OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 6 February 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 6 February 2018

CONTENTS

JUSTICE COMMITTEE
5th Meeting 2018, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*George Adam (Paisley) (SNP)
*Maurice Corry (West Scotland) (Con)
*John Finnie (Highlands and Islands) (Green)
*Mairi Gougeon (Angus North and Mearns) (SNP)
*Daniel Johnson (Edinburgh Southern) (Lab)
*Liam Kerr (North East Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Ben Macpherson (Edinburgh Northern and Leith) (SNP)
*Liam McArthur (Orkney Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Robin Burley (Scottish Mediation)
R. Craig Connal QC (Pinsent Masons)
Keith Gardner (Community Justice Scotland)
Angela Grahame QC (Faculty of Advocates)
Tom Halpin (Sacro)
Thomas Jackson (Convention of Scottish Local Authorities)
Colin Lancaster (Scottish Legal Aid Board)
Kathryn Lindsay (Social Work Scotland)
Andrew Mackenzie (Scottish Arbitration Centre)
Michael Matheson (Cabinet Secretary for Justice)
Karyn McCluskey (Community Justice Scotland)
Heloise Murdoch (Edinburgh Sheriff Court Mediation Service)
John Sturrock QC (Core Solutions Group)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 6 February 2018

[The Convener opened the meeting at 09:46]

Decision on Taking Business in Private

The Convener (Margaret Mitchell): Good morning and welcome to the fifth meeting in 2018 of the Justice Committee.

Agenda item 1 is a decision on whether to take in private item 7, which is consideration of our work programme. Do members agree to take that item in private?

Members *indicated agreement.*

Subordinate Legislation

Human Trafficking and Exploitation (Scotland) Act 2015 (Support for Victims) Regulations 2018 [Draft]

09:47

The Convener: Item 2 is consideration of an affirmative instrument. I welcome Michael Matheson, Cabinet Secretary for Justice, and his official: Peter Hope-Jones is the human trafficking team leader; and Louise Miller is from the directorate for legal services.

I refer members to paper 1, which is a note by the clerk. Do you want to make an opening statement, cabinet secretary?

Michael Matheson (Cabinet Secretary for Justice): Yes. Thank you, convener.

The Human Trafficking and Exploitation (Scotland) Act 2015 (Support for Victims) Regulations 2018, alongside the separate commencement order for section 9 of the 2015 act, place support to trafficking victims on a statutory basis, set the relevant period for support at 90 days and specify that victims of slavery, servitude and forced or compulsory labour also have a statutory right to support for the same period. Scotland is the first part of the United Kingdom to make that support a statutory right, and the 90-day period represents a doubling of the current period of support and a longer period than anywhere else in the UK.

I announced the intention to set the period at 90 days on 13 June 2017, following consultation. The announcement was welcomed by the independent anti-slavery commissioner, charities that work directly with victims and all parties in the Parliament.

The offence of holding a person in slavery or servitude or forcing a person to perform forced or compulsory labour is set out in section 4 of the 2015 act. Consultation showed strong agreement with the proposal that victims of that crime should have the same level of support as victims of human trafficking. Section 10 of the act empowers Scottish ministers to make provision for support for victims of section 4 offences, and the draft regulations specify that that support should be in line with that for trafficking victims.

The draft regulations will bolster the support to victims of these terrible crimes and, alongside the other reforms in the 2015 act and the trafficking and exploitation strategy, will help to move us towards a Scotland that is free of the suffering that is caused by trafficking, slavery and exploitation.

The Convener: Thank you. Do members have any comments or questions for the cabinet secretary?

John Finnie (Highlands and Islands) (Green): I will briefly comment, convener. You will recall that we examined the issue in the previous session. All the evidence then suggested that additional support needed to be put in place, so the instrument is very welcome.

The Convener: As there are no other comments, we move to item 3, which is formal consideration of the motion. The Delegated Powers and Law Reform Committee has considered and reported on the instrument and had no comment on it. The cabinet secretary will move the motion, and there will be an opportunity for formal debate if necessary.

Motion moved,

That the Justice Committee recommends that the Human Trafficking and Exploitation (Scotland) Act 2015 (Support for Victims) Regulations 2018 [draft] be approved.—[*Michael Matheson*]

Motion agreed to.

