to work that out. That is unfortunate when we are considering a bill that will change the rules around bail. That is a comment rather than a question.

John Watt: I was going to say that there was no question mark at the end of that. Those are all legitimate points, but I do not know where the answers come from. I think that they would come from someone who has a big pot of money.

Jamie Greene: I have a final question. The Government has introduced the bill with the ambition of reducing the number of people who are remanded and not given bail in many scenarios. The financial memorandum seems to back that up with some estimates around the reduction in the number of people who will be held on remand.

Obviously, it would be beneficial for the SPS if fewer people came into the system. However, there is a school of thought among the judiciary that the bill will not make a huge difference to the decisions that it makes and that it is already making the appropriate decisions. The removal of liberty is a very serious decision that justice partners make, and although politicians are free to tinker with the rules, justice partners will still go about their business as usual.

I am unsure as to what the potential outcome of the bill might be. Have you given that any thought? Clearly, the bill will have a large implication for the prison population and its numbers. That question is directed to the SPS.

Jim Kerr: The short answer is that time will tell. I think that the intention behind the legislation in its current form is to do just that—to make sure that the right information is available to the right organisations at the right time, which will enable improved decision making.

Remand is an appropriate disposal for some people—there is no doubt about that. I question whether, under the current circumstances, it is the right disposal for everyone whom we currently hold in custody. Our reading of the legislation in its current form is that its intention is to probe that question, but time will tell whether that results in fewer people being on remand.

Jamie Greene: Are you scenario planning for a reduction in the prison population in the way that the Government is?

Jim Kerr: We have not yet gone into the detail of what the impact might be.

Jamie Greene: Okay.

The Convener: Finally, I will bring in Rona Mackay. I know that some other members want to ask more questions, but time is against us.

Rona Mackay: I will be brief. Mr McSherry, what is your view on the removal of section 23D of the Criminal Procedure (Scotland) Act 1995, particularly in relation to domestic abuse and sexual abuse offenders?

Mark McSherry: As we iterated in our submission to the original consultation, we believe that the removal of section 23D is welcome. We say that on the basis that risk, rather than offence type, should be the principal consideration. Our view is that we should remove the very broad categories and replace them with in-depth understanding of the risk that an individual poses. We should not just consider the index offence.

I say that for another reason, too. The committee might remember some of the work that was required in relation to home detention curfews. We developed a risk assessment process for that and one of the significant limitations related to some of the statutory exemptions.

I heard one of the witnesses from last week explain why the section 23D provisions were introduced. Our view is that we need to consider the risk of sexual offending and intimate partner violence, but that needs to be based on a risk assessment, and the index offence should not preclude that. The risk of sexual violence and intimate partner violence needs to be assessed.

Rona Mackay: Given the specific nature of, say, domestic abuse offences, which are directed at one person and might involve a pattern of behaviour, can you understand the concerns of victims and women's organisations about that? Is it fair to put such offences in the same one-size-fits-all category as other offences?

Mark McSherry: I completely understand some of the concerns. I should declare that, many years ago, I managed services that delivered programmes to men who had been convicted of intimate partner violence, and I also provided support services to women and children, so I know the sector and a lot of those colleagues very well.

My point is that we need to understand the pattern, nature, seriousness and likelihood of such behaviours, so that we develop a proportionate

response that adequately protects victims and addresses the specific risk that is identified. When we use broad offence categories—sexual offending is one example—that sometimes does not allow us to understand the risk that specific individuals might pose within that broad spectrum. Therefore, our view is that that level of understanding is required.

Rona Mackay: Mr Watt, do you have a different view?

John Watt: No. I could not have put it better myself.

Rona Mackay: Thank you.

The Convener: Sadly, I will have to bring the session to a close. I thank the witnesses very much indeed. I apologise for my earlier lapse in concentration, which was highly unprofessional, but I will blame it on the late night in the chamber last night. If members have any follow-up questions, we will write to the witnesses.

We will have a short suspension to allow our witnesses to leave.

10:38

Meeting suspended.

10:44

On resuming—

The Convener: Our second panel today consists of Kenny Donnelly from the Crown Office and Procurator Fiscal Service and David Fraser, who is executive director of court operations with the Scottish Courts and Tribunals Service. A warm welcome to both of you.

We will move straight to questions. I intend to allow around 75 minutes for the panel. I will go first to David Fraser, on the issue of grounds for refusing bail. The Crown Office's submission looks at that in some detail. It has been suggested that the concept of public safety should be defined in the Bail and Release from Custody (Scotland) Bill. Do you think that it would be helpful to have a definition of that? What should that cover? What elements should be included?

David Fraser (Scottish Courts and Tribunals Service): I think that that is a question for Mr Donnelly rather than for me, so I will pass it to him, if that is okay.

Kenny Donnelly (Crown Office and Procurator Fiscal Service): The submission makes clear the Crown's view that the term "public safety" would benefit from definition, because that would provide clarity on the parliamentary intention for the courts to apply the legislation in an appropriate way. Courts are familiar with having to interpret legislation, but absence of clarity in legislation can lead to confusion and inconsistency, and interpreting it can take some time. There can be inefficiency and perhaps wrong decisions, until such time as the court has proper time to consider and issue written judgments and precedents, as they are called, on how the legislation is to be interpreted and applied. Different sheriff courts or, indeed, different sheriffs in the same court might take a different view of what public safety encompasses.

There is also a risk for the Parliament and the Government that, if there is too wide a definition of "public safety", that could undermine the policy intention of the bill. Equally, too narrow a definition could have other consequences for the protection of public safety and for confidence in the criminal justice system.

For those reasons, we think that it would be helpful to clarify what exactly is encompassed within "public safety".

On what the definition should be, I am afraid that that is a matter for the Parliament. I think that it should cover some of the anomalies around types of crime. Our submission and other submissions use the example of theft by housebreaking. I can see that some people might think that theft by housebreaking is not a public safety issue, but anyone who has ever had their house broken into or has met someone who has had their house broken into will know about the impact that that crime has and how it impacts on the feeling of safety of the individual whose house has been broken into.

