OFFICIAL REPORT
AITHISG OIFIGEIL

Criminal Justice Committee

Wednesday 18 January 2023

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 18 January 2023

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CRIMINAL JUSTICE COMMITTEE
2nd 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:

Chief Inspector Nick Clasper (Police Scotland)
Professor Nancy Loucks OBE (Families Outside)
David Mackie (Howard League Scotland)
Fred Mackintosh KC (Faculty of Advocates)
Joanne McMillan (Glasgow Bar Association)
Stuart Munro (Law Society of Scotland)
Wendy Sinclair-Gieben (His Majesty's Chief Inspector of Prisons for Scotland)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Criminal Justice Committee

Wednesday 18 January 2023

[The Convener opened the meeting at 09:31]

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

The Convener (Audrey Nicoll): A very good morning to everyone, and welcome to the second meeting of the Criminal Justice Committee in 2023. There are no apologies this morning.

The first item of business is an oral evidence session on the Bail and Release from Custody (Scotland) Bill. We have three panels joining us this morning. The witnesses on our first panel are Stuart Munro, convener of the criminal law committee of the Law Society of Scotland, who we hope is joining us online; Fred Mackintosh KC from the Faculty of Advocates; and Joanne McMillan, committee member of the Glasgow Bar Association. A very warm welcome to you all.

I refer members to papers 1 to 3. I intend to allow up to 75 minutes for this session. As time is tight, I ask, as ever, for succinct questions and responses.

On that note, I will move straight to questions and ask our panel a very general opening question. Section 1 of the bill relates to input from justice social work to inform bail decisions. I am interested in your views on whether courts are currently provided with sufficient information when they are taking decisions on bail and remand. That is a very general question to open up with. I will come to Fred Mackintosh first, then bring in Joanne McMillan, and then we will come to Stuart Munro.

Fred Mackintosh KC (Faculty of Advocates): Convener, I think that Joanne McMillan may be better placed to answer that question in detail, because, of course, it is the solicitors appearing for clients on remand who deal with the cases.

I think that there is a lack of material. I am old enough to remember that, in the early 2000s, almost everybody who appeared from custody had a bail supervision report. It was almost standard, not in every court but in quite a lot of the courts, and it meant that sheriffs were provided with information about addresses, alternative addresses and supervision that I do not get the impression they are provided with now through our current bail appeal practice.

I believe that it is a good idea to provide more information but, ultimately, I will defer to Stuart Munro and Joanne McMillan as people who deal with this on the front line.

Joanne McMillan (Glasgow Bar Association): Good morning, everyone. I noticed that a lot of you were at Glasgow sheriff court on Monday, so you had the pleasure of the custody court on a Monday afternoon. As you all saw, that is a very busy court.

I am a solicitor in Glasgow. I have been qualified for coming up on 11 years and have practised in a legal aid firm in Glasgow throughout that time. I am a member of the Glasgow Bar Association. We are all actively involved, in that we are in court daily. I am there every day. I have a custody case most days and am pretty familiar with the processes that are in place.

It is fair to say that bail supervision is pretty new. Fred Mackintosh remembers when those provisions were put in place back in the day. However, that did not really seem to take effect at the start of my career. I do not have much recollection of dealing with bail supervision when I first started appearing. However, there has definitely been a move towards far more use of bail supervision and of social workers and bail officers, who go to see the accused person when they are in custody and prepare a report. They assess the accused person, check out their addresses, check their suitability for being placed on electronic monitoring and, over and above that, check their suitability for supervision. That involves meeting the social workers regularly. It is probably similar to being put on a community payback order, pre-conviction. The same kind of work is involved: dealing with them, checking in with them and making sure that they are staying out of trouble and complying.

Overall, the GBA is very supportive of the bail supervision scheme. Often, when a client is on the cusp of being remanded in custody, that can be the thing that encourages the sheriff to grant bail. It perhaps gives the sheriff a bit of comfort to know that an accused person is not simply going back into the community with no support and will be getting support from the social work department. It is quite effective.

I had a case recently of a female who had gone into the 218 project. I do not know whether any of you is familiar with it, but the 218 project in Glasgow is a third sector organisation that deals with women and women's issues. It deals with people who have addictions, and there have been recent cases as part of these bail supervision orders. In the case that I had, the accused was bailed to the 218 project. In addition to the supervised bail report, the social workers were involved, along with me and the 218 project, in

having the client assessed for the 218 project. It meant that she went there on a residential basis and was given treatment for various things within that forum, which is really positive. The bail supervision not only deals with the social workers but brings together other agencies, such as the 218 project, to try to provide greater support and alternatives for those people who are very vulnerable and very close to going into custody. There are definitely pros to it.

There are some difficulties with the administration of bail supervision. Often, as you saw on Monday, the court is very busy. A lot of the time, the Crown takes considerable time to mark cases. It seemed to go quite smoothly on Monday, but that is not always the case. I had a case just before Christmas where a 21-year-old vulnerable boy did not have his papers marked until after 5 o'clock. He did not appear in court until half past 5, by which point the social workers were away. The social workers do not assess them for supervised bail until they know, from the Crown, that their bail will be opposed. As a result, we ended up in a situation where a vulnerable 21-year-old was remanded in custody overnight for the bail assessment to be done.

There are practical issues in dealing with bail supervision. Suggestions from colleagues that the Sheriffs Association has picked up include social workers starting their assessment earlier, even on the day. If the Crown has the benefit of the bail supervision report prior to coming to a decision on bail, that might help to inform their decision, and they might not oppose bail. If the Crown had that information and the benefit of the bail supervision report, instead of opposing bail, it might be content for bail to be granted with supervision attached to it. The case would still be required to be called, but that time would not have to be taken going back and forth arguing about whether bail should be granted. There is definitely value in it.

The Convener: This is really helpful and interesting, and it certainly fits with what we observed on Monday on the use of supervised bail. I am also interested in the information that is provided to the court by criminal justice social work and, potentially, others—we may come on to that later—to inform bail decision making and a decision on the potential for supervised bail.

Stuart Munro (Law Society of Scotland): Good morning. I am appearing today in my capacity as convener of the criminal law committee. The Law Society obviously represents solicitors from around the country.

Like Joanne McMillan, I am a Glasgow solicitor. I spent the best part of 20 years going down to the custody court in Glasgow, although I have not done it so much in the past few years. I absolutely echo what Joanne, in particular, said about the crucial nature of social work input to bail decisions. The courts are very often dealing with incredibly vulnerable people, not only vulnerable complainers and vulnerable witnesses but vulnerable accused, very many of whom have complex social problems, be they addiction or mental health difficulties. Inevitably, only very limited information about any of that is likely to be available in the very short time that the court has to process those individuals through what can often be a very busy custody court. I do not know how busy the court was when the committee was there the other day, but, back in the day, in excess of 200 people would have gone through a bank holiday custody court in Glasgow, and they all had to be processed in the course of an afternoon. The social work input is critical.

Fred Mackintosh is absolutely right: there used to be a well-utilised scheme of bail information. Certainly, I remember, in the late 1990s, going into the bail information room, where social workers were available to carry out urgent inquiries, make phone calls, search records and that kind of thing in order to provide information to the court that would then impact on bail decisions. The Law Society looked at the extent to which such information is available around the country when there was the recent change to the availability of electronic monitoring as a condition of bail. The committee will remember that that was reinstated not so long ago. Frankly, the experience varied considerably around the country. Some courts were able to resource it; other courts simply were not. It all came down ultimately to local authority resourcing.

The position was that, in certain courts, following the reintroduction of electronic monitoring as a condition of bail, it was possible for an assessment to be carried out from day 1; in other courts, it simply was not. That highlights the problem. Ultimately, we can all agree that the information is critical and will assist the court in making the right decisions in the interests of everybody and public safety, but if the resources are not there and if there are not personnel in the courts who are able to deal with them, often, as Joanne said, late in the day after the late marking of a case or the late arrival of an accused person from a police station, that information will simply not be available. As I said, we are often dealing with incredibly difficult, vulnerable people, who often have mental health or addiction difficulties. Without the information that comes from social work, it is difficult to expect judges to make the right decisions.

The Convener: Thanks very much. That is extremely helpful and will open up some supplementary questions.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Convener, just to clarify, my question is not necessarily a supplementary. I just put my hand up to show that I wanted in. Is that all right? However, my question is in this area and follows on from that.

Can I check first with the clerk whether I can refer people to my entry in the register of members' interests once, rather than doing so for each panel? If that is the case, I do so now. Thanks very much.

My question is on the discussion that we are having about bail supervision. Joanne McMillan was right to say that we were at the court the other day and saw it in action; it was really good to see. We saw that bail supervision assessments had been done a number of times but, of course, not all the time, although we do not know whether they were required. Does the panel think that the purpose of the bill is to ensure—perhaps going back to the old days, to which two of the panellists referred—that bail supervision assessments are done for every case, whether it is a thorough assessment of somebody with complex needs or simply a one-page assessment saying, "This person does not need bail supervision"? Should an assessment be done for everybody?

Joanne McMillan: There are some circumstances in which a bail supervision assessment is probably not needed. For example, you might have a client appearing who is not asking for bail; they are remanded in custody for something else, and they come down and appear. I appreciate that you were in the summary court, but what normally happens in the petition court is that they come down to answer the case and then move for bail or not move for bail, and that kick-starts the petition process, so there might be circumstances where clients do not want to ask for bail; that is, they are already in custody. It would be a waste of resources if it were to be done in every case. Perhaps it could be somewhere along the lines of saying that it should happen where the accused is moving for bail and seeking bail, so that the social worker is not carrying out reports on people who not asking for bail in the first place, as those reports are unnecessary. That might restrict the number of reports that are required.

09:45

Fulton MacGregor: Sorry, I should have clarified that my question was about whether you think that a report is always required in cases in which bail is sought. Whether it is obvious or not that bail supervision might not be suitable, the social worker still requires to meet the person, and we should say that to the court.

Joanne McMillan: I had a case on Monday that was called in court, and the Crown was opposing bail. The person had no previous convictions. I knew that the sheriff was more than likely going to grant bail and that it was not necessary for a bail supervision assessment to be done. I made a conscious decision as a professional not to have that assessment done. I addressed it with the sheriff and indicated that, if she was considering remanding the accused, which I did not think was likely, I would arrange for the supervision assessment to be done. In such situations, we know that it is unlikely and that an assessment for supervised bail is not necessary. In the majority of cases, it is essential for young individuals to have supervised bail assessments. If we are not to do it in every case, there should definitely be a distinction that it be mandatory for young people.

Fred Mackintosh: It is worth saying that the world has moved on in two important ways since the 2000s when this existed before. First, there is a much greater use of undertakings, where the police charge someone and then release them on an undertaking to attend on a later date or even on police bail. That means that people will be out in the community having, in some cases, been charged for weeks; recently, it has been much longer than that. They then turn up at court to receive the marking decision of the prosecutor. Most of the time, bail is not opposed, but you always get that terrible story of, "Well, I turned up at court on the date, having been out in the community and"—we hope—"having behaved myself, and the fiscal suddenly opposed bail at that point." To lawyers, that is not necessarily as mad as it sounds, but it happens. Even people who are on undertakings may need bail supervision reports, perhaps only when the fiscal opposes bail.

The other thing is that fiscals no longer have the discretion that they used to have. In the old days—I am looking at Stuart Munro at this point—the marking would happen locally in the court, often by a more experienced depute, and then the depute in court would also have discretion about what to do on the day about bail. The impression that I get—I am sure that you can ask the Crown Agent, if they give evidence—is that fiscals now are much more bound by the marking decision. That means that you cannot really negotiate, in a sense, once the bail supervision report is in, because the marking decision has already been made. It is probably not as clean as it used to be, and it will probably involve some form of local policy negotiated between the court, the fiscals, the social workers and the defence agents so that people know when and how to ask. It is not the old days, when there were fewer cases and fiscals could change their mind. They do not seem to have that autonomy any more.

Stuart Munro: Just to go back to Mr MacGregor's question, there is a danger of overthinking this. In bail supervision, resources would ordinarily be focused on the cases that were going to be most problematic. In the modern day, there is often much better sharing of information between the partners in the justice community, certainly in Glasgow. As a member of the Glasgow Bar Association, I will get an email, maybe at 10 o'clock in the morning in advance of the custody court starting in the afternoon, saying, "Here are the people who are going through the custody court this afternoon. Here is an update on what the fiscal has decided in respect of the cases that have been looked at so far," and there are regular updates on that. A solicitor, perhaps even before they go to court and before they go to see their client, might know what the Crown's attitude to bail is. The Crown's attitude is not necessarily the be-all and end-all of things, but that gives a hint to social work of which cases might require the most resources. On the other side of the coin, you may have a case in which bail is not opposed but, nonetheless, there is helpful information available that the social work department could provide that might assist the defence and the court in making decisions on further procedure.

Fred Mackintosh is absolutely right: we have a more dynamic system, and many more people are released on undertakings. The question of bail arises in the undertaking setting as well. The reality of the cut and thrust of the custody court and the undertaking court is that, very often, the position is not clear until pretty late in the day. We do our best to try to anticipate what will happen, but changes can always come at the end. The key thing to note is that the resources that are available for bail supervision are focused on the cases that are most likely to be in dispute.

Fulton MacGregor: Thanks for that. From what we saw in Glasgow, it seems that there is a good connection between the courts and the criminal justice social work team there, but we have also heard that that connection might not be as good everywhere across the country. I refer the committee to my entry in the register of members' interests, because I worked in the area, previously.

My second question is about how the legislation might be implemented. The criminal justice social work teams that produce the criminal justice social work reports on sentencing and the community payback orders when people are sentenced are generally separate—certainly in Glasgow and where I worked previously, in Lanarkshire—from the community justice teams. Bail supervision teams are also a separate entity. I do not know the numbers in Glasgow, but those teams are usually pretty small. In Lanarkshire, there are perhaps two folk.

How do you see that working? It is probably not for this panel of witnesses to answer, but do you see the provisions working through a specific bail supervision team rather than with the rest of the community justice team? People on bail have not yet been sentenced, which is a very important distinction to make. Carrying out bail supervision as well as doing the assessments is a lot of work. If the provisions are to work, where do you see the resources coming from?

Joanne McMillan: Glasgow sheriff court has specific bail officers—there are probably about four or five of them. Some work part time and some work full time. In addition, the social work department is upstairs and includes a handful of social workers who deal with children and secure screenings and that side of things. There are quite a number of people there. If the provision is to be rolled out across the country, people will be needed in court buildings who can go and see the custodies, as opposed to people coming in later in the day, in which case we would be in a situation in which it probably would not happen. If social workers are in the building, the solicitors and the clerks know that they are there. We are able to speak to them and have a relationship, which makes the overall process work better.

I have a case that involves a girl who is in the 218 project and whose social worker is in regular contact with me. If I bump into her, she gives me an update on how the girl is getting on, and, if there are issues, she is able to contact me. There is definitely a proactive working relationship between the defence, the court and the bail officers. The only issue, which Stuart Munro dealt with earlier, is that resources are pretty stretched. It will be an expensive exercise to roll out the provision across the country if it is not happening in the out-of-town courts, but doing it is definitely worth while.