The Convener: That concludes our consideration of the instrument. The committee's report will note and confirm the outcome of the debate. Are members content to delegate authority to me as convener to clear the final draft of the report?

Members *indicated agreement.*

The Convener: Thank you. All that remains for me to do is to thank the cabinet secretary and his officials for attending.

I suspend the meeting briefly to allow for a changeover in witnesses.

09:51

Meeting suspended.

09:53

On resuming—

Alternative Dispute Resolution

The Convener: Item 4 is a round-table evidence session on alternative dispute resolution. The purpose of the session is to explore issues relating to the use and availability of ADR in Scotland and any barriers to its use. I welcome all the witnesses, and I look forward to hearing their evidence.

We will begin with introductions. As we go around the table, I ask that you say who you represent and we can take it from there. I will start. I am the convener of the Justice Committee.

Gael Scott (Clerk): I am one of the clerks to the committee.

Diane Barr (Clerk): I am one of the clerks to the committee.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I am the MSP for Coatbridge and Chryston.

Heloise Murdoch (Edinburgh Sheriff Court Mediation Service): I am the mediation co-ordinator for the Edinburgh sheriff court mediation service.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): I am the MSP for Edinburgh Northern and Leith.

Andrew Mackenzie (Scottish Arbitration Centre): I am the chief executive of the Scottish Arbitration Centre.

John Finnie: Madainn mhath. Good morning. I am an MSP for the Highlands and Islands.

Robin Burley (Scottish Mediation): I am the chair of Scottish Mediation.

Liam McArthur (Orkney Islands) (LD): I am the MSP for Orkney. For the purpose of this morning's discussion, I should declare that my wife is a mediator with Relationships Scotland Orkney.

Angela Grahame QC (Faculty of Advocates): I am a practising Queen's counsel and vice-dean of the Faculty of Advocates. The written submissions were prepared by one of our special interest groups in the faculty—Faculty of Advocates arbitration—which has a special interest in arbitration and other forms of dispute resolution. The faculty also has a strong interest in litigation as a method of resolving disputes, but I am here to address the issues on the agenda.

Colin Lancaster (Scottish Legal Aid Board): I am the chief executive of the Scottish Legal Aid Board.

Liam Kerr (North East Scotland) (Con): I am an MSP for North East Scotland.

Maurice Corry (West Scotland) (Con): I am an MSP for West Scotland.

R. Craig Connal QC (Pinsent Masons): I am a practising solicitor advocate. I am not here to represent any particular area of ADR; I am happy to address all the issues.

Mairi Gougeon (Angus North and Mearns) (SNP): I am the MSP for Angus North and Mearns.

George Adam (Paisley) (SNP): I am Paisley's MSP.

John Sturrock QC (Core Solutions Group): I am a non-practising advocate and a full-time mediator—[*Interruption*.]

Daniel Johnson (Edinburgh Southern) (Lab): I am the MSP for Edinburgh Southern. I draw to members' attention the fact that my wife is a practising solicitor at the firm Pinsent Masons, for which Craig Connal also works.

Rona Mackay (Strathkelvin and Bearsden) (SNP): I am the MSP for Strathkelvin and Bearsden and deputy convener of the committee.

The Convener: We chose the round-table format because it is a bit more flexible and informal, although the evidence given is still on the record. The format allows witnesses to engage with one another in a free exchange. However, I ask you all still to indicate to me when you want to speak, so that you speak through the chair. Do not worry about the microphones—they come on automatically when you are called to speak.

As always, it was helpful to get written submissions. In fact, we have been inundated with submissions over the past 24 to 48 hours. This morning, we will concentrate on feeling our way through alternative dispute resolution generally. We will maybe follow this session up with another session to take in evidence on particular aspects raised in other submissions.

What are the various advantages and disadvantages of the different types of alternative dispute resolution?

Craig Connal: I am happy to deal with the different topics; it might assist if I mention a number of types of ADR, which might prompt some more discussion.