That is one fairly stark example. There are other examples that would require a degree of clarity to enable the courts to apply the legislation properly and consistently across the country.

The Convener: Okay. I will leave it at that. I think that other members will be interested in probing the specific issue of public safety a little more.

Katy Clark: I will pick up on some of the issues that have been raised.

I found the suggestions in the written submission on the definitions relating to complainer and the withholding of evidence really helpful. The committee will want to consider those and to hear the views of others.

On the definition of "public safety", it has been suggested to us that it would be helpful for the legislation to refer to "intimate partner". Is that a helpful suggestion? Could that be part of a wider definition of "public safety"?

Kenny Donnelly: Do you mean an intimate partner in the context of a domestic violence offence?

Katy Clark: Yes.

Kenny Donnelly: It would be hoped that the court would interpret "public safety" as including crimes of violence and domestic violence and domestic abuse offences, but it would do no harm to have that level of clarity. I suppose that whether the definition makes those specific references depends on what level of granularity it is going to get into. That is part of the reason why we think that the definition is helpful. There is a lack of clarity on the extent to which public safety will be considered in that regard.

From my point of view, I would have thought that that would be considered a public safety issue, albeit that it involves one member of the public. Again, that is open to confusion and lack of clarity.

Katy Clark: With regard to the public safety test, I understand why you personally perhaps do not want to come forward with a suggestion. Would your organisation be well equipped to look at that? Where do you think those suggestions should come from? If you feel that your organisation is not the place to do that, are you happy to look at a number of definitions and think through what the consequences of those might be in the courts?

It is quite easy for legislators to come up with wording, but predicting how that will be looked at and interpreted in the courts is a different matter. As you know, it is important that we get the wording right and that it has the effect that Parliament intends it to have.

Kenny Donnelly: I am not trying to be difficult in saying that it is not for me to say. As a public prosecutor, it is not for me to make the law or tell Parliament what the law should be. I am there to apply the law, which is why I say that it is not for us to say.

However, we are certainly willing to assist with input. If the Government and the Parliament wish to come up with a definition, we could certainly provide some feedback on that with regard to the practical implications and whether there are other aspects—as we highlight in our submission to the committee—that remain unclear and would benefit from further clarity. We are happy to help with that as we move forward, but it is not for us in particular to drive that as a proposal.

Katy Clark: Would David Fraser have a view on the definition? Would you want to comment publicly on that?

David Fraser: The short answer is no.

Katy Clark: That is fine.

David Fraser: As you know, the Scottish Courts and Tribunals Service is there to support the judiciary. The judiciary has provided a written submission, so I would not to say anything on behalf of the judiciary, and I have no power to do so.

Katy Clark: Thank you. We have seen the submission that it has made to the Scottish Government.

Pauline McNeill: Good morning. As much as I have read the bill, the policy memorandum and all the evidence, I am still trying—given that we are not practitioners—to get my head around legislation that is quite technical, and around amending the 1995 act, which is quite technical in itself.

To follow on from Katy Clark's line of questioning, the Crown Office and Procurator Fiscal Service's submission raises issues around whether we should define public safety tests. I do not take a view on that—I simply want to put an alternative view to you, and you can comment as you wish. I now feel that I would like to ask more people this question, so that I can sort it out in my head.

Others have said that it is incorrect to say that public safety in terms of proposed section 23B(1A)(b)(i) will serve as a sole gatekeeper, which is the matter in question, and the provision in summary procedure to which proposed section 23C(1)(a) would apply.

Some have said that it is more correct to state that, in such cases, the section—namely section 23B(1A)(b)(i) and (ii)—would serve as a separate and distinct ground for refusing bail.

Some witnesses are of the view that it may not be necessary, therefore, to define what is meant by "public safety".

I am really asking whether there is another way to read it. As previous witnesses have said, it is for politicians and the Government to frame the policy, and the policy is to give sheriffs more discretion not to remand. You can agree or disagree with that, but that is what the policy is designed to do.

The committee has been asked to consider a number of substantial matters, including whether "public safety" requires to be defined; whether it should be left to the courts to define it; or whether Parliament should say, "We want to give the courts more guidance on that." There is always a balance to be struck.

I am not asking for a really technical answer on that, but is there another reading of that, or could we amend the bill?

What I understand about all of that is that, if public safety is the sole gatekeeper—if it is the only requirement—there could be another

provision in the bill. Of the cases that Mr Donnelly has raised, housebreaking and kinds of dishonesty are the obvious ones. They are easy to understand. Housebreakers are not violent criminals, so where is the harm? However, communities might say, "Well, it would be nice if we had some respite from a housebreaker for some time." Under the current framing of the bill, could sheriffs say, "Okay, we will take a wider view of what the test is."?

Anything that you want to say on that would be helpful to me.

Kenny Donnelly: The question is quite wide ranging, but I take the point. The issue for me is that sheriffs could broaden the definition of "public safety" for other crimes in some jurisdictions and not in others. That would lead to inconsistency, confusion and, ultimately, inefficiency. Some people would have to appeal. Court time would then be taken up in interpretation and issuing judgments to clarify what the position should be and, all the while, people would either get bail or not get it because of a different interpretation of the law.

The interpretation of "public safety" is open to the court. Courts will often interpret legislation, but they have to do so within the rule of law and the parliamentary intention. From my point of view, the problem is that the parliamentary interpretation is not clear. The lack of clarity of the policy intention around offences such as housebreaking and other types of offending makes it difficult.