Fulton MacGregor: That is my point. Do the other two panellists generally agree with that? If there is to be more supervised bail, that means that there will be more supervision of it, and sheriffs are expecting that. We could even see that on Monday. If supervised bail is in place, sheriffs are expecting that there will be almost a package of support for the person. That involves regular meetings. I cannot remember exactly what the protocol is, but I think that the social worker needs to meet the individual every second day or something like that. That could vary, but, on top of preparing the bail supervision reports, it is a lot of work. The point that I am trying to make is that, if we are to do it, it will take investment. Do Fred Mackintosh and Stuart Munro have any comments to make on what Joanne McMillan said?

Fred Mackintosh: Briefly, there are two things worth saying. If there is more supervised bail, one

might expect there to be less remand. There is a saving there for the Scottish Prison Service, but there is more cost to local authorities, and that has to be taken into account.

The other thing to say is that cases are taking longer to run than they did 20 years ago. If a person is on supervised bail for 18 months, which is not unusual in a non-domestic sexual priority case in some sheriff courts, that means they see their supervising officer weekly for 18 months, which costs a lot of money. If you are going to save money in one place, what you replace it with has to speed things up and move things on in other places.

The Convener: Stuart, do you want to come in?

Stuart Munro: Yes. I have a couple of things to say. The discussion is moving on slightly from where it started.

On supervised bail, I appreciate that we have been referring to bail supervision officers, which probably does not help with any confusion. The team in Glasgow sheriff court that Joanne was talking about offers assistance to the court in making decisions about bail—full stop. Its input might lead to people being granted bail on standard conditions, but it might also lead to people being granted bail subject to conditions of supervision.

Fred is right about the backlogs in the system, albeit the backlogs on the summary side are not nearly as profound as they are on the solemn side. Somebody could be on supervised bail for a period and, if they comply well with it, they may not need to be supervised any more. That kind of flexibility is built into the system.

On the cost of resourcing, which Fred mentioned, frankly, it is far cheaper for somebody to be supervised under a bail order than it is for them to be held on remand, and, in the cases where it is the right way forward, far less social damage is caused. The interruption to that person's life, family relationships and employment from being held on remand can be ameliorated by their being held on supervised bail. I completely appreciate that the money comes out of different budgets—it comes from the SPS if the person is on remand and from the local authority if the person is on supervised bail—but there is certainly a social benefit in focusing resources in that direction.

Fulton MacGregor: I do not disagree with any of that.

The Convener: We will move straight on to Jamie Greene. A number of other members want to come in.

Jamie Greene (West Scotland) (Con): Good morning to our guests. We have spent a bit of time talking about input from social work and other stakeholders to inform bail decisions by sheriffs. None of that is unwelcome, but other parts of the bill deserve further scrutiny. In particular, I want to focus on the parts that deal with grounds for refusing bail and the removal of bail restrictions.

From the discussion that we have had, it sounds to me as though many of the issues in the system are practical ones around the provision of information and the knock-on effect that that has on resources for criminal justice social work or local authorities. I want to ask about the legislation. It is not obvious that you need primary legislation to fix what are clearly practical issues in the system; they could be fixed as it is. Why do we need a bill in order to reduce the remand population? The Government clearly thinks that there are too many people on remand—that is the whole point of the bill. Is the remand population too high, and does the bill deal appropriately with any perception that there is a high remand population?

That is quite a general first question. I will come on to a specific question afterwards.

Fred Mackintosh: Thank you, Mr Greene. The first thing to remember is that the remand population in Scotland is bigger than but not that dissimilar to the remand population in England and Wales. A recent report about English remand problems, from the House of Commons committee that is equivalent to this one, bears reading.

The reason that the remand population might be said to be too large is that not everyone who is remanded necessarily receives a custodial sentence. A good example, which was raised by a number of groups in their responses to the original consultation, is domestic violence. Domestic violence requires a rapid response from the justice system as a whole. There was a day when trials happened quickly, and, as Stuart noted, the backlog is reducing. If you need to remand someone because of the nature of the alleged offending and domestic violence, you want to resolve the matter quickly. In such cases, remand may not be so terrible. If it is going to drag on, however, or if the remand is less justified, you will be spending money and causing disruption for no good reason.

10:00

The reason you need the bill is, primarily, section 23D of the Criminal Procedure (Scotland) Act 1995. I am here because I spent 10 years doing bail appeals for people who appealed their bail decision, of which there were 10 or 12 cases every morning. There are people who probably would not have been remanded under the old system—the judges and sheriffs know this—but

who were remanded because they had a conviction for which they were sentenced to imprisonment on indictment when they were much younger but something changed and the allegation was completely different, or their qualifying conviction was a bit odd and therefore they got a custodial disposal when normally someone would get prison for it. It always seemed rather unjust that those people were having to meet an exceptionality test. I am not convinced that there are not people out there who were remanded under section 23D when that was not fully justified. A small number of people seem to have suffered an injustice. For all the times that, as a bail appeal lawyer, you criticise sheriffs, they generally do a good job. Discretion is important, so getting rid of section 23D is essential. There seems to be a consensus on that.

The other change is about sections 23B and 23C, in particular. It all depends on what ministers really intend and what you, as a Parliament, intend. I do not necessarily agree with everything that the sheriffs and judges have said about the idea of the public safety test. If it is intended to be a change, it should be more overt, but, if it is not intended to be a change to the test, it is all pointless. The previous change, in 2007, just rewrote the law. I was heavily involved in bails then, and the test did not change apart from section 23D, but we had a new bunch of sections. It all slightly depends on what the purpose is. If the purpose is to make it harder to oppose bail—the bill reads as though it is—that is all fine and good. If that is what people want to do, that will be the effect. However, if the purpose is just to rewrite it in a new, elegant way, that might not necessarily be essential. I have not really heard one way or the other what the minister's plan is, although perhaps that is me being a little cruel.

The removal of section 23D is essential, and that requires a bill. That is a good thing and is worth doing.

Jamie Greene: Your comments are on the record, and we can ask those questions of the Government when it appears before us.

Fred Mackintosh: Absolutely.

Jamie Greene: I will come back to Joanne McMillan in a second; I want to move to the Law Society first. In your written submission, your response to that question is rather brief and non-committal. I get the impression that the Law Society does not really have a view on changes to the grounds for refusing bail; you just state the obvious in the sense that judges give careful consideration to such matters and that they judge each case on a case-by-case basis. We all know that already. You have not made any commentary on the proposed changes, so I wonder whether you could share a view, if you have one, now.

Stuart Munro: The position of the Law Society is aligned to that of the faculty, which Fred Mackintosh has explained pretty well.

I have a few observations. It is undeniably the case that Scotland, in common with England, sends people to remand more than many other jurisdictions do. That is, I suppose, a political choice, in the final analysis, and it is for parliamentarians to decide whether that is a good thing or a bad thing. The only observation that we would make is that it is important to consider all the implications of a decision to remand somebody in custody. There are cases in which, clearly, there is no alternative but to do that, but it is important to remember that not everybody who is accused of a crime is guilty of a crime. It is important to remember that not just the making of an accusation but the remanding of somebody in custody, depriving them of their liberty when they have not been convicted of a crime, can have major implications and not just for that individual. They can lose their job. They can lose their reputation. They can lose their later ability to travel or to participate in particular activities. They can also lose family relationships. There can be huge implications for children, partners and so on. All of those are and always have been important considerations. However, there are undoubtedly cases in which people are remanded in custody when alternatives could have been made available.

As to the question of whether there is a need for legislation, we absolutely agree that section 23D is an unhelpful provision. Its removal would be of benefit and would allow better decisions to be made by the courts, without the exceptionality test that Fred Mackintosh referred to. In respect of section 2, again, I cannot really do anything more than echo what Fred said: it kind of depends on what it means.

The senators were very concerned about the original approach that was taken in the consultation paper, about whether or not there was a conscious decision to remove one of the legs upon which bail might be refused and the implications that that might have for, for example, persistent non-attenders at court hearings. That appears to have been dealt with in the bill that has been presented. However, the question is really about whether the phrasing of the clause will make a practical difference to the way in which individual sheriffs decide on bail applications. At the moment, that is not entirely clear. It may be that, if Fred or one of his colleagues takes a decision to appeal and clarity comes from the Sheriff Appeal Court about what specifically is meant by the provision, there might be a change in practice. I am not entirely convinced that there would be. If there is a genuine desire on the part of Parliament to reduce the number of people going on remand

in the Scottish criminal justice system, it would help if that were a little more explicit.

Jamie Greene: Thank you very much for that.

Joanne, I get the impression from what has been said that it is not necessarily that the wrong people are being held on remand for the wrong reasons; it is simply that there are too many people on remand because the trials are taking too long to come to fruition, which has the knock-on effect of more people being on remand. Dealing with the backlog and getting those—[*Inaudible*]—to pass more quickly would, by default, bring down those numbers quite quickly. We should maybe consider that. Have you any views on what has already been said?

Joanne McMillan: I echo what Stuart and Fred have said. I definitely think that there would be great benefit in section 23D no longer being in place. I think that it causes issues, and the sheriff is not able to exercise their full discretion because they are restricted by it. When Parliament has explicitly said that someone should not be getting bail in the circumstances unless it is exceptional, it is quite difficult for a sheriff to overrule that. You could find yourself with someone walking in on a bail undertaking, having been on police bail for a period. They could have an old conviction on indictment for drugs, for example, and be appearing in relation to a new matter. They could have been out on bail for six months on police undertaking with no issues and then have turned up for court, and the Crown could oppose bail on the basis that they are subject to the provisions in 23D. I definitely agree with Fred and Stuart that issues arise with section 23D.

On the overall amendments to the legislation and the public safety issue, my concern is about where it is defined. What will the definition be? Will sheriffs, ultimately, apply the same tests and consider the same factors that are already in place? If so, what would be the purpose? Is this a conscious decision of the Government and of Parliament to look at having something more revolutionary to deal with the number of people who are on remand, or is it, as Fred said, another way of dressing it up in a different way that has the same outcome? The concern is that we will find ourselves asking how we define this and where it is defined. Would housebreaking, for example, be considered a public safety issue? It is not a crime of violence, but would it fall under those provisions?

Those are the kind of unanswered questions that the legislation does not really address. Ultimately, if the legislation is put in place, it may well be for the court to address. The court would then have to make a decision by way of appeals. However, it creates a bit of uncertainty in looking at it overall.

Jamie Greene: You sit in court day in, day out and see dozens or hundreds, if not thousands, of such cases. It seems to me that remand is used quite sparingly—only in the most extreme circumstances in which the judge feels that it is appropriate. Just because the Crown opposes bail does not necessarily mean that remand will be the outcome. Do you feel that it is necessary for legislation to intervene and alter the outcomes of what is already happening? That is no disservice to the sheriffs or the decision making, but is it appropriate to narrow those parameters?

Joanne McMillan: Again, I echo what Fred Mackintosh said at the outset. It will depend on what the intention or aim of the legislation is. At this stage, there are two major reasons for the number of people on remand. One relates to the Crown's approach to bail, particularly in summary cases. The Sheriffs Association picked up on that in its response to the consultation—it raised that as an issue at, I think, point 3.2 of its report.

Crime is split into two levels: petition-level crime, which is the more serious, and summary-level crime, for which jail sentences are up to a maximum of 12 months. We have legislation that says that people should not get sentences of less than 12 months. We have legislation that says that young people should not go to prison and that alternatives should be put in place, but, time and again, when I appear in court for a case, a 17 or 18-year-old boy who has a bit of a record and has been in a bit of trouble appears in relation to a summary complaint and the Crown opposes bail. Given the Crown's approach to bail, you are automatically in a dispute about whether it is granted. Something might need to happen in relation to the Crown's approach, so that we are not in a situation in which bail is opposed in every case.

For example, a colleague of mine had a recent case in which a young person aged 18 appeared in the custody court on a summary matter the week before Christmas. The sheriff admitted him to bail, despite Crown opposition, but the Crown then appealed that decision. In other words, the sheriff decided that he was to get bail but, because the Crown appealed, that young vulnerable individual was kept in custody. Even with the whole mechanism and all the legislation that has been put in place to prevent young vulnerable kids from going to jail, he still ended up in jail, despite the positive decision by the sheriff. It is only when the case goes to the Crown Office and it considers the bail appeal that, eventually, someone will withdraw the appeal and he will be released, but he will then be released from custody without anyone being there to pick him up, so the vicious cycle will continue.

I do not necessarily know the answer to what you said about the legislation. Other things could be looked at in relation to the Crown's policy on bail decisions. A more pragmatic approach, particularly to summary cases, might reduce the number of people on remand.

Jamie Greene: Unfortunately, we can deal only with what the bill does. We cannot fix the other issues.

Joanne McMillan: Exactly.

Jamie Greene: They could be fixed externally.

The Convener: I will bring in Russell Findlay. There is a lot to cover, so I ask for succinct questions and answers. That would be appreciated.

Russell Findlay (West Scotland) (Con): Good morning. I have two questions. We have touched on some elements of them already. The first relates to part 1 of the bill and the grounds on which bail can be refused being narrowed to two particular criteria: one relates to the significant risk of prejudice to the interests of justice, and the other relates to the risk to public safety. We have heard, off the record, from prosecutors that there are concerns about the lack of a legal definition of "public safety". There is a fear that, if that is not properly defined in the bill, it will cause problems with interpretation that will end up clogging up the Sheriff Appeal Court. Should there be a definition? If so, what might that look like?

Fred Mackintosh: The problem was quite succinctly expressed by the judges in their previous response. Remember that these are senators; they are not the people who will interpret the legislation. Since the Criminal Proceedings etc (Reform) (Scotland) Act 2007, we have had the Courts Reform (Scotland) Act 2014, which transferred the Appeal Court's responsibilities for summary appeals, including all bail appeals by sheriffs, to the Sheriff Appeal Court. They are a hard-working and diligent bunch of people, but they are not High Court judges.

Under the old system, bail appeals were decided by a High Court judge. They would happily spend the rest of their day writing things up. If you read the faculty's response, you will see reference to a case from the 1970s called Smith v M—I encourage the clerks to make it available to you—which involved Lord Justice Clerk Wheatley. On that day, he was dealing with bail appeals. They happened in his chambers, and there might have been five of them. I have no idea what he had planned for the rest of his day, but he spent the rest of it writing that judgment. That is the standard, core decision on bail.

It is virtually impossible to get a similar written judgment from the Sheriff Appeal Court. I think that that is due to time pressure, because it has other business—it is straight on to being the Sheriff Appeal Court. That difference in status means that you will not get an interpretation quickly in a written form that we can all use. The practitioners will rapidly work it out, and word will get around, but what "public safety" means will not be in a published form.

Personally, I think that there should be quite a broad definition of "public safety". I do not think that Smith v M is particularly wrong, with the possible exception of one element relating to the idea that it is sufficient to say, "There is going to be a long sentence, so we will lock you up now." I always feel a little bit bad about that; I do not think that it is quite right, given the presumption of innocence.