Although I understand that we are here to discuss ADR, I say, without having any axe to grind, that I would be disappointed if we headed down a route similar to the one that has been taken south of the border, where there is a pretty firm drive to keep people out of the courts. In this jurisdiction, at least so far, the courts have been perceived as part of a public service to which everybody should have access in an efficient and cost-effective way. The notion that one should really try to keep everybody out seems—

The Convener: We will cover that angle as the discussion develops. Thank you for raising it.

Craig Connal: I am conscious that a number of people here will speak about particular areas. When I was asked to appear before the committee, the forms of ADR that occurred to me included arbitration, of which Andrew Mackenzie is a great promoter, whereby the parties select a decision maker under a statutory scheme, and mediation, on which a number of witnesses have a particular focus and which is, in effect, a chaired negotiation—that is just my term; it is not an official definition.

10:00

I will mention other types in passing, because the people here do not deal with them in particular. There is adjudication, which some committee members will be very familiar with. In the construction industry, adjudication was imposed by statute some years ago as a form of dispute resolution outwith the courts. It is meant to be quicker and cheaper than going through the courts or arbitration. Arguably, it is not an alternative in the normal sense, because if someone has a construction contract, they must use adjudication first, although they can challenge the decision later. I mention it only so that the committee is aware of it.

The other form of ADR that occurs to me is expert determination, which is probably also not on the agenda of any of the witnesses today, and which is used in some contractual structures. Expert determination is where the parties agree that if a particular type of issue crops up, they will send it away to an expert, such as a surveyor or other type of expert, whose decision will be final. It is not quite like arbitration, in that it is not treated as a quasi-judicial determination, but it is another mechanism that some people use to reach a decision.

Having given that outline, I am happy to contribute to the discussion later. I ought to stop now and let others speak.

John Sturrock: I will pick up on a general issue to do with the term ADR, or alternative dispute resolution, which I think was mentioned in the paper that was submitted on my behalf rather hastily last week.

I think that there is a danger—which we might already have had a hint of—that the different options for the resolution of disputes will be viewed as being in some way in competition with

one another. One cause of that view might be the use of the description "alternative dispute resolution". In many jurisdictions, "ADR" is no longer used to describe what are, as Craig Connal has fairly said, a large number of possibilities for helping people to resolve disputes.

The question about the term is: alternative to what? In earlier days, one was looking at alternatives to court—to litigation. Really, what we are looking at is a range of options by which people who have a dispute that is unresolved and which they have been unable to resolve themselves can be assisted in the early, effective and efficient resolution of the dispute.

I would counsel the committee to move away from using the expressions "ADR" and "alternative dispute resolution", if it feels able to do so, and to look at a range of dispute resolution options. There are a number of those, which Craig Connal has outlined.

For me, the question to be asked is: what is the appropriate process to offer to those who have unresolved disputes that will help them to resolve their dispute quickly, effectively, constructively and efficiently? A number of questions arise from that, which allow us to look at the different forms of dispute resolution and to work out a hierarchy, if you like.

The reality is that the vast majority of disputes are resolved by the people involved themselves, using what we would call negotiation, whether that is skilled or not. Those that are not resolved in that way are resolved with the assistance of others using negotiation. Only a very small number of disputes require the assistance of a third party. Let me give examples of questions to ask. When is it appropriate to involve a mediator as that third party? When is it appropriate to involve an arbitrator? When is it appropriate to involve the court? In most jurisdictions—and Scotland has historically been slightly out of step here—the court is viewed as a last resort, for all sorts of reasons.

It seems to me that those are the questions and issues that the committee might wrestle with.

The Convener: The suggestion to think of it as a range of dispute resolution options is helpful. I think that Daniel Johnson has a small question on what John Sturrock has just said.

Daniel Johnson: It is on the back of what John Sturrock and Craig Connal have said. Should we be viewing things such as the small claims court as threads in dispute resolution? That is, should we be looking not just at alternatives to court but at options within the court system and at whether simplified routes through the court system might be—or should be made—available to people? Is that fair?

John Sturrock: That is fair, but I might take it back a step and ask: what is the most effective way for people to resolve their small claims? Is it through an adjudicative process, where a third party pronounces the decision, or might there be a number of cases in which the negotiation process would effect a more helpful result for the people involved? There are principles to be applied, and then, as you rightly suggest, we ask: if adjudication by a third party, including a court, is appropriate, what is the most effective and streamlined way of doing that, in the circumstances?