There is also an issue that we have not touched on yet which relates to proposed section 23C(1)(a), which would remove from a summary court the ability to oppose bail for people who simply have a record of not attending or about whom there is information that they will not attend. It allows that to happen only in relation to any failure to appear at that particular set of proceedings in that case. Again, one issue that relates to that is the efficiency of the court. However, it is also about public confidence and the impact on victims and witnesses. There is a risk—it could be seen as more than a risk—that that provision will result in more people not turning up for diets and, as a result, victims and witnesses having to be countermanded as witnesses and re-cited to attend on another day. That would not be good for the efficient running of the court service or for victims and witnesses with regard to the impact that it would have on them.

Pauline McNeill: Thank you, that is really helpful. I have one other question, which I put to last week's panel. We attended a custody court—I thank the SCTS again for letting us in on that because it was really helpful—and the evidence that we heard there was that, these days, fiscals do not seem to have the discretion to take a different view from what is marked up on a case. Procurators fiscal who served previously whom I have met said that they would have had more discretion.

I asked last week whether that was because centralisation of marking in the Crown Office has led to a more rigid approach. I am really keen for you to comment on that because it seems to me—correct me if I am wrong—that a procurator fiscal, as a highly trained lawyer, has an individual commission to make decisions on behalf of the Lord Advocate. Why should a procurator fiscal not be able to use their discretion, if they hear, in court, reasons to change how a case is marked?

Kenny Donnelly: The short answer is that procurator fiscal deputes have that discretion, but they must use it wisely, and within the framework of the law and departmental prosecution policy. There is nothing to prevent a depute fiscal in court, on hearing representations, from departing from the instruction that was given by the marking depute.

However, you will have seen how busy the court is and how busy the depute in court is—they deal with every case in that court, and do not have time to consider the fine detail of every case. Although they might empathise with points that are raised by the defence, they would have to look at the whole picture in order to make a different decision, and they do not have time to do that. Often, within the time constraints of the busy court, it is difficult to properly review a decision that has been made by someone who has had the time to consider and mark the case and formulate the bail instruction—albeit that that is done in ignorance of the position that the defence might want to put forward.

11:00

Separately, we have quite a lot of young inexperienced deputes at the moment, and it takes a while to build their confidence to the point at which they feel able to change a colleague's instruction, especially if that colleague is more senior. There is, therefore, sometimes unwillingness to use discretion, and it can be more comfortable to say that a change cannot be made.

I also have to say that none of that is determinative in the process, because the information that the defence solicitor wishes to put to the fiscal with a view to changing the position in relation to opposition to bail will be given to the sheriff, who, ultimately, is the decision maker on bail. Although the Crown will have put forward the arguments that the marking depute will have consulted when marking the case for opposition to bail, the sheriff will then hear from the defence solicitor, who will make points in favour of bail being granted. One likes to think that a sheriff who

has properly considered all the points will make the right decision in terms of balancing the interests of justice and the interests of the accused.

Pauline McNeill: I am assuming from what you have said that no policy decision has been made that fiscals cannot depart from how a case is marked.

Do we need to look at how the system is resourced? I take your point that the decision is up to the sheriff, but if we are sending in young inexperienced fiscals, would not it be helpful to the court if the fiscal who is in the court is in a different position from the one who is marking the case and is hearing all the facts and circumstances? I note what you say about the pressure that fiscals—experienced or otherwise—are under in custody courts. That has been a concern of mine for more than a decade. Would it help the court if, in a minority of cases, the Crown could, having heard all the points that have been made, say that it will not oppose bail?

Kenny Donnelly: Thank you for those comments—I am sure that your concern extends to people who are under pressure in committee rooms.

The issue is that we are all young once—we all have to learn our trade and gain experience by working with our peers and people who are more experienced than us. That partly involves recognition that a senior colleague who gives an instruction has relevant experience that enables them to do that. That is why time, experience and confidence are needed before a person would start to question and/or change decisions that have been made by senior colleagues.

You mentioned the position in relation to central marking. I am sorry; I forgot to come to that. That is not a material factor in this. In my 30-plus years prosecuting I have seen that when fiscals are in a custody court, they do not mark the cases, because they are usually in court doing something else while other people mark them in one of our centralised marking hubs or in the local office across the road. That is just a practical and logistical issue; custodies come in and one person could not mark them all—certainly not in the busier courts. The process of getting a case and having instructions from a colleague has been and will always have to be the case because of how the system operates.

As for changing the system and resourcing it differently, we are always willing to accept greater resource, but the only way to give a fiscal more time would be to have more courts and a limit on the number of custodies in a court. Again, there would be efficiency and cost issues; that would mean that there would have to be more judges and that defence solicitors would have to be in different places at different times. Given the provisions in the bill, that would also have resource implications for social work input, and for input from other key personnel. It would be quite impractical.

Russell Findlay: I thank David Fraser for facilitating our visit to Glasgow sheriff court the other week. I found it to be enlightening. The care and attention that was being put into bail decisions was pretty robust, and was consistent with what I have seen over the years. The sheriff gave everything due consideration, and the fiscal did a hard job competently, with a lot of cases to deal with.

Most of the people whom we have heard from so far say that there are far too many people on remand; ergo, people should be bailed more often. The responsibility for that ultimately lies with the judge, but the Crown plays a huge role in that, with its input.

Written evidence from the Howard League Scotland suggests that

"significant cultural change—particularly amongst some parts of the Crown and judiciary—will be required"

to fundamentally change things with the bill, if it is passed. I suppose that I am asking whether that criticism of the Crown is a fair comment. Is this about cultural changes, or is it really about resources, as just about everything else is?

Kenny Donnelly: I do not accept that proposition: I do not think that a cultural change is needed. As I said earlier, I am a public prosecutor and I operate within the constraints of the law and of prosecution policy that is set by the Lord Advocate. The law on bail is fairly clear, whatever you may think of it, and obviously the Parliament intends to change it.

The Criminal Procedure (Scotland) Act 1995 put in place a framework that sets out the basis on which bail can be refused, but with the presumption that bail should be granted unless there is good reason not to do so. All that is clear. A prosecutor will oppose bail only where there appears to be good reason to do so within the existing legal framework. That is not a cultural issue; it is about the framework.