10:15

The problem is not so much the definition; it is the context of the whole system that it sits in. Ultimately, will there be a systemic attempt to re-educate everybody to ensure that they change their approach and that the system moves in a different way—perhaps a more Scandinavian way—on summary justice? If there will be, will that include things that have been talked about on and off for years, such as the use of bail hostels? Will it include reminder texts? Will it include legal aid being granted faster? Will it include there being more criminal defence solicitors who are under 50 and consideration of all the issues that put the system under stress? It is about more than just a definition.

The definition in Smith v M is perfectly respectable. If you want to change it, ministers need to explain what they want to change. I have personal views about how you would change it, but I do not think that the faculty has a view. It is a conscious political decision for ministers to say, "We want fewer people locked up." If that will mean that serial non-attenders are not remanded, what will we do about them not turning up? The judges explained that quite well.

Russell Findlay: In Smith v M, there is a go-to definition.

Fred Mackintosh: Yes, and it is a massively broad definition. It basically says, "Full discretion to the judges. Please do not get involved. We are making the decision." That is contemporaneous and very much of its time.

Russell Findlay: Presumably, the bill seeks to narrow that definition.

Fred Mackintosh: Yes, presumably, but it does not say that, and ministers should probably explain, not least the Lord Advocate, because it is

part of the same operation in some senses. I hope that that is helpful.

Russell Findlay: We can do without the courts having to interpret more legislation from this Parliament; we get enough of that already.

Would either of the other witnesses care to address that point? It has been very well explained. I have something else that we can move on to if you prefer.

Joanne McMillan: I echo what Fred Mackintosh said.

Stuart Munro: I am happy to agree with Fred Mackintosh in everything that he said.

Russell Findlay: In perpetuity.

Stuart Munro: That was not an open-ended commitment. [*Laughter*.]

Russell Findlay: Another element that has been referred to is section 23D. My understanding is that, in section 23D of the Criminal Procedure (Scotland) Act 1995, there is a presumption against bail for certain types of offences, including violent offences, sexual offences and domestic abuse offences at summary level and drug trafficking at solemn level, if there is a previous conviction to that effect. That might be overly simplified, but that is more or less it.

All of today's witnesses are for the abolition of section 23D, but we heard last week from victims groups who are of the view that it should be retained. Do their views cause you to rethink that in any way? If it is to be abolished, could or should it be replaced by something else to give protections to victims?

Fred Mackintosh: I am happy to make suggestions. Victims groups are, for valid reasons, suggesting that it be retained. Their anxiety is legitimate, and I do not wish to suggest in any way that there is not a legitimate concern. I suggest, however, that the way to ensure that domestic violence offenders in particular are kept away from their complainants or victims is through the manner in which the cases are prosecuted—the alacrity and level of commitment with which that is done. That means that there should be a whole-system response, which includes bail supervision if the person is on bail, rapid disclosure by the Crown, early availability of dates and good liaison with witnesses so that they know when to come to court and do not fail to turn up, which often causes problems, even if the reason does not particularly relate to the case.

It is worth remembering that a lot of solicitors are currently not doing some of the cases when there are court-appointed lawyers. You can ask them about their reasoning, but that means that such matters are dealt with more slowly, because you need a solicitor for a domestic case, as the accused cannot properly cross-examine their own complainant. A whole-system response is needed, and that might be more effective than section 23D, which is more of a sticking plaster. The most dangerous people, about whom victims groups are worried, will probably be remanded anyway, and I do not think that that will change.

Russell Findlay: My final question is a much more overarching one, if that is okay, convener.

The Convener: Yes.

Russell Findlay: It is about resources. We are told that the national care service is a work in progress, and the minister told us that it will be at least 2024 before we know whether criminal justice social work will be part of that. If bail is to be radically changed, whatever the outcome, it is almost certain that that will put greater pressure on criminal justice social work. You cannot speak for that sector, but can you foresee how it would possibly cope with the likely increase in work? That question is probably for Joanne and Stuart.

Joanne McMillan: In Glasgow, the sector is very much stretched. Criminal justice social workers are often quite harassed and they must deal with people who are not the most helpful. They are very pleasant and polite, and want to do their job to the utmost, but they are limited by the resources that are available.

They supervise bail as well as doing assessments. They can be in a situation in which there are 60 custodies on a Monday and they have to try to get through them. The cases are often not marked until after lunchtime, so they are unable to see their clients in the morning. Then, all of a sudden, they get a flurry of requests when the bail position is finally known, after which there is a big queue to get into the cells.

All those things add up and make our lives more difficult. The bail process definitely impacts on resources, and something would have to be done if there is to be momentous change, from which there might be a benefit. There would have to be an injection of money somewhere to address that.

Russell Findlay: Thank you. Feel free to come in, Stuart, if you would like to.

Stuart Munro: I go back to your previous point about section 23D. As Fred said, of course victims groups have a legitimate reason to be concerned about that. They will be anxious about what it might mean for bail decisions in the courts, but those concerns might be misplaced to an extent.

Section 23D is an arbitrary provision. Broadly speaking, it says that the court cannot grant bail where someone is accused of a particular category of offence and they have a previous conviction for that offence on indictment. At a

practical level, if, say, a 45-year-old man is accused of a domestic violence offence and he had a conviction on indictment for domestic violence 20 years ago, the court would not be allowed, in principle, to grant bail, unless the exceptionality test was met. If, on the other hand, that 45-year-old man had half a dozen convictions in the past three years but all on summary complaint, section 23D would not kick in. Therefore, it is a pretty arbitrary, one-size-fits-all kind of solution that does not really assist the court to make proper judgments as to who could or could not be trusted with being admitted to bail and let back out into the community.

As Fred said, the whole-system response is the key to this. There are examples, of which I am sure the committee is aware: the domestic violence court in Glasgow; and the evidence and procedure review pilot that is taking place in Dundee, Hamilton and Paisley, where the idea is to transform how summary justice is dealt with in domestic violence cases. Instead of accepting a situation in which somebody can go to the custody court today and have a trial in six months' time, let us try to accelerate that procedure dramatically by tackling all the things that get in the way, such as court backlogs, delays with disclosure and delays with legal aid. Let us try to focus the process and make it much quicker by making appropriate investment and changes so that, if people are being convicted of domestic violence offences, the courts can be much more proactive and engaged in trying to fix the root of the problem rather than getting somebody six months later, by which time various things have moved on.

To my mind, that is the way in which those things are solved; that is the way in which victims, complainers and witnesses can be reassured that the system is working effectively. However, that is about more than just making decisions on the issue of bail.

Russell Findlay: Thank you.

The Convener: I will bring in Pauline McNeill, followed by Rona Mackay.

Pauline McNeill (Glasgow) (Lab): Good morning. Thank you for the evidence so far, which has been really focused and has helped me to understand some key points. It strikes me that the system is not joined up; there is also an issue with resources.

Last year, the committee questioned the remand figures—those are of concern to the committee, and we raised that with ministers. The response was that the bill would go some way to reducing the remand population. I am sure that you what you are saying is correct, but—perhaps this is not clear in the bill—I always understood that to be what we are attempting to do.

You and others have raised a number of issues in which clarity is needed, including around what a public safety test is. We need to get into the detail of that. One of the issues that came up when we visited a court on Monday was whether there would be a public safety test for theft or housebreaking cases, so it is really helpful to hear your comments.

I have a couple of questions for you, Joanne. You mentioned 12-month sentencing, young people and the approach of the Crown. In addition, Fred said that the Crown no longer seems to have discretion. Does the centralised marking system have anything to do with that? I have had concerns about the system because marking is no longer done locally—as you know, it can end up anywhere. There is a real disconnect, with fiscals marking cases from, for example, Glasgow, which I represent, but who do not know the area. I wondered whether you thought that that might be one of the reasons for the decisions that are being made.

Joanne McMillan: The difficulty that we face with marking—Fred touched on this—is that somebody is marking a case while sitting in a house somewhere or sitting in a hub. I am not sure where that hub is, but the markers always refer to it. They are sitting in a place, making a decision on the basis of the paperwork that is in front of them. They do not have the benefit of the bail supervision report or of having spoken to the defence agent to find out whether there is an explanation behind it. They set out the bail position and, if the sheriff grants bail, whether that should be appealed. That is then passed to a young fiscal in court, who literally stands up and reads off the reasons for the decision and has no discretion whatsoever to make a decision. You could have the most exceptional set of circumstances and explain that to the fiscal. Although the fiscal might completely understand where you are coming from, they will say that their hands are tied, because someone else—they might be more senior than them—has marked that and they cannot overrule them. That has taken away people's ability to make decisions at a local level to expedite matters. I think that—

Pauline McNeill: The committee noted that, in one case, where the witness had failed to appear on several occasions, the sheriff asked the Crown whether the witness had been prepared for the trial in the first place, which was obviously a determining factor in the sheriff's mind. I think that the fiscal said, "Well, there are no notes here to tell me one way or the other". They only have the notes that are in front them. That is helpful to know.

Joanne McMillan: Those are very limited.

Pauline McNeill: Does Fred or Stuart want to come in?

Fred Mackintosh: I note a recent decision by the Sheriff Appeal Court. I will not name the case as I do not want to name the appellant—he does not really deserve to be named—but I will send a copy of the decision to your clerk. I was involved in the case—it was quite an anxious one—and included an interesting discussion in the Sheriff Appeal Court about delays. I agree with what Joanne said: there is a problem with Crown preparation. However, let us not forget that its staff are overworked, too.

I will send details of that case to your clerk. You might find it of interest as an example of what can go very wrong.

Pauline McNeill: Thank you. Stuart, do you want to add anything?

Stuart Munro: I rather suspect that, if the Crown Agent, or one of his senior colleagues, were present, he would be saying, "Look, we are trying to enable our fiscals in court to exercise a degree of discretion. The difficulty is that that very often does not percolate down."

Pauline McNeill: Thank you. Maybe you do not know the answer to this, but my understanding is that fiscals have an individual commission when they are appointed, which is meant to give them discretion, as a fiscal, on behalf of the Lord Advocate. Is that your understanding?

Joanne McMillan: I am not sure about that, but if you speak directly to a fiscal about a case and say, "These are the circumstances surrounding this case. This person has never been in trouble before. These are their exceptional circumstances. This is a medical report confirming all the difficulties that they've got. Would you take a view? Would you not proceed with it?", their response would be, "No. There is a policy. We can't make a decision in relation to that."

I will give an example. The other day, I had a client who was remanded in custody for a serious solemn matter. He had a justice of the peace case and the Crown had not brought him down. I asked the fiscal: "Would someone take a view in relation to this? He has already been remanded in custody for something else. He has not been brought. We've had numerous trial diets and the witnesses are not present." The fiscal responded: "No. I have been told that I've to make another motion to adjourn it."

10:30

We are in a kind of churn. They say that they will speak to their boss but, on their return, they tell you that they will be making a motion to adjourn the case. That is what happens rather than somebody who is qualified being able to make a decision in court and say, "Do you know something? Is it really in the public interest for this to continue? It's being prosecuted at justice of the peace level, which is fairly low in prosecution terms; the person has got other issues and is not at liberty. Is it really in the best interests for this to continue, and to continue to create the churn and the backlog that is there?"

That churn and backlog have a massive impact on the overall running of the court, the length of time that people are remanded in custody, and the fact that solemn cases cannot be dealt with because the courts and the fiscals are tied up with dealing with the less serious stuff that has been adjourned over and over again. All that has a knock-on impact. If the fiscals had a bit more discretion, it might make things a bit easier.

Pauline McNeill: I have a quick question to help me understand a point about the case involving the 21-year-old that you mentioned, Joanne. You said that social work finished at 5.30; did that mean that that person was at a disadvantage?

Joanne McMillan: Yes.

Pauline McNeill: Right. Obviously, we need to ask social work what is going on there. Do you have you any ideas? There is a potential human rights issue here. The courts run until 7 in the evening. If someone is taken at 2 in the afternoon and gets the benefit of social work, and someone else is taken at 5.30 and does not, that is a clear omission of the system.

Joanne McMillan: Yes, and I definitely think that that is down to resources, not individuals. People are doing their best in difficult circumstances and they are working really hard—I do not take that away from them in the slightest. It is the system. For example, they need to be there until the last custody is dealt with. If that means that their shift should not start until 2 o'clock in the afternoon so that they are able to stay later, that might need to be the case. They should not be expected to come in first thing in the morning and stay all day if they are not getting paid, getting overtime or getting the resources for that. I am not suggesting that that is the case.

I definitely think that clients can be at a disadvantage. It is often the cases of the younger people—the young, vulnerable kids who need additional supports—that are later on in the day, and which the Crown takes a bit of time to mark, particularly if there are petitions and the issues are more serious.

The Convener: We are into the last 15 minutes or so for this item. A couple of members still want to come in. I will bring in Rona, then Katy.

Rona Mackay (Strathkelvin and Bearsden) (SNP): I have two questions. The first goes back to section 23D and my colleagues' earlier questions. I will be frank: I do not think that your explanation for the removal of section 23D, on which you are unanimously agreed, will reassure women's organisations or victims. I understand what you are saying about the whole-system approach. That is fine if it works, but that is a big if.

I cannot quite grasp your point. Are you saying that you want to have the ability to release a domestic abuser? Why would that ever be correct? I cannot understand that. It is possible that I do not understand your reasons. Why not keep the exceptions to reassure victims and organisations? I am unsure of your reasons for not doing that.

Fred Mackintosh: I can answer that. The first thing to remember is that section 23D applies to all categories of cases. That means that, as a matter of definition, from the point of view of the sheriff, they are not releasing a domestic abuser; they are releasing someone who is accused of being a domestic abuser. I appreciate that, on the law of averages, they may well be guilty. It is important to remember that section 23D applies in a wide group of other circumstances.

The next thing to remember is that the cases are often being prosecuted at summary level. Therefore, at that level, unless there is a bail aggravation, in which case they will get remanded anyway—with a bail aggravation and a previous conviction of domestic abuse, they will be remanded anyway—they will be looking at a maximum 12-month sentence, and, of course, we are trying to discourage those.

There are well-resourced and intelligent community-based programmes for people who are convicted of domestic abuse. If we are going to remand people, we are not remanding them as a sort of pre-payment on punishment; we are remanding them purely to protect the public. The question whether the public—largely, the person who is accusing someone—needs to be protected is the sort of decision that sheriffs are already very good at making.

In the summary case example that Stuart gave of a 45-year-old with three or four previous convictions for domestic abuse in recent years, I would say that they are almost certain to be remanded. Section 23D also applies to a person who has a previous conviction, on indictment, for violence committed when they were 19—perhaps for thuggish behaviour—who is now 45 and nothing has happened in between. I would suggest that if someone were accused on summary complaint of domestic abuse at the age of 45 with one previous conviction when they were 19, and there has been nothing in between, that is a good work record. They would not necessarily get remanded were it not for section 23D. If section 23D is arbitrary, we should avoid that in the law.

There was a time when we had a whole-system approach to domestic abuse prosecutions. When it started in a big way in the period from 2005 to 2007, ministers, the Lord Advocate and the police were very keen on pushing those through quickly. I would suggest that the quicker it goes, the less chance there is that the wheels will come off bail.

Yes, the change will create anxiety, but I suggest that we should try to reassure people rather than have an arbitrary rule in our system. We got rid of the arbitrary rule, for example, that murder was never a bailable offence because arbitrary rules are a bad idea.