Robin Burley: My point was going to be similar to John Sturrock's. The term "ADR" tends to cover a mixed bag of apples and pears. One thing that might be useful to think about is that, at one end of a spectrum, we have interest-based systems of coming to an agreement, and at the other end of the spectrum, we have rights-based systems. Arbitration is very much at the rights-based end, and mediation is very much at the interest-based end. The spectrum that was described earlier covers a range, into which interests and rights can come. That might be a helpful way of looking at the issue.

As I said, mediation is very much at the interest-based end of the spectrum. What follows from that is that it is voluntary and facilitative. Those are key aspects of mediation. Another useful thing to consider is that mediation not only is an alternative to the courts, tribunals and onwards but has a phenomenal reach. Mediation operates from the playground, through family situations, which do not necessarily come to court, through communities, workplaces, commercial and public services to—in the shadow of the courts—tribunals and onwards.

That reach reflects something slightly different about mediation, which is also reflected in the fact that mediation is about a way of having dialogue. It is important that that underpins the way in which people deal with difference and the disputes that may come from—but do not necessarily come from—difference. Mediation is also about the change in the culture of how we deal with things. I will leave it at that.

The Convener: It is very wide ranging, and people of all ages, from the very young to the very old, can benefit.

Angela Grahame: We can see "dispute resolution", as opposed to "ADR", as the umbrella term; underneath that umbrella are various methods of resolving disputes, including litigation, arbitration, mediation and other methods that Craig Connal mentioned. All are options for individual clients, and the decision on which is the best method to use to resolve a dispute should be carefully considered with each client, with advice from their legal adviser, if they have one.

When we look at the differences between the methods, we can see that they all have advantages and disadvantages and that not all of them are appropriate for every individual. They should be carefully considered, and the best method, tailored to the individual's needs, should be selected.

It is unfortunate that litigation is not represented here today. What is on the agenda is ADR and the barriers to using it, and that is obviously significant. However, if we consider "dispute resolution" as the umbrella term, it is important not to exclude litigation. As Craig Connal said, we would not want to ignore it completely, because it is a fundamental and important part of the package of methods that are available to clients.

The Convener: That is helpful.

Andrew Mackenzie: I agree with Angela Grahame that it is about the range of options that Craig Connal and John Sturrock described. Therefore, it is about ensuring that the parties understand what the options are. More information about the options is needed for people and small businesses. Practitioners and advisers need to make sure that the parties in a dispute are aware of the options that are open to them, which could include mediation, arbitration or litigation. As Angela Grahame said, there is no right or wrong option—what is right for the parties depends on the case.

Colin Lancaster: There is permeability between the forms of dispute resolution. A dispute need not necessarily go down one route or another. Quite often, as John Sturrock has described, people may start a negotiation in anticipation of court proceedings or to avoid them; court proceedings may result from a negotiation that has not successfully settled the matter but which may have narrowed down for litigation the issues that are in dispute; through litigation, referral may be made to mediation in a variety of circumstances, which may bring an end to the proceedings or further narrow down the issues, resulting in a subsequent settlement or, indeed, a narrower litigation. Very often, it is not one option or the other. People might try a range of ways to resolve disputes, particularly if they are quite tricky.

The Convener: That opening has given us a good basic understanding.

Rona Mackay: How often is the client advised of all those options? I am trying to get the scale of how often people use ADR. Is it recommended regularly by the profession?

Angela Grahame: I am the vice-dean of the Faculty of Advocates. Advocates are generally involved in litigation, although a strong interest group is involved in arbitration and mediation, on which we are training large numbers of advocates so that they can be effective and give detailed advice to clients. However, advocates are involved in many situations because litigation has already started, so the gatekeeper or first point of contact with a client or potential client on a decision about whether to resolve a dispute is the solicitor or solicitor advocate. They may be in a better position to comment on the frequency of advice. The Law Society of Scotland's code of conduct requires solicitors to give advice about the different methods of dispute resolution that are available to clients. If clients request information, I have no doubt that the solicitor could advise on that.

Rona Mackay: Thank you. That information is helpful.