For example, I have heard someone referring to the Crown relying on section 23D too often, but section 23D is a matter of fact. It specifies that if someone has a qualifying conviction, there have to be exceptional circumstances for them to get bail. Unless the prosecutor brings that to the attention of the court, the court will not know that the accused has the relevant qualifying convictions. There is an issue about the prosecutor informing the court in order to allow the court to make the

appropriate decision whether to grant or refuse bail, but the court is ultimately responsible for making that decision in every case.

The court requires to consider bail; I think that the Sheriffs and Summary Sheriffs Association makes that clear in one of the early paragraphs of its written submission to the Scottish Government. The court can refuse bail irrespective of the Crown's position, although it rarely does. I think that that shows recognition by the judiciary of the professionalism of the fiscal, in that the fiscal will bring matters to the court's attention where a decision requires to be made. The association also makes it clear that it is not uncommon for the Crown to oppose bail being granted, nonetheless.

That is not the end of the matter, because there is an appeal process through which both the Crown and the defence can appeal. The number of appeals is relatively low; I do not have the statistics, but I am sure that they could be made available. The number of successful appeals is lower still. There is not evidence to support the suggestion that there is a culture issue.

The issue is whether or not the framework exists. In an earlier question, Mr Findlay mentioned "risk appetite". The framework has to reflect the risk appetite of Government and the Parliament when it comes to what the basis for opposing bail will be, in order to allow us, as petitioners in the court, to apply the law within that framework and for decisions to be made subject to that framework.

Russell Findlay: The bill suggests that criminal justice social work will have a much earlier and more active role in informing the Crown and the court about cases. Would that be helpful, as far as the Crown is concerned?

Kenny Donnelly: Yes—but there are practical challenges, including in relation to resourcing and timing. Maybe I am being overly technical and pedantic in saying this, but the bill suggests that the criminal justice social worker must be offered the opportunity to comment in any case in which the court is considering bail, and of course the court considers bail in every custody and undertaking case.

Some practical arrangements will have to be made in respect of when a criminal justice social worker can have meaningful input, because in many cases bail is not opposed, and there is no need for criminal justice social work intervention. However, assessments by criminal justice social workers of alternative proposals—such as supervised bail, which was mentioned earlier—are invariably helpful because they allow the court at least to be informed of the full range of options that are open to it in making its decision.

Russell Findlay: Does that means that the bill would, in effect, formalise the existing system, whereby criminal justice social work can and does feed into decision making?

Kenny Donnelly: That is my view, but it is not mandatory. There was a reference in the previous evidence session to consistency of provision across the country. Availability of social work is dependent on local resources, as is availability of the various support options, such as supervised bail and electronically monitored bail, which is in its relative infancy and is still not available in every local authority area. Although it is early days and, so far, the experience of the initiative on that alternative has been relatively positive, the fact that it is not consistently available is not helpful.

Russell Findlay: Does the Crown have a view on the provision in the bill that written decisions should be provided for bail reasons?

Kenny Donnelly: No—the Crown does not have a particular view. At the moment, when the court grants or refuses bail, the sheriff states the reasons for the decision. In the event that there is an appeal, the sheriff is required to provide a written report—appeals usually happen within two or three days—so in cases where the decision is challenged there is a written record fairly soon thereafter. I do not feel strongly about whether having a record of the decision might be helpful.

Russell Findlay: I wonder whether that might slow down the process on the day.

Kenny Donnelly: That is potentially the case, because the reasons would have to be recorded in the minute of the court for signing off, so it would be an administrative challenge. It might be a question for David Fraser to answer, because his staff would have to minute that.

David Fraser: Yes—the SCTS thinks that a requirement for manual recording would create the potential for courts to run for longer. We might also have to make changes to COPII—our criminal operations digital case management system—so there would be a cost incurred not just in terms of the time that it takes courts to run but in adapting our system so that it could record that.

The Convener: I will pick up on a point that Russell Findlay alluded to earlier and which David Fraser also picked up around the practical challenges of the proposed wider role of criminal justice social work. What is your perspective on what the challenges might be for you and your staff?

David Fraser: I am limited in what I can talk about because we support the judiciary, so I am not here to speak on its behalf. From an operational perspective, if we were to introduce a system in which social work reports were required

in every case—they are currently provided at the request of the judge or the sheriff—there would be a significant resource implication for social work. Again, it is not for me to comment on that.

That would also create the potential for reports not being available when they were required in the court, which could create an element of churn because we would have to wait for reports to become available and cases could therefore be adjourned and recalled. If the case related to an individual who was being held in custody, they might have to be held for additional time. That goes against the policy intention, which is to have fewer people on remand.

The Convener: That is helpful. I have a question about a very practical issue, which came up during the committee's visit to Glasgow sheriff court last week. Is there order in a custody court list or is it quite random?

David Fraser: I am grateful that you got the opportunity to see how a custody court is run, because it can be very challenging. You will have seen all the people running about and all the different players involved. The role of the clerk of court is very difficult. When the court starts we have the list of all the people who will appear that day, but the running order will change almost instantly, depending on where we are with papers being marked, which solicitors have seen their clients and which solicitors are ready to go.

I do not know whether you noticed, but solicitors came in and out to queue and say whether their cases were ready. Sometimes, being a clerk of court is like being a flight controller. Committee members saw two members of staff—one co-ordinating and one actually running the court. A lot of the committee's members were there. If I may, I will make an observation about a matter that was touched on earlier in relation to the counter position and opposition to bail. From my memory, there were three cases in which bail was opposed. In one of the cases, the individual was remanded and, in the other two cases, the sheriff made a decision to release the individuals.