That is my answer. I am not sure that it will satisfy you, though.

Rona Mackay: I understand what you are saying, but, if I take that back to perception and to a very simplistic level, that is not how victims of domestic abuse or women's organisations will see it, because it still gives the impression that it will be easier for alleged perpetrators to get out on bail.

Fred Mackintosh: It is worth members of the committee remembering why section 23D came about in the first place. The press reports are still online. There was a distressing incident in Livingston, which you can find out about, where someone had been released on bail and they then committed a serious crime. I cannot remember which crime it was, but it was very serious and had a sexual nature. The then First Minister Jack McConnell stepped up and insisted that the law be changed, and the whole of the bail regime and the section 23 provisions were changed on the back of that.

It could be the case—this is a matter for the committee, not the faculty—that those hard cases make bad law and that, in retrospect, that was perhaps a knee-jerk reaction by the legislature and the Government. Ultimately, you, as a committee and a Parliament, have to perform a balancing act. All that we are saying is that, in almost all cases, the decisions that you are worried about probably would have been made anyway without section 23D.

Rona Mackay: So, individual risk would be taken into consideration just as much as public risk.

Fred Mackintosh: Yes. Sheriffs are very reactive on domestic abuse. There is an old statistic. I cannot remember how many times people are supposed to have carried out an act of domestic abuse before someone reports it, but

that statistic is academically well respected, if not relevant in individual cases.

Sheriffs are very live to the fact that an offence probably did not come out of the blue, shall we say. If people have previous allegations against them, or they have previously breached bail, failed to comply with court orders, driven without insurance or done things that show that they do not really care, sheriffs are pretty firm. I would hope that the matter will be managed by applying the rest of the system. If you change the rest of the system, that is a different point, but section 23D is probably an unnecessary overreaction.

Rona Mackay: I am conscious of the time, but I have one other question and, rather than ask everybody to respond, I will ask Joanne McMillan to do so.

It is currently estimated that, at any one time, 30 per cent of the female prison population in Scotland is on remand. To me, that is a huge number. Some 54 per cent of them lose their tenancies, 61 per cent have children, and there are huge knock-on effects for families.

Joanne McMillan talked about a case in which the woman went to the 218 project, which is very successful. In your opinion, why does that not happen more often? Is it because of a lack of resources?

Joanne McMillan: It is probably because of a combination of things, including a lack of resources. It can sometimes be quite difficult to get clients motivated to go into those places, but there are fantastic benefits to them.

Rona Mackay: Are all sheriffs aware of those options?

Joanne McMillan: Yes—certainly in Glasgow. I am not sure about outside of Glasgow, as the 218 is a Glasgow programme. That took a bit of work to get it done. I phoned the 218 project and spoke to social workers, and that continued overnight. All sorts of things were done so that support was put in place. Lengthy reports were prepared—there was all that sort of stuff.

Rona Mackay: Does it go down to individual solicitors such as you, who know about those things and will proactively look for them? Are there some who just say, “Well, this is the system. This is what happens. You will be remanded” or whatever?

Joanne McMillan: I would say that the majority of solicitors probably do it, because that is the nature of the job that we do. We want to help people. We do not get paid to do any of those extra things. I could quite easily just have gone in and said, “These are our positions for bail,” but I did not. I spoke to the 218 project, the social workers and the client, and did all of that. That is because, inherently as a profession, we want the best for our clients. We want to see them rehabilitated and to see them improve their circumstances.

Rona Mackay: There would be fewer women on remand if more people were able to go to those things.

Joanne McMillan: Absolutely. If that was rolled out across the country in every court—maybe not even in every court but in every sheriffdom—those organisations that, in essence, people are bailed to would be in place. That approach provides a more caring and nurturing environment, as opposed to locking people up in Cornton Vale and putting them in—

Rona Mackay: We know about the serious rates of mental health and addiction problems for domestic abuse victims.

Joanne McMillan: Absolutely.

Rona Mackay: That is fine. Thank you.

The Convener: I will bring in Katy Clark and then Collette Stevenson. I ask people to watch the time.

Katy Clark (West Scotland) (Lab): I have two questions, if that is okay, convener. The first is on the public safety test in the bill. As we know, that is simply not defined, which could cause a great deal of problems. Have you given any thought to how that test could be defined? If we were to keep it in the bill, how could we define it? I may be putting you on the spot too much now, so I would be quite happy to hear from you afterwards in writing.

Fred Mackintosh: I do not think that the Faculty of Advocates has a view on how that should be defined. Probably the most powerful comment is that of the Lord Justice General in his response. Ultimately, if the current test is Smith v M—as set out there, and it has not changed, despite the change in 2007—it is probably incumbent on the Scottish ministers to explain what they are trying to change.

I can see an advantage, if you want to reduce numbers, in removing the consideration of how long the sentence will be as a factor. Beyond that, it is quite difficult, because it is quite a holistic process. Certain policies will reduce numbers. To take a previous comment, section 23D will reduce the numbers of female and male prisoners on remand because, in effect, it applies to both. However, beyond not taking account of the likely length of a sentence, nothing immediately springs to mind. I would be interested to know what the ministers say, if you ask them.

Katy Clark: Thank you for that. Does Joanne McMillan have any thoughts on that?

Joanne McMillan: I simply agree with Fred Mackintosh on that.

Katy Clark: I do not know whether the Law Society of Scotland would like to come in on that. It might be something to consider after today. Do you have any initial thoughts?

Stuart Munro: Likewise, I think that the Lord Justice General put it well in the senatorial response. If the concept of public safety is to mean the protection of the public from any offending behaviour, the outcome regarding remand in custody may be little different from at present. If, on the other hand, it is to be understood as to refer to safety in the ordinary sense—like freedom from injury, danger or risk—many offenders who appear in the summary courts charged with things such as theft and who pose a substantial risk of continuing to offend while awaiting trial will require to be released on bail. I think that it is for ministers or for Parliament to determine what they want the provision to mean. It is then for the lawyers to try to implement that.

Katy Clark: I think that the problem is that we might end up in the same place, but there might be a lot of appeals before we end up in that place.

Stuart Munro: An awful lot of time and money could be spent getting to exactly where we are already.

Katy Clark: Thank you.

My second question is about virtual custodies, which is an issue that we have been discussing over an extended period. The Scottish Government might come forward with firm proposals on that at a later date. Given what Joanne McMillan said and expressed so clearly about the importance of discussions—of speaking to all the parties, including the police, the social workers and the procurator fiscal—and the value of face-to-face discussion and talking, what are the circumstances in which you think that virtual custodies would work?

I will start with Joanne McMillan, because she has been talking about some of that.

Joanne McMillan: I think that virtual custodies should really be the exception. I was never a fan of virtual custodies, and I do not think that many practitioners were great fans of them. The difficulty is that they take the human aspect out of your job. As Stuart Munro said at the beginning, we deal with vulnerable individuals who have mental health difficulties. Often, we are the only professional person in their life whom they trust. On a two-minute phone call, you cannot see them, they are often upset, and you cannot reassure them. Social workers then cannot go and see them to get a kind of vibe from their presentation and see how they are. If all of that is done over the phone, it totally takes away the human aspect of it, and it would be detrimental.

10:45

There are benefits of virtual custodies. There are situations in which people are brought up to answer warrants from places down south. You can wait until 8 o'clock at night for them to eventually appear, and then bail is okay. It could be something for which they could have easily been logged on to the police station down south for them to appear remotely and be dealt with.

There are exceptions, and there is certainly a benefit for cross-border things that are not contentious or are fairly straightforward, and we would not have to expend resources such as the cost involved of the police holding people, bringing them up, and all the things that are involved with that. However, for run-of-the-mill custodies, for the majority of folk who are vulnerable, I am not a fan of virtual custodies.

Katy Clark: When somebody is already in custody for something else so that there is no possibility that they would be getting released anyway, is that perhaps an example of an exception?

Joanne McMillan: They would not be in a police station if they were already in custody for something else. People are usually brought directly from the prison to the court to be dealt with. There might be circumstances in which it is not a custody appearance—it is just a regular appearance in court. It might be that full commits are done by videolink. That is when they first appear; they then appear for full committal a week later, and that is done by videolink. There are some benefits to those things but, overall, for the first appearance, it is very important that people are present.

Katy Clark: I appreciate that we are running out of time. Is Stuart Munro able to add anything to that?

Stuart Munro: Virtual custodies are a complex issue, and they require a bit of time for representations and consideration to be given. A range of aspects comes into this. One is the reality of the experience of accused people of being taken from a police station, where they are in a cell on their own, put into what is often very poor accommodation at the back of a court, where they may be sharing with seven or eight other people, and held there for hours and hours with very limited access to anybody. The question whether you can do that virtually really comes down to what virtual custodies mean in practice.

I completely agree with Joanne McMillan that the idea that you can do that over a phone call is nonsensical. Technologies are available—high-quality videoconferencing—that can minimise the limitations that come from having a consultation with somebody with a screen in the way. For virtual custodies to work—they may have a place—it will require the right technology, the right resources, very careful planning and implementation, and the ability to ensure that we can still engage with folk such as the bail supervision people, the Crown and so on. Fundamentally, it must be ensured that the accused person is able to participate effectively and effectively communicate with those whom they need to communicate with, including their solicitor. That is a very difficult thing to achieve. It is not impossible—the Law Society does not think that it is necessarily impossible—but it is very difficult, and the virtual custody tests that we have had so far have not come close.

Katy Clark: I do not know whether the Faculty of Advocates—

Fred Mackintosh: I agree with everything that Stuart Munro has just said. It makes perfect sense. You are here in a room, and there is a reason why you are here. I suspect that the reason is the same. You can do things remotely; it just requires lots of thought.

Collette Stevenson (East Kilbride) (SNP): I have just one question, which relates to the reasons for refusing bail. The bill looks to expand the current requirement for a court to state and record the reasons for refusing bail. Do you think that that will be helpful?

Stuart Munro: Yes, that absolutely is helpful. Ultimately, if a court is taking away somebody's liberty, with all the implications that that has, it does not seem too much to expect that some careful reasoning for that will be recorded. I do not think that there is any practical difficulty with why that cannot be captured in writing as well as given orally. So, yes, I think that that would be helpful.

Joanne McMillan: My view slightly differs from those of Stuart Munro and Fred Mackintosh. If you are appearing in court and the sheriff refuses bail, the sheriff will address the client directly and say, "These are the reasons why I am remanding you in custody." I am of the view that it is not necessary to provide a written explanation unless an appeal is being put in. If I were to mark a bail appeal, a sheriff would then provide a report. At that point, it would be helpful to have written reasons provided. Sheriffs are under a bit of pressure with their workload. It would probably be an unnecessary step for a sheriff to give written reasons for every decision when the decision will potentially not be challenged further.

Collette Stevenson: Okay. That is interesting.

The Convener: For the record, the Crown is coming in next week to give evidence. Some of our discussion today has referenced that organisation. It will be interesting to hear some of its commentary.

Before I bring the session to a close, we have not really had a chance to cover part 2 of the bill. Our second panel of witnesses, who have joined us in the public gallery of the committee room this morning, may be interested in that. Before we finish, I would like to ask whether you have any specific views on part 2 of the bill in respect of release from prison—particularly Friday releases, the power to release early, and the key issue of release planning. I will do things in reverse order. I will bring in Stuart Munro first. I will then come to Joanne McMillan, and I will finish with Fred Mackintosh.

Stuart Munro: The Law Society agrees with much of what is set out in the bill. It is the same position at the other end as that on bail supervision. Decisions about remanding in custody have to be made on an as informed a basis as possible. Equally, letting somebody out of the prison environment should be done with as much planning and care as possible. The Families Outside written submission is particularly interesting in that respect.

Ultimately, there is nothing worse than vulnerable people who have been disconnected from society for a period being turfed out of prison, not having anywhere to stay when they go back, and not having any way in which to access services. All that that is likely to achieve is to put their rehabilitation at risk, there will be a risk of further offending, and the cycle will begin again. It is really important that planning takes place, and there is a huge social benefit in that. The bill's objectives in that respect are to be commended.

The Convener: Thank you.

Joanne McMillan: Not releasing prisoners on a Friday is a great idea. If people who get out of prison late on a Friday have no accommodation and need to get prescriptions—they are often on methadone or other substitutes—but nothing is available to them and nobody is working over the weekend, it is only a matter of time before the phone goes and they are back in custody. There is definitely value in their being released on a Thursday or earlier in the week and that not being done on a Friday.

My colleague Lorna Clark specialises in parole matters and deals with a lot of parole cases, so I discussed the reintegration licence with her. Ultimately, there is already in place the home detention curfew, which allows individuals to be released on a reintegration licence 180 days prior

to their parole qualifying date. However, the difficulty in practice seems to be that the start of the parole process—individuals getting their dossier from the prison and a hearing being fixed—is not happening until at least eight to 10 weeks prior to the parole qualifying date. At that point, the case needs to go to the Parole Board of Scotland, which then needs to make a decision on it. It has right up until the last minute to make a decision. It can make the decision a couple or so weeks before, or even after, the parole qualifying date.

If that were to be put into practice, and if the reintegration licence prior to release on parole were to be encouraged, how it operates would have to change overall in order to ensure that people are given the opportunity and that parole decisions are not being made at the last minute so as to ensure that there is a benefit and an opportunity to utilise it.

Again, it comes down to resources. It also comes down to the coursework in prisons. There are already considerable backlogs with the coursework being done in the prisons. That is a major issue as well, and it needs to be addressed if all those things are going to come together and come into play in the model way in which they should. There are other, bigger issues that require to be addressed if all those things are to work.

Fred Mackintosh: I agree with Joanne McMillan and Stuart Munro.

I will end with a little plea. The Prisoners and Criminal Proceedings (Scotland) Act 1993 is an extremely badly drafted piece of legislation. It is said by those who practise in the field that, if you think that you understand the 1993 act, you do not understand the 1993 act. There is a wee plea in paragraph 15 of the faculty's response: will you please rename the sections so that they actually describe what they do? They are not clear. If I, as someone who litigates in the inner house and challenges the Parole Board for Scotland, find it hard to remember what sections do because what they do is not even described within them, how on earth will someone who is trying to understand the law that will apply to their family member or a victim who is trying to understand the law? If there is anything that you could do just to make that part of the 1993 act a little more user friendly, you would be doing a great task.

The Convener: On that plea from our colleagues, I thank you all for your attendance. It has been a very interesting session. We will have a very short suspension to allow our witnesses to leave.

10:55

Meeting suspended.

11:00

On resuming—

The Convener: Our second panel consists of former sheriff David Mackie of Howard League Scotland; Professor Nancy Loucks, chief executive officer at Families Outside; and Ms Wendy Sinclair-Gieben, His Majesty's chief inspector of prisons. I welcome you all. As with our first panel, I will move straight to questions, and I intend to allow about 60 to 80 minutes for this panel.

I will start with a general opening question on part 2, which relates to release from custody. I will come to Wendy Sinclair-Gieben first, then Professor Loucks and then David Mackie. With the aim of supporting the successful reintegration of prisoners into the community, the bill includes provisions on release planning and standards of throughcare support. Are the proposals helpful, and would you like to see any changes in the provisions?