Craig Connal: We have to be careful about how the different methods relate to one another. In the example of litigation and arbitration, the law says that, if there is an arbitration clause and one party insists on dispute resolution by arbitration, the courts will enforce that—"to arbitration you must go", as one judge put it. If both parties want a matter resolved by a judge—it may be a technical legal point—they have the option to agree between themselves to go to court.

Mediation is discussed regularly, usually against a background of trying to resolve matters. People sometimes have the impression that the whole function of lawyers is to generate as much litigation as possible to make as much money as possible, but that would be a short-term view, as it could leave clients unhappy at the end. I suspect that many lawyers spend much of their time persuading parties to do other things rather than fight forever in an expensive forum, whether arbitration or litigation, which inevitably leads to whether there is another way to resolve the matter.

As John Sturrock said, the simplest method is to negotiate a solution. If someone can do that, why should they do anything else? However, it may not be possible—personalities may be involved and it is not unusual for people to take positions—in which case one option may be mediation.

The common view is that compulsory mediation is a bit of a contradiction in terms. It is something that people should opt to do because either they or their advisers think that it is the right thing; they should not be forced into it. It is probably fair to say that finding a solution is always discussed and that mediation will come in depending on the other options.

10:15

The Convener: I will bring in Liam McArthur, who wants to pick up on a small point.

Liam McArthur: Mr Connal has covered some of what I was going to ask, so I am happy to leave it at that.

The Convener: That is fine. We will move on to John Sturrock, Andrew Mackenzie and then Heloise Murdoch.

John Sturrock: I will respond to Rona Mackay's question, if I may. In some ways, she has identified the key to all of this, which is that people in Scotland with disputes should be able to make informed choices. I have no doubt that the provision of information is better now than it has ever been, and that many advisers now include in their advice to clients the fact that there are options other than litigation.

However, when matters become disputatious and are not capable of easy negotiation, it is fair to say that the prevailing culture in Scotland is to default to adversarial processes. In such processes, as Robin Burley hinted earlier, people inevitably set out their positions. They are involved in the paradigm of establishing right against wrong and have a win-lose approach. I suggest—and this may be where one becomes a little bit more tendentious—that there are significant societal, economic, business and community benefits for Scotland in moving towards a more consensual culture in which more disputes are dealt with co-operatively and consensually and therefore by negotiation, which may be aided or otherwise.

As a mediator, the phrase that I hear more than any other is, "I wish we'd had this conversation a year ago." That is often said by experienced people—clients, businesspeople, parties and individuals—who are involved in significant litigation and who discover that, in the course of a day, they can indeed resolve their disputes, but have spent a considerable amount of time and incurred a lot of emotional and other stress and disproportionate cost.

I am considered in what I am about to say, but I am pleased to be able to put it on the record. I know that people will say that it is a special pleading, but I will try to distance myself from that. I am frequently shocked at the disproportionate amount that parties, including many lay people, have incurred in costs in litigation prior to achieving a solution in that litigation that, it seems to them and others on the day, might have been achieved at much less cost and with much less stress and anxiety.

Therefore it seems to me that, in Scotland, there is a possibility of our moving towards a more consensual approach to many disputes—though not, by any means, all of them. If we can invite, inform, encourage and advise people with disputes to use a range of options—including, as Robin Burley has described, interest-based negotiation, by which he means that people are able to work out what they really need and want and find the intersection of that—that would be a good thing. Mediation is never compulsory. Even if people are encouraged or compelled to use it, we can never compel them to agree. In that process, they can still decide not to reach an agreement and use other processes if they wish to do so.

Therefore I say to Rona Mackay that provision of information about the options is very important. However, other stimuli and incentives may be necessary in order to bring Scotland to a place that so many other jurisdictions have reached.

Rona Mackay: Thank you. That is helpful.

The Convener: I am aware that a number of members want to come in, but I am going to go to the witnesses first, to hear what they have to say.

Andrew Mackenzie: I have something to add on the question. John Sturrock is right that there is now more information about mediation and arbitration than there has been. However, I think that there is still more to do on educating the wider public about the options and, indeed, encouraging solicitors to do more to make sure that they are very clear on the options for their clients. As Angela Grahame has said, solicitors have a duty to ensure that they explain the different options. We perhaps need to go back to universities and ensure that, at the time of the law degree, students are being made more aware of the options and there is not just the usual focus on litigation that we tend to find—for example, during the diploma in legal practice course.