11:15

Again, from my perspective, what we have at the moment works very well. I do not know whether that is the impression that members got. I have managed to determine the number of people who are on remand and awaiting trial in our legal system and I am happy to share that with the committee, if it would be useful. In summary cases, only 1 per cent of people are on remand. For sheriff and jury cases, it is 12 per cent, and for High Court cases it is 27 per cent. I have detailed figures; if the committee would find them helpful, I can get them to you.

The Convener: We would definitely find those figures extremely useful, so thank you for that offer.

Fulton MacGregor: I want to pick up on David Fraser's last point. In the court session that we watched last week—that was useful, as other members have said, and I thank you for the opportunity—bail was granted on all but one occasion. Do you think that the bill is actually targeting the other courts that you mentioned, in which remand rates are 12 per cent and 27 per cent, rather than the court that we attended?

David Fraser: I can only speak personally, as I am here as a member of the Scottish Courts and Tribunals Service. From an operational perspective, I note that the committee attended a summary court. The figures that I cited relate to the number of cases that are awaiting trial and to whether individuals are on bail or are remanded. At the time that those figures were recorded, 23,745 trials in the summary courts were waiting to happen, and only 222 people were remanded, which equates to the 1 per cent figure that I mentioned. In the solemn sheriff and jury courts, there were 278 individuals on remand, and in the High Court the figure was 172.

Looking at the volume of cases going through the courts and the volume of trials outstanding, my take is that the number of individuals who are on remand, compared with the number who are in the system, is already quite low. It is difficult, therefore, to see how that could be reduced further. Again, I cannot comment on that; the reasoning as to why particular individuals would be remanded and retained would—as my colleague said—be a matter for the judiciary.

Kenny Donnelly: For clarity, the court that the committee attended in Glasgow was a summary custody court, which deals only with summary cases. David Fraser referred to sheriff-and-jury cases and High Court cases, which begin by way of a petition. At times, we refer to that as solemn business. In Glasgow, there is a separate custody court for petitions, which the committee would not have attended, because those first appearances take place in a private courtroom from which the public are excluded. Those are the more serious cases and, perhaps not surprisingly, as the gravity of offending becomes more solemn, the remand figures become higher.

Fulton MacGregor: Thank you for that clarity, Mr Donnelly.

I have a question on the provision in section 1, on the input of justice social work. My colleagues Russell Findlay and Audrey Nicoll have already picked up on that issue, so I will keep it brief. You have talked a wee bit about the resource implications of the bill. Presumably, however, if the

bill has the desired effect, more sheriffs would take up the option of supervised bail or other disposals.

I know that you cannot speak for the social work department. Nevertheless, do you see how those procedures could be managed if there was more bail supervision? What sort of resources might be required for that?

David Fraser: It is difficult for me to see what difference that would make to what currently happens. When we went to the custody court on Monday, we saw that bail supervision reports were requested on several occasions. That already happens under the current system.

Kenny Donnelly: It would be for criminal justice social work to provide the level of support that is required. The impact on the court relates purely to cases on remand. There is a risk that when people are not on remand, they may fail to attend or to comply with the requirements of the order, which can give rise to further charges. However, it is difficult to quantify that.

The big resource challenge arising from social workers having input at that stage of the proceedings in every case, and from increasing alternatives to bail, is a matter for local authorities, rather than something that David Fraser or I could comment on further.

Fulton MacGregor: I accept that. I just wanted to get your thoughts on the record.

David Fraser: I have one final observation on that point. There is a time constraint in relation to the summary courts. Individuals have to appear in court on "the next lawful day", which—excepting weekends—is usually the next day. There is then a time pressure with regard to whether an individual from social work is available in order to get everything prepared for court.

As my colleague said, the point that you raise is not really one for us, although we both recognise that it would be a significant question that social work would have to investigate.

Jamie Greene: I will put my first question to the Crown Office. I foresee that I will get the diplomatic answer that, "Those decisions are for Government and Parliament to make". However, the Crown has submitted a detailed paper outlining several concerns, so I think that my question is appropriate. Is it your overarching feeling that the 1995 act is fit for purpose and does not need to be amended? My question relates primarily to part 1 of the bill; part 2 is a separate matter.

Kenny Donnelly: To put it diplomatically, that question is not really one for me. The Crown Office works to the framework that Parliament imposes. As the committee will be aware, the 1995 act was amended in 2007 with a couple of significant amendments that imposed the section 23D presumptions. Those amendments also introduced the duty on a sheriff to consider whether to refuse bail irrespective of the Crown's position. That was in response to public and political concern at that time, arising from cases in which offences were committed by people on bail. In some of those cases, the original offence had been relatively serious but bail was not refused, in part because the Crown had not opposed it. Under the original provisions in the 1995 act, the court could not refuse bail unless the Crown opposed it. That was the reason for the changes that were made to the act. We adjusted to those changes, as we will adjust to any change that arises from this bill.

It is really for others to assess the appetite for risk with regard to the potential consequences. In so far as the policy intention of the bill is to have fewer people on remand in custody, the framework would, if it supported that, be delivering on that objective, although that would give rise to more people and community on bail and the risks that Mr Findlay mentioned in the previous evidence session. There are already people on bail committing offences in the community, and there may be further offences committed by such people. I cannot say that that will definitely happen, but it is a risk that reflects current experience.

It is a balancing exercise for the legislature in creating the legal framework within which we, as prosecutors, operate. Only time will tell whether that will be successful. All of it will require interpretation, and much of it will depend on how the public—by that, I mean those who come into contact with the criminal justice system—respond. That includes whether they adjust their behaviour as a result of some of the provisions, whether that is in a positive way because they are given the opportunity for supervised or electronically monitored bail rather than remand, or alternatively with regard to the more negative potential impact of further offending.

There is also a potential impact in terms of further inefficiency arising from failure to appear at diets, for the reason that I gave earlier concerning the amendment to section 23C(1A)(b).