Wendy, over to you.

Wendy Sinclair-Gieben (His Majesty's Chief Inspector of Prisons for Scotland): The proposals are helpful. I have long been of the opinion that discharge planning, if you like, should follow a healthcare model, in the sense that, the minute someone goes into hospital is when you start the discharge planning. Someone might be in hospital for a long time, but managing the discharge starts on day 1. Having the bill as back-up in looking at discharge planning will have considerable benefits in changing behaviours in how we manage such planning in Scotland.

I have some doubts about the efficacy of even earlier release. That would need to be operationalised before I could comment further on that aspect of the bill. However, the fact that the bill looks at the issue for the first time is appreciated and welcome.

Professor Nancy Loucks OBE (Families Outside): I agree that the bill is very helpful in that regard, and it spells out some of the considerations that need to be made in preparation for release. I agree completely with Wendy Sinclair-Gieben about the need to plan for release from day 1. One of the previous witnesses spoke about access to courses that are required for release, and one of the questions that we have at Families Outside is about the necessity sometimes for people to move from their local prison to prisons that are further away, which can damage family contact at a time when they need it most. Is there an option to look at other opportunities, such as peripatetic services, where the courses travel around to the different prisons rather than requiring people to move? There could also be consideration of the cost involved for

families in trying to maintain contact when someone is in a prison much further away.

Some additions could be made to the bill. Broadly, in part 2 and in the previous part, there could be more recognition of the impact on families at the point of remand and at release. There needs to be more in the bill on support for, and involvement and consideration of, families. There could also be more reference to the role of the third sector in providing such services, because it provides a huge amount of input throughout remand and sentence, and certainly on release. That is not really included or specified, so that would be useful.

David Mackie (Howard League Scotland): I agree with everything that has been said, and I agree strongly that any throughcare provisions should be strengthened and, in a sense, replaced. They were there before, and the notion that the Scottish Prison Service would have responsibilities following the transfer to local authorities is a constructive approach.

We should not lose sight of the importance of third sector organisations in this area, especially organisations that can offer close mentoring support, because it is that sort of close support in the first hours, nights and days that matters most. In the current economic climate, the funding of those organisations, some of which are very small, is an issue, and some of them face existential problems because of funding. I do not have the answer; I am just raising the importance of third sector organisations in the work of helping people to reintegrate into the community.

The Convener: We recently visited a third sector organisation that supports individuals who are at the point of leaving prison. What came across very strongly to me was the issue of timing and the value that seems to be placed on the likes of third sector organisations being able almost to insert themselves into prison prior to an individual walking out of the gates. I found that very powerful; the organisations are catching somebody, as it were, before they walk out of the prison and potentially become lost to services or difficult to engage with. That made complete sense to me, and I would like to explore your views on that a little bit more.

I will come to Nancy Loucks first.

Professor Loucks: The reason why that is critical is that building relationships and establishing some sort of trust prior to people's release is essential if they are going to engage after release. I would like to see recognition that some people who go to prison may already be working with third sector organisations—they may already have key workers, for example—but that gets lost as soon as they enter prison. The third sector organisations might suddenly have someone not turning up for appointments, for example, and they may not know why, because they are not told that the person is in prison. Ideally, it is about making sure that people can maintain or continue that relationship, where it already exists, and make use of that type of provision. We can certainly act more creatively on that.

The throughcare support officers that the Prison Service had until a couple of years ago were highly valued because, again, they were in prison and establishing those relationships from the beginning. It was also very enlightening and rewarding for the prison staff to see a different side and to see the challenges that people face when they are released from prison. It was a real loss when that service was suspended.

There are a number of ways of going about this, but it is essential to have that support prior to release and to continue it in the community.

Wendy Sinclair-Gieben: I cannot say strongly enough how much I support that. The reality is that a combined effort is needed. Having throughcare support officers who build relationships with prison staff is excellent. That cannot replace, and must be seen as an adjunct to, community support. At the end of the day, the most important thing is that another victim is not formed when that person leaves prison. The victims need to know that, while a person is in prison, the issues that caused them to commit the crime or to tangle with the police in the first place are being addressed. If support is needed to find housing for people, reduce their legal commitments or sort out their debt, health or addiction problems, which will prevent the next victim, that is what we should be doing. I think that victims would accept that.

David Mackie: I agree with everything that has been said. I will add that thinking about the exit from prison and the throughcare arrangements at the point of exit is too late. The thinking about and planning for leaving prison should start pretty much as soon as the sentence is imposed. In court, I have said to people whom I have sentenced, before they have left the dock, that they might be feeling pretty shell-shocked and down at that moment but that I would like them to turn their mind to their leaving prison in however many months it might be.

I support very strongly the concept of mentoring, and especially peer mentoring, by life-experienced mentors. That is the sort of third sector organisation that I had in mind in my previous answer. If you take the concept of mentoring to its logical conclusion, the mentor should meet the person as they leave the dock and accompany them throughout their prison journey, planning

their time in prison, making best use of it and preparing them for their exit.

Otherwise, I have nothing to add to what has already been said by the other witnesses.

The Convener: Thanks very much. I am sure that there will be more questions on that topic.

Collette Stevenson: Good morning. I will touch on the issue of release on licence for long-term prisoners. As an independent prison monitor, Wendy Sinclair-Gieben will know that one of the biggest issues is progression through a long-term sentence. One of the stark stats is that the open prison is being utilised at only 52 per cent or something at the moment. The bill will remove the home detention curfew and introduce a reintegration licence, and there will be a new system of temporary release. In relation to temporary release, the situation in the open prison does not bode well, does it?

Wendy Sinclair-Gieben: There are two things. One is that we are ignoring 25 per cent of the prison population, which is those on remand. That is a significant concern for me. While people are on remand, we are not tackling any—or we are tackling very few—of the criminogenic factors that led them to commit the crime, or potentially commit the crime, in the first place. That does not affect progression.

One of the top two complaints to us—or the top two requests for independent prison monitoring—is around progression, which is about the prisoner journey and what happens to them from when they are convicted. There are various hoops that they have to jump through and various assessments that go on before they can reach the open estate or release, depending on the length of sentence. The progression system has not worked and is still not working post-Covid. It requires significant effort to make it work. People are waiting for significant periods to progress to the next stage, even though they have been cleared for the next stage.

To give the SPS its due, there has been a 25 per cent increase in the number of people going to the open estate. Work is progressing, but the open estate is still very much underutilised. It is a fantastic resource for testing people in the community before they are finally released. I agree with you that it is vital to get the prisoner journey right and to get them through the system so that they can be tested and properly assessed to ensure that their risk is reduced on release. Currently, that is not working efficiently.

Professor Loucks: I do not get the impression that you are going to get a lot of disagreement on the panel. I echo what Wendy Sinclair-Gieben said. I reiterate the role of families in all this. We know that, for people who maintain positive relationships with their family, their risk of reoffending is reduced by up to six times. A lot of that is for very logical reasons: they are more likely to have a place to live when they get out, and they are more likely to have social and financial support, links to employment and so on. It is about recognising the role of families throughout remand and sentence and release.

It is also about the family's journey. Families tend to be absent from that process quite a lot, particularly with things such as parole and licence conditions—they are not included in that conversation yet. If someone is restricted in where they can live or work, that will have an impact on the family as well. I am keen for that to be recognised, included and supported, so that families can take part along the way. Some of that might be families who are the victims of the offence and are very worried about what happens on release. It is about recognising that and being able to factor that in to the planning.

Collette Stevenson: David, do you want to come in?

David Mackie: Very briefly, because there is nothing that I can usefully add to what my fellow witnesses have said; they have greater expertise in that area than I do.

To pick up on what the chief inspector said about progression, there is a huge emphasis on prisoners achieving results in the existing scheme. I encourage the notion that other ways might be found of measuring their preparedness for return to the community rather than focusing on the courses that they are currently required to complete before progression takes place.

11:15

Collette Stevenson: I want to come back in on the rehabilitation courses, which are intended to reduce reoffending when people come back out into the community. We know that it is hard for them to get on to such courses and to progress through them, but do you think that the courses work in reassuring victims and the community? When people go through into reintegration, should there be an overlap whereby such courses continue?

Wendy Sinclair-Gieben: Interestingly, a considerable body of research on this has shown that the likelihood of reoffending is reduced by doing the accredited offending behaviour courses. There are also a whole pile of courses under "What Else Works?". That includes the Sycamore Tree restorative justice programme, which is run by the chaplaincy. Those courses have not been researched and accredited in the same way, but the accredited offending behaviour courses

definitely have a positive impact and therefore need to be considered.

Like David Mackie, I firmly believe that other things need to be considered. Whether you have sorted out the family relationship, the accommodation, the addiction issues, the outstanding warrants and the behaviours that have gone on before are all things that need to be looked at in addition to the offending behaviour programmes. Reliance on offending behaviour programmes, when there is a waiting list for them, simply builds frustration.

The Convener: David, do you want to comment on that?

David Mackie: No—there is nothing that I can usefully add.

Professor Loucks: It is worth reiterating Wendy Sinclair-Gieben's point that the offending behaviour courses are very useful, but they focus on the behaviour of the individual, not the context that they go back out to. In a situation where there are long-standing issues such as mental ill-health, substance misuse, lack of housing and lack of employment, those are structural features. Also, the stigma of a prison sentence and having a prison record will not help people to resettle on release. Those are broader factors that we have to recognise, address and support.

In relation to providing support for people who are on remand, one of the issues at the moment is that they do not have access to offending behaviour courses. They have not been convicted, so that makes perfect sense. However, they could access support with housing, mental health and substance misuse issues, whether they are found guilty or not. The report that Families Outside produced recently on the financial impact of imprisonment showed that people are not accessing benefits when they come out from prison and that it can take weeks, months and sometimes up to a year to have their benefits reinstated. That does not set them up well to be able to resist reoffending.

Russell Findlay: Good morning. David Mackie, I was struck by your written submission. On page 25, you say:

"This is an opportunity to challenge the entrenched practices of some members of the judiciary who appear to accept the Crown's opposition to bail applications too readily".

On page 24, you say that, if this bill is enacted:

"We would suggest that significant cultural change—particularly amongst some parts of the Crown and judiciary—will be required for these changes to take effect".

You are a former sheriff, so you come to this with that perspective. Can you expand a bit on the cultural blockages and issues that exist and the direction of travel? Are they less prevalent than they used to be? I do not want to surmise or put words in your mouth.

David Mackie: I need to preface my answer by explaining that I am retired from being a full-time sheriff, but I still sit part time as a retired sheriff, and I have been helping out with a lot of the backlog that developed during the pandemic. I will not sit again until after April, but I am still a sitting sheriff. Secondly, I am not here to represent the judiciary in any way. My primary purpose here is as the chair of Howard League Scotland, but, of course, I bring with me my personal experience as a sheriff working in this field. Anything that I say is entirely my own view. The last thing that I will say is this: do not think that I am a typical sheriff. I am not sure whether there is such a thing. I may not be representative of all sheriffs, but I hope that I am representative of a growing number.

The observations in the Howard League Scotland response really relate to the practice around the opposition to bail by the Crown and decisions on bail by sheriffs. There is a perception that, at the marking stage, decisions to oppose bail are made almost routinely. I do not have statistics to back this up, but, in my experience, the most common ground for opposing bail is the likelihood of further offending, and, in support of that, a schedule of previous convictions is presented. One would be forgiven for forming the impression that a decision to oppose bail is made simply because of the existence of a schedule of previous convictions. It is an often fallacious assumption that the existence of previous convictions suggests a risk of further offending. If that forms the basis of opposition to bail, the sheriff is often in the position of having to make that important decision on liberty with incomplete information. That might be the only official information that sheriffs are given. They are then reliant on submissions from the accused person's solicitor in opposition.

We may come to it in another question, but I cannot emphasise strongly enough the importance of the sheriff's having information. Whether it takes the form of a formal risk assessment is, to my mind, of less importance than simply having information about the accused person's circumstances, because, when one looks behind the schedule of previous convictions, one often finds that, in this world, which is not divided conveniently into those who commit offences and their victims, that person may themselves have had a traumatic background and been the victim of offending. The person may be on a community payback order already or may just have got their first house in five years, and that will be their anchor for progression back into the community. Those sorts of factors do not emerge unless somebody tells the sheriff.

In the court that I had the privilege of serving for 15 years in Alloa, I often had the benefit of a supervised bail scheme and a social worker in court who could have a 10-minute interview with the accused person and provide one-and-a-half pages of invaluable information, with that sort of background. Sometimes the social worker recognised the person, or else might have known the person well. There are frequent offenders who come before the court many times, and the social worker might know that, last week, an updated criminal justice social work report was prepared for that person, and that would be drawn down and made available to me in court. It does not take too much to open up access to significant, important information that would assist the sheriff in making decisions, but, in a busy custody court, it takes a degree of resilience for a sheriff, in the absence of additional information and good advocacy, to keep saying no to the Crown when an apparently unassailable case is being advanced that the person is liable to commit further offences.

In so far as the cultural change is concerned, that is really a nod in the direction of everybody who is involved in the criminal justice system, especially decision makers such as sheriffs, of the importance of being trauma-aware and to realise that the vast majority of people who appear in front of them are there as a consequence of their life circumstances and not so much because they are bad people, that the problem that has brought them there may not be addressed or solved by custody and that, in fact, custody may make the matter worse, and that they should take the trouble to learn from people such as the witnesses whom you heard from last week, Professor Fergus McNeill, Dr Hannah Graham and Professor Lesley McAra, and Professor Cyrus Tata in Glasgow. There may be colleagues of mine who do not know who those people are, but, if we do not engage with criminologists and learn as we go, we will not be sufficiently informed to make the important decisions—decisions that might be right in law and be unassailable on appeal but are wrong for the person.

Russell Findlay: Thank you. I do not know whether either of the other witnesses would like to come in on that, but I have another question if they do not.

Victim Support Scotland told us that it is inevitable that the more people who get bail, the more offences will be committed. We know that one in eight crimes are committed by those who are on bail and that 23 per cent of bail orders were breached, so it seems logical that the more people who are bailed, the more crime there will be, the more work there will be for the police, and, perhaps, the busier the courts will become. Without fixing the bigger issue of support and investment in criminal justice social work to stop reoffending, therefore, the bill might fuel bail, fuel crime and make things worse. Do you have any view on that?

David Mackie: I completely disagree with that. It is the wrong approach. Our starting point should be "What is prison for? What is custody for?", and the bill points us in the right direction: it is for the protection of public safety. How we use prison and how many people are imprisoned is more of a sociopolitical choice that we make as a society.

The question touches on the risk appetite of our community. I met a Finnish judge at a time when Finland was imprisoning people at the rate of something like 42 per 100,000, while we were at about 150 per 100,000—we have come down to 135 or thereabouts now—and I said to him, "Are we really that much less law-abiding in Scotland than you are in Finland? Are we badder people in Scotland than you are in Finland?". He said, "No, I do not think so". I asked him, "How come you can keep the prison population so low?", and he said, "Well, it is a decision that we have made". His answer was, "It is quite hard on the rest of us, but that is what we have decided to do".