Heloise Murdoch: A lot of what I was going to say has already been covered, but I want to add to the point about mandatory mediation. When a sheriff makes a referral to the Edinburgh sheriff court mediation service, it is mandatory for the parties to speak to me, as the co-ordinator, and receive information. It is always clear from that point onwards that mediation is one choice among other choices.

I want to add a comment to what John Sturrock said. I find that a lot of the cases that I deal with are more suited to mediation than to litigation. Maybe those who are involved do not have a lot of evidence or there is a lot of emotion, and sometimes people just want an apology. Mediation enables people to meet on an even basis, as it is set up for party litigants. There are some cases in the court where one party is represented and the other is not.

With mediations, about 75 per cent are successful, but it is always stressed right from the beginning that it is a choice. As long as the information is there, people always have the option, even after the mediation, of going back to court. We track cases after they go to mediation

and we find that, in about 50 per cent of them, even if the parties do not settle at mediation, they settle later and do not reach a proof or evidentiary hearing.

The Convener: I have a particular interest in apologies, which you mentioned. Are people aware of the Apologies (Scotland) Act 2016, and has it helped to encourage them to come forward seeking mediation and an apology?

Heloise Murdoch: I have not had experience of that so far, but it is something that I will look out for.

The Convener: There is more work to be done.

We will hear from Robin Burley and Angela Grahame next. I always give the witnesses the first shot. After that, I will bring in Liam Kerr, Ben Macpherson, Mairi Gougeon and Daniel Johnson, and I will then go back to Rona Mackay.

Robin Burley: I was going to comment on the compulsion aspect as well. I think you would find that, among the mediation community in Scotland, there is agreement that mediation should not be compulsory. Where we find the word "compulsory" being used in relation to mediation, it is usually about people having information. In the appendix to the submission from Relationships Scotland, there is an article by Stuart Valentine about people getting information before they go on, and quite a lot of jurisdictions require that. It is generally felt that that aspect of compulsion is acceptable, but compulsion to go to mediation is not.

Issues arise about the way in which that simple procedure has been carried out in the courts recently. I do not think that there is yet a good understanding that, when a sheriff asks people to go to mediation, that needs to be about their finding out more about mediation rather than about their case being determined through mediation.

In relation to simple procedure, it might be worth mentioning that, tomorrow evening, Scottish Mediation will hold a seminar that will involve sheriffs and others, including the Scottish Government, looking into and exploring the past year of using simple procedure; the ADR clause in relation to that, which generally means people going to mediation; and how we can improve that process. Any member of the committee who is interested in joining us at that seminar is welcome to come. It will be at 5 o'clock tomorrow.

The Convener: That is duly noted.

Angela Grahame: I draw the committee's attention to a significant event that will take place in Edinburgh in 2020: the International Council for Commercial Arbitration 2020 congress. I understand that the event is the arbitration world's equivalent of the Olympics. The Scottish Arbitration Centre competed with a number of high-profile venues and secured the bid—there is mention of that in its written submission to the committee.

In the world of arbitration, all eyes will be on Edinburgh, and it is an amazing opportunity for us here—and in Scotland generally—to showcase our talents in arbitration. It is important that we all work together. In April this year, the official handover will take place in Sydney, Australia. The dean of faculty will attend, along with other members of faculty. FoA arbitration—the special interest group on arbitration in faculty—wishes to assist in promoting the event over the next two years, because the profile of arbitration will be raised.

The Convener: That is helpful to know. However, today we are drilling down into why we should use arbitration and what the advantages are.

Liam Kerr: A number of the witnesses suggested that compulsory mediation would not be the way to go. Was mandatory conciliation the right way to go in the employment tribunal? It has a high success rate, and there are savings to the parties and the public purse. If it was the right way to go in the employment tribunal, why does it not extend to other forms of litigation?

John Sturrock: That is a topic with which the committee should wrestle. I have an open mind about that.