Jamie Greene: I will reframe the question; it is relevant for both witnesses. If the Government's intention is to reduce the remand population, there are three important ways of potentially achieving that. One is to narrow the grounds for refusing bail, which would affect the decisions that the judiciary makes. As we have heard, the remand population is quite high because of the backlog of cases and the time spent on remand, so that is an option for change. There is a middle way, which we touched on earlier, around whether the Crown

opposes bail in the first place. That is the principal driver when there is a debate over whether or not bail is granted. Could changes be made by clearing the backlog and shifting the culture, procedural or otherwise, around the decision by fiscals to oppose bail?

A third and final way of reducing the remand population would be to narrow the discretion of judges and sheriffs, which would seem to be a last resort. Perhaps we need to do it the other way round: if we narrow the grounds for refusing bail first, everything else will follow.

Kenny Donnelly: Gosh—I do not know where to start. There are a number of issues in there.

You are right about the remand population. My understanding of the data is that fewer people have been remanded in custody in the past two or three years than was the case before the pandemic. The remand population is increasing because people are spending longer on remand as a result of the backlog and the inability to get through business. The intention of the bill is to narrow the door and decrease the input, but there are still problems at the output stage, although we are taking positive steps to target the backlog.

Custody cases are prioritised as part of that. However, in the most serious courts in particular, there are so many cases competing for priority, and there are other factors that impact on scheduling and prioritisation. The policy intention of reducing the backlog, if that is the intention of Parliament and Government, requires action at both ends. As I say, that is a political decision; I am not sure that I can comment much beyond that.

As I said earlier, I do not accept the proposition that the fiscal's attitude to bail is determinative. It does a disservice to the professionalism and skills of our judiciary and of our defence solicitors, who advocate in favour of the accused, to suggest that a fiscal who opposes bail is the factor that determines whether bail is granted. It might be the factor that, in practice, brings the matter to the attention of the court, so that the court can then make an informed decision as opposed to accepting the parties' position that bail is not opposed as a professional judgment on the part of the Crown. That is a matter for the Crown.

In appropriate cases in which there are good grounds for considering that bail might be refused, those grounds should be made available to the court so that it can decide. That will be the case irrespective of the legislative framework, which will simply shape the basis on which we oppose bail. The number of cases in which we oppose bail will also shape that basis, because there will be certain instances in which it will not be open to us to oppose bail. The decision will still ultimately rest with the court.

Jamie Greene: You have, however, expressed in writing some reservations about the proposals. They might be less diplomatic in writing than in person, but they are notable. Aside from public safety is the issue of prejudicing the whole justice process, including those who use the system to evade justice through non-appearance, for example. You used the phrase "cohort of defenders". Is there any concern that, as a result of shifting the balance to the sole principle of public safety as the primary ground for granting or refusing bail, sheriffs will be unable to remand people when there is a concern or significant risk that the person will simply not appear in court at a future date?

The committee saw that in person; I noticed that dates for court appearances were normally set quite soon after the custody hearing. We know that there is a cohort of people who simply will not attend. Is the inability to remand those people, specifically for that reason, a problem?

11:30

Kenny Donnelly: That is one of the concerns that we raised in our written evidence. With the amendment to section 23C of the 1995 act, in summary cases—and only those cases—courts will not be able to rely on a person's history of not attending or a concern that the person might not attend future diets as a reason to refuse bail.

I am trying to find my copy of the bill, to give you the correct reference. The proposed new subsection 1A of section 23C will make clear that, in summary proceedings, the court can take account of the grounds in section 23C(1A)—that is, the likelihood of absconding or failing to appear—

"only where ... the person has previously failed to appear at a relevant diet".

The "relevant diet" relates to the current proceedings. From a custody court perspective, there will have been no relevant diets. Separately, the court can refuse bail if the person is charged with failing to appear.

The proposal removes a cohort of cases in which the Crown would oppose bail on the basis of someone having a lengthy history of not attending. It will no longer be open to the Crown to oppose bail or to the court to refuse bail—in summary cases only, I hasten to add; that is how the bill is framed.

As I said in response to a question from Ms Clark, the difficulty with that is the impact on the system. If someone does not turn up, the diet has to be rearranged, witnesses have to be

countermanded and sometimes, if it is a trial diet, people who attended have to be sent away to come back on another day. There is an issue of public confidence in the justice system, if people who are known for not attending are allowed out and then do not attend court again. That can undermine people's confidence and their willingness to attend court and do their public duty by giving evidence. That is undesirable, obviously, but it is where the bill is currently at.

Jamie Greene: Thank you.

Mr Fraser, you talked earlier about data to which you have access. You have probably heard committee members complain a lot about the lack of available data on the issue.

There seems to be a pyramid. At the top, we have very few people in summary cases being remanded, with people not being remanded unless the offence was grave or the sheriff sees an immediate need to do so. Lower down, we have the serious cases at High Court or solemn level, in relation to which there has been a marked increase in the number of people who are remanded.

Is that due to the nature of the offences that come through the courts, or is the issue simply that, as some people think, too many people are being remanded for the wrong reasons? There is a philosophical debate to be had about that. It seems to me that the volume of remands comes from the serious cases, where remanding someone might be the right thing to do, not just on public safety grounds but for a wide range of reasons.

David Fraser: I can give a personal observation, having been involved in things that are happening in the Scottish Courts and Tribunals Service. A bit of work has been done, which led to the Lord Justice Clerk's review into the management of sexual offence cases. That was primarily driven by the increasing volume of crimes of that nature. I am perhaps straying into territory into which I should not stray here, but you would assume that the more serious offenders would be coming through the High Court and would be there for a longer time.

When it comes to summary cases, there is the 40-day limit, and the service prioritises that, so if someone is remanded pending a trial on a summary matter—the 222 individuals I mentioned—their trial will take place within 40 days. Notwithstanding that we are still working through the backlog of cases, what we are discussing is a separate issue, because such people are not held longer than the statutory time limit. That approach continues.

In solemn cases, people are potentially remanded for longer. I think that Mr Greene picked up on that. Is it about the numbers that are there or the duration that people are there for? I do not have that data, but I can understand your point.