Decades ago, we, as a society, made a decision in relation to mental health to do away with large residential institutions and move to care in the community. That was a risk that society was prepared to take and tolerate at that time. The same issue arises in relation to offending. I repeat that the vast majority of people who are in the cohort that we are talking about fall into that category. They have experienced trauma, and they might have been victims of crime themselves. They might have had adverse childhood experiences, and I do not need to tell people on the committee the significance of that, which is that having two or more such experiences is likely to lead people into the criminal justice system. It is about recognising that the solution does not lie in prison and that prison might make the matter worse.

The way to reduce crime and offending to address the needs of the people who are committing the offences is to address those needs. Drug treatment and testing orders provide a good and graphic example of how that works, the obvious proposition being that, if someone is committing crime to acquire funds to feed their habit, you will address the crime by addressing the habit. That principle can apply beyond the realm of drug addiction, taking you into the realm of community justice, community-based disposals and the extent to which services can be provided to support people away from an offending lifestyle.

It is too simplistic to suggest that, if there are more people who are not remanded in custody, there will be more crime. I disagree because of the research. I cannot quote it, and I cannot direct you

to it, but I listen to people such as Professor McNeill and Hannah Graham. We know from them that even a short period in custody—perhaps particularly a short period—can be so disruptive and damaging that it increases the likelihood of offending on exit. I think that the proposition that supports the suggestion that you made is fallacious for that reason.

11:30

Professor Loucks: If I may add to that quickly. At the end of your question, you mentioned the need to increase supports and so on from social work. I agree: that answers a lot of that question. At the moment, there is a tendency to use bail as a waiting period prior to the trial, but also as a period of supervision without the support that is required to address the issues that caused the offence in the first place. At the moment, throughout Scotland, the availability of that support is very patchy. This recognises the fact that that support is not consistently available throughout the country, whether that is due to cuts to local authority funding, cuts to third sector funding or whatever issues there might be. Also, it goes back to the earlier question about the decision for judges to use remand or bail, because they need to know what support is available in their community. If that support is not there, the confidence to use non-custodial options will be reduced as well. Also, it recognises that, when a decision is made to remand someone rather than use bail, the family is impacted as well. The family has not committed an offence, but it is punished. That longer-term impact on the family is something that also needs to be taken into account.

Russell Findlay: Indeed. Thank you.

The Convener: I have a number of members who want to come in. I will come back to you, Russell, but first I will bring in Rona Mackay and then Pauline McNeill.

Rona Mackay: Good morning. I have three questions—one for each of you. Professor Loucks, you mentioned your organisation's excellent and very detailed report on the cost to families of imprisonment and release. We do not have time to delve into the report, obviously, but what is its key message?

Professor Loucks: It is about ensuring that we recognise the impact and try to reduce it. The expense to families of trying to maintain contact, particularly at remand and release, can be up to half their income. To reduce the expense for families, ideally, people should not be put in prison in the first place, but, if they are put in prison, they should be placed someplace accessible that families can travel to. The travel costs should be supported, recognising that the families are not guilty. Again, as I mentioned earlier, it is important to ensure that people have access to benefits from the point of release, rather than having to wait.

Rona Mackay: Do you think that they are getting enough information about that?

Professor Loucks: The issue is about having the information and the practice recognised and firmly in place. At the moment, the legislation does not preclude that from happening, but it just does not happen in practice. It is something that is absolutely critical, however, because the burden is falling on families to support people on release.

Rona Mackay: David Mackie, what is your view on the removal of section 23D? Are women's organisations and victims right to be concerned about that? I presume that you heard the earlier session, where it was unanimously agreed that it should be removed. I still cannot get my head around that, but maybe you can give me your view.

David Mackie: I support the removal of section 23D. The fundamental principles around which decisions on bail are made are not changed. The provisions in the bill provide sheriffs and judges with all the discretion that they need to address the concerns of victims. Victims' concerns and the recognition of a risk of harm to complainers are uppermost in decisions on bail. I would have liked to see the expression "intimate partners" somewhere in the bill as a recognition of that particular concern. The public, in my view, are adequately addressed.

Again, when one turns to the actual process of a decision being made, more important than the terms of the legislation is the information that is available to the person making the decision and the accuracy of that information. The concerns of a victim in a situation of domestic abuse or violence are more important than the precise terms of the legislation. There was an appeal decision, not long after section 23D was introduced, which made the point that the principles—even those relating to 23D—were no different from the principles applying to decisions on bail generally. However, section 23D placed an emphasis on serious offences and repeat serious offences.

Without diminishing the extent of the concerns, especially those relating to domestic violence, I think that those concerns are misplaced. There can still be trust that good decisions will be made, as long as the best information and the best advocacy is available to those who are making them.

Rona Mackay: From a non-legal point of view, I ask: why remove them anyway? What is the point? It does not send out a good message to non-legal people. From what I have heard this morning, if someone asked me why those

provisions were taken out, I am not entirely sure that I could convince them why that was done.

The KC who was here referred to a case in Livingston and the introduction of section 23D in 2005. It was a horrific case—you might remember it. The person who was released went on to kill an 11-year-old boy and then hanged himself. He had been given bail, and the case was so shocking that the then First Minister decided that we needed to do something about it. I am unclear why those provisions are being removed.

David Mackie: I cannot comment on that case, and especially on whether the presence or otherwise of section 23D had a bearing on the decision to release the person on bail. In cases like that, one would need to know on what allegation the matter of bail was decided. It probably was not an allegation of attempted murder: it might have been a much lesser offence. That is why it is impossible for me to comment.

Rona Mackay: I understand that.

David Mackie: I do not have an entrenched view on this. What I am saying is that I have no concerns about section 23D being removed.

Rona Mackay: Okay. That is good to know.

David Mackie: I do not think that its removal makes a huge difference, to be honest—that is the corollary of the answer that I have just given. It may be that there is a recognition now that section 23D has become somewhat redundant in practice.

Rona Mackay: That is reassuring.

David Mackie: That is really what it boils down to.

Rona Mackay: Wendy Sinclair-Gieben, I have some questions for you. The number of women on remand is shockingly high—I do not need to tell you that—and the disruption to families that follows is evident. Why do you think that so many women are remanded for low-level offences? Why are they there in the first place? I do not know whether you heard the previous session, but we spoke to a solicitor who had dealt with a case where the person was directed to the 218 project in Glasgow, which is hugely successful. I put it to her that, if that happened more often, fewer women would be remanded. What is your view?

Wendy Sinclair-Gieben: I really wish that I could give you the answer. David is probably more qualified to answer that than I am. I have thought a lot about it. Why are all of the seven people under the age of 18 on remand when we have secure care available, with all the expertise and staffing that could start to tackle the issues of why they are on remand?

Why so many women? It is just too complex for me and certainly outwith my level of expertise. I can only give a personal answer, having looked at the academic research. I think that it is a combination of factors. Sheriffs may not have a good collection of alternatives, which is really important. They should have a menu, if you like, with supported bail as one of the options. It may be due to a backlog from Covid, with greater offending having occurred in the middle. It may be due to a lack of joined-up thinking and informed decision making. There may be insufficient diversions to stop people going to court in the first place, or it may be due to a risk-averse approach—I really do not know.

Currently, 70 per cent of women on remand do not go on to receive a custodial sentence, and there are six or seven women under the age of 18 on remand. Those two figures pose a question that needs to be answered.

Rona Mackay: David Mackie, would you like to comment briefly on that?

David Mackie: Yes. I cannot answer your question; I do not know why those decisions are being made. As of last night, the overall remand population had crept up to 29.25 per cent, if my arithmetic is correct, and, in the female estate, it was at 38.68 per cent. I know that you cannot take one day's figures and build on it, but there seems to be a creeping trend. When the Howard League Scotland report that you have in front of you was prepared, those figures were 27 per cent and, I think, 35 per cent.

Anyway, the question in relation to women may not be unique to women. The decisions on bail are probably made in the same way, but there is an exaggerated remand population in relation to women, and I am at a loss to understand how that can be. I shake my head in dismay at the fact that so many women are being remanded in custody, especially when we know that 70 per cent of them will not receive a custodial sentence for the offence, even if they are found guilty, and those people are innocent until found guilty.

In a sense, the issue comes back to comments that I made earlier about the appetite for risk. We have a presumption against custodial sentences under 12 months, which, as you probably know, is the custodial limit for summary offences, and it is in the summary criminal court that the vast majority of the cases that are most disruptive to society are dealt with. It is a mistake to call them the less serious cases, but the offences that can be disruptive to society and perhaps impact most on individuals, such as domestic abuse, public disorder, violence, the lesser drug offences and vandalism, are dealt with at that level. I am proud of the fact that we as a nation have made a statement that custody is no longer the default sentence for people who have committed offences at that level. The corollary of that must be that we

want to put in place the supports that people need to help them to move away from their offending lifestyle and to address their needs to achieve that.

In the particular world of bail and the immediacy of the decision that has to take place in the space of 24 hours, usually, of somebody being arrested, the unsung heroes are the criminal justice social workers. If we are serious about providing sheriffs and decision makers with additional information, they are the people who will do that. In the areas where a supervised bail scheme exists, measures are available for sheriffs to receive reports from social workers. I have explained what happened in my court in Alloa: it was invaluable.

I respectfully agree with the comments made by Professor McAra yesterday that, if we are taking the principle seriously to its logical conclusion, we ought to elevate our thinking to the formation of a custody and bail unit of criminal justice social workers whose task it is to prepare reports and, where possible, risk assessments and to address the immediate issues of housing and mental health assessments in cases where there might be a question of someone going to a hospital rather than a custody order being made. It is about creating a resource that will address the needs of those who are arrested. That sounds like a counsel of perfection, but there is no harm is setting our sights high in achieving that, because, in a perfect world, that is what we would have. All too often, people appearing—

The Convener: May I intervene at that point? We are enjoying and finding significant value in your comprehensive answers, but I am mindful of time, and I have four members who want to come in. I hate cutting you off.

David Mackie: No, not at all. I need that sometimes.

The Convener: Professor Loucks, would you like to respond?

11:45

Professor Loucks: Yes. As I said earlier, the patchiness of the support provision for people on bail is exacerbated, particularly in relation to women in the justice system. It is not cost effective for local authorities to have one or two places on supervised bail set aside for women, so they do not fund them at all. It means that those options are not available.

Women do not fit the local authority approach. It needs to be more collaborative to make sure that they have the support that they need. People in other parts of Scotland cannot refer to the 218 project, for example. That type of facility is not readily available in other parts of the country, so we really need to think about how we manage the situation of women separately. At the moment, we end up with people who need desperate amounts of support, and they end up being remanded in custody for their own safety, which is not how we are supposed to use prison.

Rona Mackay: Thank you. That is really useful.

The Convener: Just on the point about under-18s that you covered earlier, it is worth noting that the next bill that committee will deal with is the Children (Care and Justice) (Scotland) Bill. There is a presumption in it to send under-18s to secure care and not prison. Obviously, we will look more closely at that issue down the line.

Pauline McNeill: Good morning. I have two questions: one to David Mackie and one to Wendy Sinclair-Gieben. I will begin by thanking the Howard League for the work that it has done in highlighting not just the remand population, which first drew my attention to this horrendous issue for Scotland, but the conditions in which prisoners have been held on remand in particular. The committee is at one on this, and we have discussed it with the chief inspectorate. It is a situation that we all want to get out of. I just want to thank you for that.

In your submission, David, you say that you would like to see the bill also include provisions for discretion where a case is unlikely to result in a custodial sentence. Can you say more about that? I imagine that you would not know in all cases whether there is likely to be a custodial sentence, but anything that you can tell the committee about how that would operate would be helpful.

David Mackie: This goes back to the point that I have already made, which is that we have a presumption against custody under 12 months, and there is a certain logic that, if somebody is not going to receive a custodial sentence for the offence that they have committed, assuming that they are found guilty of it, there is no justification for their being remanded in custody. It is as simple as that. If the logic of that presumption were applied at the stage of decisions being made on bail, one would imagine that a remand would become the exception rather than the norm.

Pauline McNeill: Wendy Sinclair-Gieben, this might be another question that you cannot answer but, after the visit to the Glasgow sheriff court on Monday, the committee was interested in the profile of remand prisoners and the distinction between summary cases and petition cases. In Glasgow sheriff court on Monday, in summary court, most of the 13 cases that we saw were bail supervision cases. That was the trend for the day. I believe that those figures are available. Do you think that it is important for us to analyse the remand profile to try to understand it? It is still a bit

mystifying why, as David Mackie mentioned, the overall remand population is around 29 per cent. It was only one day in Glasgow sheriff court, but, looking at summary justice, the sheriff was very particular about applying that principle of remanding only where there was no other way that the sheriff could go in respect of bail supervision. Will you comment or give us any information on that?

Wendy Sinclair-Gieben: That is a difficult one. The gathering of data and statistics to inform why it is happening—why bail is being refused and why people are on remand—is really important That would really help. Although some statistics are gathered, they are by no means enough, and they are not publicly available in a way that would enable us to analyse them and draw some conclusions.

The concept of informed decision making is important. You will see in the National Preventive Mechanism submission that we say that social services "must" provide a report—that is one of the things that we feel are really important. Before that, however, the possibility of informed decision making absolutely relies on evidence in order for that informed decision to be taken. If we do not have the evidence of what brought people to tangle with the police in the first place, why they are on remand or why bail is being refused, it is very difficult to change a culture away from remanding.

Pauline McNeill: I was thinking more about looking at the profile of remand prisoners. What would it look like today for categories of offences? What would be the balance between petition cases and summary cases? I imagine that there are more petition cases. What would the balance be between High Court cases and crimes of theft or dishonesty? Are you aware of whether that information is available?

Wendy Sinclair-Gieben: Yes. Justice analytical services has a great deal of that information. I know that, the last time I looked at it, what threw me was the number of cases or the high percentage of cases going to the High Court that were legacy sex offending cases. That really made my eyes open. You will find that very interesting.

Jamie Greene: One of the problems with legislating to change the parameters of the grounds on which bail can be permitted or refused is that it is quite an all-encompassing approach. I do not know that it necessarily accounts for the nuances of courts. It applies to summary and solemn cases. It does not differentiate between domestic and non-domestic cases, nor does it take into account the nuances of specialist courts that deal with sexual abuse or drugs, or youth or female courts, for example. It is a one-size-fits-all approach to the changes.

My worry about that is whether it is the right approach. I wonder whether you might comment on that. Should a more nuanced approach be taken to legislating when we make changes to refusing grounds for bail, as the bill proposes to do? That is quite an open question, after which I might zoom in on some specific scenarios.

Professor Loucks: I am not sure that I would be qualified to answer that question, I am afraid, but I am happy to comment in general.

Jamie Greene: Okay—no problem.

Professor Loucks: We need to look at the levels of legal aid that are provided. Referring to Pauline McNeill's question about what happens after people are remanded in custody, I am aware that there is a backlog, because there are not enough solicitors available to take up their cases. Lawyers are not taking on legal aid work because it is not worth their while. There are people who are lacking representation and, on that basis, are not able to proceed with their cases. I will leave it there, as there are much greater experts to my left.