Jamie Greene: It is just about that correlation. There is clearly a disagreement and there are different schools of thought. We are remanding too many people while not necessarily analysing the data on who has been remanded and for what reason. That important piece of work, which would help to inform a view on whether too many people are being remanded, is yet to be done.

David Fraser: I am certainly happy to share with the committee the information that I have on cases that are pending trial and the stages of the individuals within that. I can also give you information on the various offences that they are there for. I will share that with the committee.

Jamie Greene: That would be helpful. Thank you.

The Convener: We would happily accept any data that you can provide. The issue has emerged and has been the focus of questions from committee members, so that would be very helpful.

Collette Stevenson: My question follows on from Jamie Greene's. When we visited the sheriff court, I think that Sheriff Joan Kerr commented, more in relation to solemn cases than to summary ones, that the accused often do not even apply for bail but, instead, automatically go on remand. Obviously, that depends on the case. Are there statistics or data to suggest that there has been a shift in that regard?

David Fraser: Not that I am aware of, from an SCTS perspective.

Kenny Donnelly: Are you asking about data on those who do not apply for bail?

Collette Stevenson: Yes.

Kenny Donnelly: I am not sure that that is recorded. I think that that would simply be recorded as bail having been refused. A number of factors might give rise to that position on the part of the accused, but it generally relates to other personal circumstances or other cases. Someone might know that they are about to be remanded or sentenced for something else, so it is about starting the clock ticking on their custody period at that time.

It is still open to the court to grant bail, notwithstanding the lack of a motion. That is, however, unusual in solemn cases, although perhaps less so in summary cases. In solemn cases, if somebody does not ask for bail, that is generally determinative. As I said, there will generally be something behind that that gives rise to it—often, it is because another sentence is

being served or some other thing is pending. I am not sure how you would get data specifically on that and, as I say, I do not think that it is recorded separately in the court system.

David Fraser: It is not recorded in the court system.

Collette Stevenson: Can you understand why we are trying to drill down into and analyse that kind of information? The very reason why the bill has been introduced is that remand figures are so high.

Kenny Donnelly: I do not know whether the issue was raised with the Law Society of Scotland—I looked at the *Official Report* of that meeting, but I cannot remember—but it might be the best organisation to ask about the reasons why people do not move for bail. The Law Society will have a better idea than I do, because I sit on the opposite side of the table and do not have access to the accused and his reasoning for his decisions. If that is an important point, it might be worth asking the Law Society whether it can at least give examples of the type of reasons why that would be the case.

Collette Stevenson: My other question is an overarching one. In your submissions, you look at each of the sections in the bill. Rather than a critical analysis, do you have any suggestions for amendments to the bill?

Kenny Donnelly: No, but thanks for the invitation. [*Laughter*.]

As I said, that is for the Government. It is not for the prosecutor to frame the law. We have highlighted in the submissions what we think are the practical consequences and difficulties of the bill as it is currently phrased. That is the appropriate and correct approach as part of the consideration by the committee and by the Parliament as a whole. I am afraid that what the framework should be is not a matter for us.

Collette Stevenson: Thanks for your answer. David Fraser, do you want to comment?

David Fraser: I will equally decline. I can talk about the matter from an operational perspective. It would have an impact on how the Scottish Courts and Tribunals Service runs its courts. There is a submission from the judiciary, so I will leave it at that.

Collette Stevenson: I have no further questions.

The Convener: It was worth a try.

Rona Mackay: I will come to Kenny Donnelly first. At the risk of repeating myself, what is your view on the repeal of section 23D of the 1995 act?

Kenny Donnelly: As a prosecutor, I am genuinely neutral on that, because the law is the law. Many of the factors, particularly those that relate to violent crime, will still be captured by the definition of "public safety", subject to that being clarified. To the extent that section 23D allows the courts to take account of previous convictions in relation to public safety, previous convictions for domestic violence, sexual violence and more general violence would, I presume, fall within the way in which the court interprets "public safety", so the court would still be able to take those into account.

I suppose that the argument in favour of removal is that removing the presumption that bail should be refused unless there are exceptional circumstances would give the court more discretion. However, I would not express a view on the matter one way or another. It will come down to the interpretation and application of the provision on public safety.

Drug dealing is the other factor that is captured by section 23D. Subject to clarification of what "public safety" amounts to, you would think that there is a public safety element to the supply of drugs.

Rona Mackay: Will the removal of the exceptions make a lot of difference?

Kenny Donnelly: It is hard to tell. I have seen and been involved in cases in which the previous conviction was many years ago or such that the disposal was very low, which would indicate that the court perhaps did not take as serious a view of it as might otherwise have been the case. I think that the committee has received some evidence about that. I can see the argument for saying that it is a proportionate response to use that as a basis for a presumption against the granting of bail, but it is not for us to comment on the legal framework and its risk. That is for you to determine, and it is for me to operate within that framework.

Rona Mackay: Sure. I understand.

Kenny Donnelly: I can see the argument. It would still be within the court's discretion to take account of previous convictions, but the bill gives the court greater discretion to grant bail without requiring exceptional circumstances.

I talked about the confusion and inconsistency caused by the lack of a definition. When section 23D was first implemented, there were a lot of different interpretations by the courts of what exceptional circumstances were. It took some time before we got definitive guidance as to what those would be, but the situation stabilised at that point. However, before then, there was inefficiency and inconsistency.

Rona Mackay: There is a proportionally high number of women on remand. A previous witness said that he thought that, in some cases, sheriffs were remanding women because there was no real alternative and they did not know what to do with them. Is that the case?

What is your opinion on the high number of women who are on remand? Is that because there is no throughcare or nowhere else to send them?