Wendy Sinclair-Gieben: I echo that—I cannot absolutely comment on what you have asked about. I think that there is a need for the bill to be operationalised, because it has not been defined, as yet. However, like Nancy Loucks, when we go into prisons, we find that, anecdotally—I do not know whether this is true; we have not done the research, nor do we have the evidence to back it up—people tell us, first, that they are pleading guilty because it will mean spending shorter time in prison and, secondly, that they cannot get legal representation. It is interesting that two organisations are getting the same anecdotal feedback.

Jamie Greene: Those are problems that the bill does not address or fix. We know that the backlog and the amount of time that people are being held on remand awaiting trial is an issue. Another problem is the suspicion that defence lawyers might be saying, "Just plead guilty, because the sentence will be less than the amount of time you spend on remand." People are still in the same environment, but they have fewer rights and options open to them, which is worrying.

Mr Mackie, could you go back to the original question? You will know, because you sit in a court, that courts deal with different cohorts of people in different ways, but the bill does not do that.

David Mackie: The answer to the question lies in understanding how the question of bail is dealt with in legislation. There is no attempt in legislation to establish a detailed list of regulations that addresses or attempts to address every possible scenario.

The approach starts with the European convention on human rights, which says that everybody is entitled to bail. That is the starting point; every person accused of an offence is entitled to bail, full stop. Our legislation then addresses the exceptions—the reasons to justify the withholding of freedom. The bill resets the bar, in effect, in that it restates the principles that decision makers, judges and sheriffs take into account when they decide on bail. Nuances in individual cases are addressed through the information that is available to the decision maker.

Rather than being concerned about creating legislation that endeavours to address every circumstance, the judges and sheriffs are provided with wide discretion in addressing these issues. How that discretion is used is the important point, and that relies heavily on how well informed the decision maker is, in general, with regard to what might be called judicial knowledge—these days, judicial knowledge includes trauma awareness and that sort of thing. Most importantly, it relies on the decision maker having access to risk assessments in the most serious cases and solemn cases that might involve allegations of murder, rape and so forth. It is important to not become too preoccupied with the availability of risk assessments, which make a particular demand on resources and time in what are very time-critical situations. Information about the background of the accused person and the victim or victims and their families is helpful.

I hope that it is not out of turn for me to mention that I share the disappointment of Families Outside that the bill makes no specific reference to children or to the requirement for courts to have regard to the interests of children who are affected by decisions on bail.

Jamie Greene: I am sorry to interject, but we are tight on time. From what I saw at Glasgow sheriff court on Monday, sheriffs consider such factors. They will consider, for example, whether the accused is a young person, a female or someone who has been declared as having mental health or addiction complications. Having a full-time job is clearly a factor in some cases, as is the mention of children or the fact that the person is somebody's carer. Those are already factors, so why do we need to bake that into the legislation?

David Mackie: I absolutely agree that sheriffs take account of those factors. They suck in whatever information they can and have regard to such circumstances.

However, with regard to the statutory basis on which decisions are made and the perception of society and the world of how we approach such questions, recognition of the rights of children should be given prominence because, to be perfectly honest, some sheriffs are more aware of that than others. Sheriffs and judges are having to begin to grapple with the true impact and implications of the convention, because if a person who is the primary carer of a child is sentenced to prison, the interests of that child go from being a primary consideration under the convention to the paramount consideration. Judges may have to not only recognise that a child will be affected by the decision but, in fact, ensure that the interests of that child are taken care of. For that reason, there is merit in considering the inclusion in the bill of a specific reference to the rights of children.

Jamie Greene: I apologise—it is not in my nature to interject—but I want to get through my questions. I will pose a scenario that fits in nicely with the mention of children. Let us say that, over the course of a weekend, an adult male beats up his wife, partner or child and appears in custody on the Monday morning, which, unfortunately, is a scenario that arises. In your view, is it the default position that that person would be released on bail or, in scenarios in which it is clear that an act of domestic violence has been committed and a member of the household has been assaulted, should that person be held on remand? As a sitting sheriff, what would your default position be?

12:00

David Mackie: There is no default position. The starting point is that that person is no different from any other accused person. They are entitled to bail unless there are reasons not to grant it, and then one would consider the particular circumstances of the case. It is impossible to give any kind of general answer, because so much depends on the circumstances.

For example, if there were special conditions that had a realistic prospect of keeping the parties apart and keeping the alleged complainer—the victim—safe, those might be considered. It is very common in such cases for conditions to be put in place that prohibit the accused person from having contact with or approaching the alleged victim. There might be conditions excluding them from an area or even a whole town. Years ago, there was a famous case in which somebody was excluded from the whole country. There is a range of possibilities. If the information that is made available to the court makes it clear that there is a strong history of repeated offences of violence involving the couple, it might well be the case that, even with the existence of bail conditions, the only solution is to remand the accused person in custody.

From my answer, you will see that so much depends on the particular circumstances of each individual case. It would be dangerous to have what you described as a "default position" whereby, when an allegation of that nature arises,

the accused person should be remanded in custody. You must not forget that a common occurrence in such cases is that, when all the turmoil settles down, the alleged victim starts to make requests for her partner to be released, because she relies on him for support, childcare and income, and because they have a family. Those very complex challenges can arise a week or two later.

Jamie Greene: My final question is on a specific issue. If the changes in the bill come to fruition and the public safety consideration is the primary consideration for whether bail is granted or otherwise, what powers will the sheriff have to deal with the issue of repeat non-appearances? That has been specifically raised with us. There is concern that a person will simply fail to appear at future diets, and sometimes custody is the only way to ensure their presence at the trial, for example. If the sheriff has nothing up their sleeve to ensure that a person who, historically, has breached scheduled appearances on a number of occasions appears in court, they will not be able to do that. How do we deal with that?

David Mackie: The sheriff still has that power, but it is modified in the bill. In summary cases, the relevant section appears to endeavour to address that very point: somebody can be remanded in custody for a failure to appear in court, but only if they have previous convictions for failing to appear in court, in respect of either bail or actual court hearings. The point that we made in the Howard League Scotland submission was that there should be some kind of time limit on how old those previous convictions might be, because somebody might appear in court with a conviction that was several years old that would fit those criteria and justify their being remanded in custody.

My basic answer to your question is that the sheriffs still have that power. There is the wider provision about interfering with the course of justice. In summary cases, there is that power and, in solemn cases, it is not watered down at all. That is how that issue has been addressed. The bill seems to endeavour to avoid the unnecessary remanding in custody of people who are otherwise not a risk to society. That perhaps says more about how we keep in touch with a cohort of people who are very vulnerable and chaotic—how we keep tabs on them, how we get them to court and how we persuade them to come to court.

Jamie Greene: Thank you for allowing me to ask those questions, convener. I appreciate that, as I am conscious of time.

The Convener: Not at all. I will bring in Katy Clark and then Fulton MacGregor, and then we will have to bring the session to a close.

Katy Clark: In the previous session, we heard evidence about the central marking of cases and the decisions that the Crown makes as to whether to oppose bail. In particular, there was a suggestion that procurators fiscal should be able to use their discretion more in the courts, rather than having to go up a managerial chain and impose central policy.

We will be meeting, and hearing evidence from, the Crown next week. I am interested in any thoughts that you have about changes that need to be made to practice or, indeed, process or policy in Crown decisions. You might feel that you do not have expertise in that and do not have an opinion.

David Mackie: I do not know enough about Crown practices and procedures to say what it should or should not be doing. What I can say, though, is that there is value in having in court a regular depute who takes ownership of the case and understands the court's approach to questions of bail. I have benefited from that in practice in my small court in Alloa. We usually had deputes who were there for years at a time, and a certain common understanding emerged as to the sort of information that the sheriff would want and the particular considerations that the sheriff would take into account in deciding bail.

It is a difficult question, because the Crown deals with a large volume of cases. Those cases have to be marked, and a view on bail has to be taken, so questions of defensive decision making and suchlike arise. I am not in a position to comment beyond that.

Katy Clark: You might feel, again, that you are not able to answer my next question. We have heard about the importance of information being provided to the sheriff and the court. In the previous session, we were told that there was better provision of social workers in the courts back in the 1990s and early 2000s. That is quite anecdotal, so there might be great geographical differences in the levels of provision. Are you able to point us towards any evidence or work that has been done on the availability of that support in the courts? It is a resource issue rather than necessarily a legal issue. Do you have any experience of that?

Professor Loucks: Not particularly, but I agree that resourcing is a huge issue in social work in particular. Court-based social workers are not available in many courts. There are other ways of gathering that information, depending on what time of day the information is requested—whether a stand-down report can be requested, for example. There are also creative ways of working around that. For example, the Prison Reform Trust has just introduced child impact assessments—whereby social workers can inform the courts—

that are done by a person whom the child chooses. Whether that is a teacher, a health professional or a school dinner lady, as it was in one case, that information is still available. Social work has very much welcomed the approach of being able to provide that information without necessarily requiring additional resource from social workers, who are very overstretched.

Katy Clark: My final question is whether you support the inclusion of the public safety test in the bill. You spoke a little about that already. Would that be a helpful addition to the bill, or would it make no difference whatsoever and, possibly, create uncertainty? We have heard that it might lead to appeals as we tried to clarify what that provision would mean.

David Mackie, you made suggestions about additional provisions that could be put into the bill that might be of assistance. If there is going to be a test of that nature, do you have any suggestions about how we could define it?

David Mackie: I hesitate to try to offer a definition. First, the public safety test is in the existing legislation as part of the definition of "public interest", and the bill seeks to restrict it to public safety. I echo comments that were made in the responses from the judiciary and others, in that it would be helpful to have a definition of "public safety". I am not ducking the question, but I would need to reflect on what the definition should be. It would probably be inappropriate for me, as a sheriff, to attempt to do that. In a sense, that is the very question that policy makers, on behalf of the community, would answer for us: what is meant by "public safety"? If that is the expression that is used, different sheriffs and judges might apply their own interpretation. There is very wide scope for interpretation, so a process of clarity might emerge only through appeal decisions. Attempting to offer a definition would provide benefits for judges and in achieving consistency in bail decisions.

Katy Clark: Thank you.

Fulton MacGregor: I will try to be brief. I had three questions. I say "had" because my colleague Katy Clark picked up on the question that I was going to ask David Mackie. It was about the Crown's processes, but we have had responses on that from you and the previous witnesses. Suffice it to say that you have given us some information that we can take into next week's session. That has been very helpful.

My question to Nancy Loucks is about the input of criminal justice social work, as the bill proposes. You talked a wee bit about that. We heard from a previous panel—not the previous panel today but last week's panel—that the process could involve the third sector more, including organisations such as yours and others that work in the community. Do you have any idea of how that might happen? Would you welcome approaches from criminal justice social workers to talk to you and seek advice and guidance on how families might be impacted by decisions?

Professor Loucks: Absolutely, and that already happens to some extent. When social workers are aware of us, we have that communication. The role of criminal justice social work is very much focused on the person who is accused or convicted of the offence, whereas our focus is on support for the family and what that means for them. There are parallel priorities in that sense.

Particularly when a longer sentence is involved, social workers are required to visit the family, but, in families' experience, that meeting is often about what the person in prison needs as opposed to what the family needs. We need to look more at what that means for families that need protection or additional support, particularly families that are struggling financially. I mentioned the financial impact report. There are families that are simply not eating at the moment—they cannot afford to, because they are pouring money to the person in prison or trying to maintain contact.

We often have conversations with children and family social workers about the appropriateness of contact and a child's right to contact under article 9 of the United Nations Convention on the Rights of the Child. It is about whether that contact is safe and appropriate and how we can support that. There is definitely a lot that we can do in that regard. We can also provide support in relation to supervision on release. Criminal justice social work might see someone for 45 minutes every fortnight, so there is a role in providing the family with more day-to-day support, not just as a tool but in recognition of the support that they might need to enable them to support someone coming out of prison.

Fulton MacGregor: If the suggestions that have been put forward for inclusion in the bill are realised, will that increase the opportunity for joined-up working before a decision on bail is made?

Professor Loucks: Although it is very useful that the bill provides those opportunities, it does not state explicitly how that might work. There is certainly a role for third sector organisations and families in being recognised. They should be involved as part and parcel of the process rather than as an exception and at the discretion of the social work team. It is about ensuring that that is a given rather than an exception.

12:15

Fulton MacGregor: Thanks very much.

I will ask Wendy Sinclair-Gieben a more general or philosophical—whichever word we want to use—question. We heard quite a lot of evidence from the previous panel and from the academics who were with us last week. The committee generally shares the view, which, I think, you have hinted at, that, if we invest more in the community—the bail stage is one example of that—there might, ultimately, be a saving in prisons. Nobody expects that to happen overnight. There will need to be a long period while both are funded similarly, although community justice might need more. I will ask the cabinet secretary about that. In time, however, we should see that change. That is the hope and the desire. How would you, in your role, and prison services feel about that? Would you support it, or would you resist that change? Does that make sense?

Wendy Sinclair-Gieben: I have repeatedly talked about my concerns about overcrowding in our prison estate. I have not been anything other than robust on that. Every person who works in the Scottish Prison Service and in my organisation would applaud a reduction in the numbers. Unfortunately, it is not a binary qualification yet, but I take your point. The reality is that, if we can get prison numbers down, existing prison staff will be able to reassess what they need to do and to do much more in providing purposeful activity and reducing the risk associated with a person leaving prison, which will therefore benefit the community.

In the longer term, if we could reduce prison numbers to the extent that other European nations such as Holland and Portugal have done, as a taxpayer, I would be absolutely delighted. If that funding could go into the community to divert people from prosecution, to prevent the problems in the first place or to find alternatives to prison that are more effective, there is not one person in the justice system who would not be delighted.

Fulton MacGregor: That was eloquently put, as ever. Thank you.

The Convener: I am sure that we could continue for much longer, but I will have to bring the session to a close. I thank the witnesses. It has been an invaluable session.

We will have a short suspension to allow our witnesses to leave, and we will have a quick comfort break.

12:17

Meeting suspended.

12:20

On resuming—

The Convener: Our final panel consists of one witness, as, unfortunately, Chief Superintendent Gordon McCreadie has submitted his apologies. We have with us Chief Inspector Nick Clasper, policy and partnerships, Police Scotland criminal justice services division. You are on your own this afternoon, chief inspector, but a warm welcome to you. We have about 45 minutes for the session. We may have to cut it short a little owing to the previous panels' overrunning, but we will see how we go.

I will start by asking you a very general question about the information that the police include in police reports that inform the fiscal and the court around decision making on bail. Clearly, Police Scotland officers have a role to play in informing that process. It therefore may be helpful if you were able to set out the type of information that is included in police reports around bail in particular and tell us whether you, as an officer, recommend that bail be sought or otherwise. Over to you.

Chief Inspector Nick Clasper (Police Scotland): Thank you, and good afternoon, convener and members. The standard prosecution report is the means by which police officers will present information to the Crown about the individual. There are two sections in particular that police officers complete in the prosecution report on individuals and their circumstances. The first is the antecedents that relate to the individual's background, such as family circumstances, employment, earnings and benefits. The second part of the report is specifically about bail and asks a number of questions around offending, previous convictions and whether the individual has previously offended when on bail. It also asks the officer to provide a view on whether they support a release on bail and, if they do, whether they believe that any special conditions would be appropriate for the case that is being submitted.