Kenny Donnelly: I genuinely do not know. Over the years, the statistic has been presented to me, but it does not necessarily reflect my experience of being in a court, so it always comes as a slight surprise. I am still a wee bit old fashioned but, generally, my impression is that more males are remanded than females. I suppose that the issue is the proportions but, even proportionally, it is hard to reconcile your statement with my experience. It is not a question of the Crown or the court taking a different approach.

Rona Mackay: No, I understand that. It is a mystery.

Kenny Donnelly: It is. I am sorry, but I cannot reconcile it.

We increasingly get input from criminal justice social work, as one of the earlier questions touched on. That is particularly the case in relation to vulnerable groups—if someone who belongs to a vulnerable group is in the cells, they are prioritised. That is often the case with women who have children for whom they have caring responsibilities. More often than not, there is some input from social work, with different options for the sheriff being provided.

As I said, that is why I find it difficult to reconcile the experience in practice with the data. I am not questioning the data; it is just that it sits uncomfortably with my personal experience. I am sorry, but I cannot provide a reason.

11:45

Rona Mackay: Thank you.

This question is for David Fraser. When we were on our interesting visit to Glasgow, we learned that different courts are being set up. A women's court is about to come into play. Could you expand on that? There is also a youth court and a drugs court. Are those trial courts? If the youth court and the drugs court are already running, how has it been going? What is the scene for the women's court?

David Fraser: If you do not mind, I will write to you specifically on those points. The new court that is being set up relates to trials. A number of specialist courts have been running in Glasgow, and I would be more than happy to give you an update. Do you want to know about all those courts or are you particularly interested in the women's court?

Rona Mackay: Those are the three that we heard mentioned. I did not know whether there was a trial period or whether the process was set to continue.

David Fraser: It has been set up and it will be evaluated. I will write to the convener to give an update on where we are with each of the courts and what the intention is.

Rona Mackay: That would be excellent. Thank you.

The Convener: We are on time, so I will allow Russell Findlay to ask a quick question, after which Jamie Greene wants to clarify a point. He has promised me that he will be even quicker.

Russell Findlay: I will be quick. If the bill leads to more bail, there will probably be increased reliance on supervised bail, which I believe includes electronic monitoring. We have heard evidence from some people that the amount of time for which a person is subject to electronic monitoring should have a bearing on the sentence that is ultimately imposed, if a sentence is imposed.

As things stand, does the Crown have confidence in supervised bail electronic monitoring? If so, does that apply Scotland wide or is it a bit of a patchwork quilt? Secondly, does the Crown have any view on the suggestion that the amount of time for which a person is subject to supervised bail electronic monitoring should be a factor in subsequent sentencing?

Kenny Donnelly: I make it clear that supervised bail and electronic monitoring bail are not always one and the same thing. It is possible to have supervised bail with electronic monitoring or supervised bail on its own. Generally speaking, the issue is more about the court's confidence in that, because the court has to impose that as an alternative to custody. It will do so only when it thinks that remand might be the only alternative. Generally speaking, the reports that we get suggest that that is reasonably effective. As ever, there is some level of non-compliance. I do not have data on that, but the courts service might do—sorry, David. Someone could look for that.

As a project, electronic monitoring is still in its infancy, relatively speaking, and it is not consistently available. As I think I mentioned earlier, in the most recent update that I had on that, there were still quite a number of local authorities that did not have the resources or the facilities to support electronic monitoring bail, which means that, in certain courts, it is not available.

Similarly, given the state of local authority budgets, I would need to get someone to confirm whether supervised bail is available in every sheriff court. I am not sure that it is or that it is available to the same level. That issue might have come up in the session with the previous panel, when John Watt mentioned that drug treatment and testing orders are not currently available in Edinburgh because of resourcing issues and so on. There are resourcing issues for local authorities in relation to the support of such schemes.

Russell Findlay: I think that I speak for everyone here when I say that the more data we have on what is available at the moment and how it works, the better.

Kenny Donnelly: We can try to find that out. I will write to the committee.

Jamie Greene: The financial memorandum associated with the bill includes commentary that the Government believes that what is proposed will not result in any up-front or one-off costs for the Crown or the SCTS. However, earlier, you stated that some procedural or technical changes would need to be made within the system to accommodate and implement any changes as a result of the bill.

Do you agree with the Government's assertion that the bill will come at no cost to your organisations? If you disagree, will you go away and do any associated analysis or work on what changes would be required and the potential costs of making those changes?

David Fraser: I think that there would be costs involved, and I am quite happy to go away and have a look at those. When I write to the committee, I will include those costs.

Jamie Greene: Thank you.

Kenny Donnelly: There are no immediately obvious calculable costs for the Crown, because we will still get cases in, we will still consider them and we will still present them to the court, for the court to make the decisions.

Potential costs could relate to an increased number of diets per case if there were further failures to attend and suchlike, but that is all speculative and difficult to predict.

Equally, if the courts are to run longer, we would have to look at the resource impact of that. For instance, when we talk about the need for both the social work input and the written reasons to be factored into the timing of the court, we might run into a situation in which we look at additional overtime costs and suchlike for the staff who manage the courts.

However, there is nothing that is particularly apparent. We will keep that under review and, if my team are shouting at their computer screens at the moment about something that I have missed, I will write to let the convener know. However, it is not obvious that there is an easily calculable answer to that question.

Jamie Greene: Yes, but you will know the cost, for example, of non-attendance and repeat diets coming back to the same place or of additional deputes. I am sure that those things have costs.

Kenny Donnelly: Sure, and we can look at that. For each summary case that requires to be adjourned, there are, on average, three witnesses. The cost and the impact will depend on whether they attend, the stage at which non-attendance happens and suchlike. I will take that point away and see whether there is something that I can reasonably provide. I do not want to be too speculative but, equally, I will try to assist as best I can.

Jamie Greene: Thank you.

The Convener: That brings our session to a close. I thank the witnesses very much indeed for their attendance, and we look forward to receiving their follow-up submissions.

That completes our public agenda for this morning.

11:52

Meeting continued in private until 12:57.

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