The Convener: Following on from that, one of the issues that we have been looking at closely is the voice of victims, complainers and witnesses. To what extent do you include information from, for example, victims in the police report?

Chief Inspector Clasper: When it comes to issues such as domestic abuse, we specifically give the Crown information on the victim's view of bail and any conditions that they feel may be appropriate. That is also covered as part of the standard prosecution report.

The Convener: There will probably be some more questions on that issue.

Russell Findlay: Good afternoon. The Scottish Police Federation has submitted some written

evidence. The federation is not entirely sure what problem needs to be fixed. It is of the view that its members see people being granted police bail almost as a matter of routine and that the majority of those who have been kept in custody are granted bail by the court. Do you think that there is a slight disconnect between the reality of what is happening on the ground and what we are hearing from some of our witnesses, which is that too many people are being remanded?

Chief Inspector Clasper: The question about remand is one for the sheriff—the judicial decision maker. Officers will present all the available information with respect to the background of the individual to try to fully inform and allow the sheriff to make an appropriate decision when it comes to bail.

Recently, we have been working closely with community justice colleagues in Social Work Scotland to enhance an information-sharing agreement to ensure that justice social workers have access to court custody lists in the morning so that they can advance-triage those whose bail they believe may be opposed. That will allow them to get an earlier start on preparing information so that the sheriff has that to hand when the decision is made.

Russell Findlay: Okay. Thank you. As far as I am aware, we will not be given evidence in person by the SPF. In response to the release of people from prison, it says that Police Scotland is already

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

Do you agree with that interpretation that, right now, Police Scotland cannot manage high-risk offenders in the community? Whatever your answer to that, what happens next if the bill is passed?

Chief Inspector Clasper: Police Scotland has robust processes in place to manage offenders when they come into the community, be it on release from prison or on release from court on bail. We have a number of approaches where we can examine the potential risk that that individual poses and put in specific safeguards around enhanced checks. I draw the committee's attention to our approach to domestic violence, where we specifically go and visit offenders who have been released on bail to remind them of their responsibilities. Undoubtedly, if there were to be an increase in the number of persons on bail, that would create further demand on Police Scotland's resources, and we would need to consider how best to manage that risk going forward.

Russell Findlay: There are two issues: managing people who have been bailed, and early release of prisoners who might need some form of monitoring as part of the conditions of their release. Is it the case that Police Scotland cannot, as the federation states, safely manage that cohort within current resourcing arrangements?

Chief Inspector Clasper: No, I do not believe that that is the case. Police Scotland manages effectively and efficiently individuals who come into the community. Obviously, we look to identify methods of mitigating the risk and how best to support the reintegration of those individuals into the community. Ultimately, the aim is to ensure that their successful reintegration prevents further offending and that they can re-enter the community at that point.

Russell Findlay: Thank you.

Jamie Greene: Good afternoon, chief inspector. I want to follow on from that conversation around the duties on the police and enhanced responsibilities that result from an increased volume of people on bail. This was mentioned in the previous evidence session. We do not know how up to date the figures are, so perhaps the parliamentary research team could help us with this, but when I last checked, the figure was that one in eight crimes was committed by someone on bail. I do not know how many crimes that is, but it is a fair amount. Obviously, the police are the front line when it comes to dealing with reported crime. They are responsible—and not just for how the reporting is handled. We can talk about 101 calls until the cows come home—that is another matter for another day. You have to turn up to and deal with the initial report and, perhaps, arrest someone, potentially dealing with their custody over the weekend, for example. I will turn the phrase on its head: is it inevitable that if the bail population—rather than the remand population—increases, the number of offences committed by people on bail will also increase? Is that a wrong assertion?

12:30

Chief Inspector Clasper: I do not think that I am qualified to make that assumption. Empirical data shows that the offending rate among individuals who are on bail is around 17 to 19 per cent. If you follow that empirical data, what you say may be the case. However, that does not necessarily correlate with the effect that further mitigation measures might have on bail compliance. It is difficult to say one way or the other whether that would be the actual outcome.

Jamie Greene: Let us imagine that it was, though. You have to scenario plan because, presumably, there would be a knock-on effect on you, your resource and your ability to deal with any increase. If there were an increase, would that require additional resource or funding? I know that

the police already have a heavy workload as it is, given that you deal with a wide range of emergency situations that, perhaps, other agencies ought to be dealing with. We have taken evidence to that effect, and it is already a matter of public record. Would it put increased pressure on the police to deal with that 17 to 19 per cent rate of reoffending by individuals on bail if the numbers increased? What would you say to alleviate the concerns of your front-line officers, who may have expressed concern through the federation rather than directly to the committee about potential increases in workload due to changes in bail conditions or the rules around granting bail?

Chief Inspector Clasper: Obviously, if there were an increase in demand, that would increase workloads and, without any increase in resourcing, that would have to be met through existing staff resources. If the demand on front-line policing were to increase, we would obviously look for an increase in resourcing to match that. The financial memorandum pulled out the fact that the effect is unknown at the moment. We are unable to quantify the potential effect without some indication of how many more individuals might be on bail and any correlated increase in offending or in bail offences. The chief constable has stated publicly that he is reviewing the structure of Police Scotland, focusing on public protection and so on as a priority. I would say that public protection around domestic violence and sexual offences, and associated bail issues, would obviously be looked at.

Jamie Greene: That is entirely the answer that I expected from you. It is entirely appropriate that, if your workload is increased, the Government must rise to the occasion.

I have another question around monitoring. Let us say that there is a political decision to hold fewer people on remand, and so, subsequently, more people may be given bail—that is, after all, the premise of the bill. There may be additional conditions or increased monitoring, whether electronic monitoring or other forms of restriction of liberty. What role will the police play in that regard? Will the police have no role at all, with it being purely down to criminal justice social workers or other agencies to fill that role, or will the police have quite an active role with regard to those who are out on bail, who may be among that cohort of up to 20 per cent who reoffend while on bail? What duty do you have in relation to ensuring that public protection is paramount?

Chief Inspector Clasper: Obviously, part of our existing processes is our duty in relation to assessing the risk to the public from an individual who is on bail. Where it is assessed that an individual poses a higher risk, we can put additional measures in place. I have already referred to further visits to domestic violence offenders to ensure that they are aware of and remain compliant with their bail conditions.

Can I just clarify something? You mentioned electronic monitoring. Were you looking for details on police involvement in electronic monitoring?

Jamie Greene: Only if you think that you would be involved.

Chief Inspector Clasper: Yes, we are involved. My team has been closely involved with partners on the implementation of electronic monitoring. Police Scotland will generally deal with any report of a breach of electronic monitoring conditions in the same way that we would deal with a report from a member of the public that a bail condition had been breached.

The chief superintendent has raised the issue of demand for electronic monitoring with the Scottish Police Authority. One of the good things about electronic monitoring is that it provides constant, consistent assurance that bail conditions are being adhered to, whereas, previously, such assurance about a curfew, for example, would be dependent on officers attending at the address and knocking on the door. Electronic monitoring also means that we are now aware of every time that a person is not at an address. We deal with that as a breach of bail and investigate and report it accordingly.

Jamie Greene: That is really interesting. When things were more people-based or manual, there was a sort of mystery shopping element: you turned up at the address, and if the individual was not where they should have been, you took appropriate action. Now you know in real time about every breach that occurs and have a duty to respond to that. Are you able to respond? Is it physically possible for you to turn up to the address of every person who is tagged and deal with the situation if they are somewhere that they should not be, or do you just have to compile reports and let them accumulate?

Chief Inspector Clasper: The system is that the breach of bail is reported directly to the control centres, which carry out a risk assessment of the breach. However, response officers are tasked to deal with such breaches in the same way that they would if somebody had phoned the police to say that they had seen their neighbour, who they knew was on curfew, leave the house. We would deal with such situations in exactly the same way. It is about the route of reporting rather than the involvement of electronic monitoring.

Jamie Greene: That is interesting. I am keen to let others come in if they want, convener. I have only one question to ask at the end, if we have time, about serious organised crime.

The Convener: I will let you back in, Jamie.

Katy Clark: I want to go back to the beginning of the bail process. We have heard about the importance of providing sufficient information to the court in relation to bail decisions, and we have heard that the social work provision that we would ideally want to be in place is often just not there. How does that interface with your work? The police are not social workers, obviously, but presumably you have to go some way down that path to ensure that there is sufficient information. Could you comment on not just the resource implications but the extent to which you are able to go down that path to ensure that there is a holistic understanding of the situation when the court is making a decision?

Chief Inspector Clasper: At the moment, when somebody appears in court and the Crown needs further information, it can and often does try to make contact with the reporting officer to get further information about that individual. That may or may not be possible, depending on shift patterns. It goes back, however, to the convener's initial point about the sufficiency of information in the standard prosecution report to ensure that a broad and balanced decision is made by the sheriff. We work with the Crown in regularly reviewing the information that it requires in the report. Again, that is an area where, if the Crown felt that the information that is being provided to it is not sufficient, it would advise us and we would look at whether or how to provide further information.

Katy Clark: It was pointed out to us that the interests of children need to be a top priority. To what extent would you get involved in getting sufficient information about that? Would you have to refer to other agencies?

Chief Inspector Clasper: For domestic abuse, the domestic abuse report has a requirement to look at children in the household. For example, it is an aggravator if a child is present during a domestic abuse crime, and we would include that in the standard prosecution report.

At the moment, we would not look at the views of children. I am aware, however, having listened to the earlier panel, that changes might be made as a result of the United Nations Convention on the Rights of the Child. That would obviously be done in conjunction with the Crown.

The Convener: I will move on to questions on the plans for release from custody. Sections 9 and 10 of the bill aim to support individuals' successful integration back into the community. They have provisions relating to release planning and throughcare support for prisoners, and those provisions refer to Police Scotland. Police Scotland has a close relationship with the Scottish Prison Service on a range of issues, particularly at the point of release for an individual. In practice, what police input would you expect that is not taking place already? Given the point that Jamie Greene made about the impact on police resources, should the practice around that change?

Chief Inspector Clasper: Police Scotland, as you said, has good working relationships with its community justice partners. We will be involved in the discussions on release planning, particularly in respect of any risk that release may pose for the community or the individual who is being released into the community. We are content that that is something that we do at the moment.

As I said to Mr Greene, any increase in demand may necessitate consideration of an increased resource. Where you transfer risk from one part of the criminal justice system to the other, there may be a necessity to rebalance the funds to follow that risk. Certainly, that is worthy of consideration. Again, I refer back to the financial memorandum: this is very much an unknown quantity, so we were unable to give a precise indication of what the impact may be.

The Convener: That is interesting.

I will continue with the release theme. Earlier, we heard evidence about the value of the third sector and other organisations starting throughcare support before an individual is released. Is there a pre-release role for Police Scotland that is not already in place that fits within the provisions of the bill?

Chief Inspector Clasper: Police Scotland would become involved in the latter stages. Ultimately, prior to any planning, the vast majority of that would sit with bodies other than Police Scotland. We are happy to join and be involved in the discussions about the plans for moving forward. However, I do not have any further comment on that.

The Convener: Jamie wants to come back in, and then we will probably bring the session to a close.

Jamie Greene: A few other things popped into my mind. How will we quantify that rebalancing, which I think is the word that you used, if we are shifting the balance of risk from one element of the criminal justice system to another—in this case, to the police? The financial memorandum is suitably vague in its analysis of that, beyond the fact that there may be a shift in the volume of people from those remanded to those who are released on bail. What work needs to be done ahead of the bill continuing its progress through the committee and Parliament to give you the satisfaction that the policy shift and rebalance will be matched by financial rebalancing?

12:45

Chief Inspector Clasper: One of the challenges that we highlighted in the original consultation was about the uncertainty as to what is a public safety test and how that would impact on the existing provisions and situation. I watched the earlier sessions, in which there were significant discussions about section 23D of the Criminal Procedure (Scotland) Act 1995. Our position on that was that we were concerned that, without some definition of what public safety is, there might be diminution of rights or protections for victims and/or witnesses and the removal of some judicial discretion in that.

On the work that needs to be done, there may be scope for trying to understand what exactly the proposed changes will mean in respect of the increase in the numbers who will be admitted to bail. Unfortunately, that is not an easy piece of work. The former sheriff on the previous panel quite artfully articulated the challenges that the judiciary face in trying to work out who should and who should not be admitted to bail.

Jamie Greene: There is a parallel question about those changes. At the moment, one of the serious considerations for sheriffs in granting bail is the risk of interference with witnesses or victims. There are mixed opinions on what would happen if there were to be any changes to that. Some think that that ground for refusal is being diminished; others believe that it will still exist and will be protected under the new legislation. I am not sure that I know the answer. If there is a risk of that ground for refusal being taken away or diminished, what concerns might the police have about those accused of quite serious crimes who do not necessarily pose any immediate public safety risk but present quite a significant risk of interference or of prejudice to justice?

Chief Inspector Clasper: That was the concern that we picked up during the consultation. There is no clarity on what a public safety test would mean for the protection of witnesses and victims. We also raised a concern about, for example, witnesses to organised crime, who were not covered in the initial consultation. Without a better understanding of their impact, we would remain concerned about the changes.

The Convener: Fulton MacGregor wanted to come in with a question.

Fulton MacGregor: I have a couple of quick questions for the witness. This has been the shortest panel session so far—thanks very much for that.

One of the concerns that we heard was about non-appearance at court and the seriousness of that. However, we have to balance that concern against whether individuals should really be remanded just because they have not attended at court, if every other factor suggests that they do not need to be remanded. We heard about that from at least one if not both of our earlier panels today, and we have heard about it previously.

Would the police have some sort of role in the area? I do not think that it would be anything to do with the bill, but there might be police policy to explain the seriousness of attending at court. I know that the police do that anyway, but perhaps it needs to be looked at it in another way, if the bill is to have the effect on whether people receive remand for just not appearing at court.

It is a very broad question. What role do the police have to ensure that people attend at court and do not put themselves in the position where they do not appear five times, or whatever the case may be? It can even be more than that.

Chief Inspector Clasper: Non-appearance at court also places a demand on the police. Generally, when an individual does not appear, a warrant is issued for their arrest, which requires police inquiry, apprehension and presentation before the court. The police are not always privy to details on the actual notification to individuals about court dates and appearances, so what you suggest may not be an appropriate role for us.

During the consultation, we raised the initial concern that there was no mention of the administration of justice. Having worked closely with colleagues in Social Work Scotland and Community Justice Scotland for the past 18 months, I am aware that the use of bail supervision or some form of support during bail to assist individuals to remember when to go to court would be beneficial. That may be an opportunity to prevent the likes of those with addiction or mental health issues, or those who live chaotic lifestyles, not appearing in court in the first place and being pulled back into arrest, custody and presentation at court again.

The Convener: Thank you very much, chief inspector. There are no more questions. This has been a nice, neat panel with which to end our morning. We appreciate your time.

That concludes the public part of our agenda. We will now move into private session.

12:51

Meeting continued in private until 13:03.

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