Significant costs are attached to a justice system. When people litigate, they incur and cause others, including taxpayers, to incur the justice system's costs. If, as the evidence suggests, mediation can help to resolve a large percentage of cases that might otherwise be in the civil justice system, there is at least a discussion to be had about whether people should be encouraged, incentivised or even compelled to try that process in advance of using the justice system, which is their entitlement under article 6 of the European convention on human rights.

You raise a point that is worthy of consideration. I repeat the point that, in encouraging, incentivising or compelling people to try mediation, no one is forcing them to achieve a settlement to reach an agreement, for that could not be done. There are public interest and financial interest reasons for discussing the issue, and the committee should do so. In many jurisdictions, that has been a necessary interim step towards encouraging the greater use of voluntary mediation over the longer term.

Robin Burley: Sometimes, there is a process whereby, if the parties have not come to an agreement by the end of the mediation process, the mediator can be asked to give some evaluation of the situation. In a way, that steps

outside the interest-based arrangement and moves towards a judgment. As John Sturrock says, those are issues to be explored. However, because in interest-based mediation we are trying to find a resolution in the interest of the parties, it needs to be voluntary. Only after that could one step aside from the mediation and have the mediator take on a slightly different role.

Craig Connal: The concept of having an effective court and justice system that is accessible to all is important, and forcing people not to go to that system seems a challenging idea. I agree with the comments about the voluntary nature of mediation.

I am afraid that I have heard anecdotally about quite a few instances in England and Wales in which people have gone to mediation because they were told that they had to. There is a cost involved in mediation—there is a process and the mediator has to be paid. Lawyers are often involved. The parties can go through a process at the end of which they are no further forward. Mediation is also sometimes used as a tactical device to winnow out something from the opposition during the process without any intention of settling. There are arguments about the use of mediation, so there is no simple answer to the question.

10:30

At an event that I attended, I had occasion to discuss the issue with Lord Tyre from the Court of Session. I asked him directly whether judges should be pushing mediation. He deals with commercial disputes in that court, so he is possibly at one end of the spectrum. His response was no—he regards those in the business community as his customers and he looks to create an effective system that gives decisions in the way that customers want. The commercial court is very good at that. The only thing that he said was that, as soon as he saw in front of him what looked like a corporate dispute that involved two brothers fighting with each other, he immediately said that they might want to think about other methodologies for resolving the dispute, because fighting to the death in the courts might not be the right way forward.

For what it is worth, my view is that it is horses for courses. In some cases, the courts may provide the best solution—for example, if somebody has not done what they should have done and the other party has been deprived of that and has been forced into some form of compromise. However, in other cases, a much more constructive solution can be achieved by negotiation or mediation.

Liam Kerr: I am not readily persuaded that that answers my question. My point is that, if we accept that a reduced cost to the public purse and to the parties and increased success rates are the endgames, we must conclude that bringing in a mandatory prerequisite for the employment tribunal of some form of conciliation has succeeded. If we started from that point, why would we not at least consider extending the same principle to other forms of litigation?

Craig Connal: I do not think that I have all the answers, and I do not pretend to have them. Mediation is less used where it could be most effective, which is in smaller disputes and in disputes that involve individuals, in which their feelings and concerns might be particularly heightened by what has happened. Mediation has tended to focus on being a provision for the commercial world—that is where it started, although it has extended into other areas, as one witness said.

In the majority of employment disputes, which essentially concern an individual's rights, one might be able to push people into a negotiation, which might be effective. I am afraid that I cannot comment on whether that is a good or a bad thing; I maintain the view that forcing people to go through a compulsory mediation process before they get access to the courts is quite a difficult issue.

The committee is probably aware of the recent litigation over employment tribunal fees that reached the Supreme Court, in which a long judgment was given about the importance of access to justice and how anything that stands in the way of that could be unlawful. That court also made statements about why everybody—not simply A and B who happen to be engaged in a dispute—benefits from the existence of an efficient justice system.

Some nuanced questions are involved. I take the point—from the employment lawyer who is sitting two places to my right—that a system of compulsory reference to the Advisory, Conciliation and Arbitration Service has proved to be successful. I have no doubt that Liam Kerr is right about that.

John Sturrock: There are others who are better placed than me to discuss this point but, although Craig Connal referred to mediation having started predominantly in the commercial field in Scotland, and although there is a lot of mediation in that world, there is considerably more mediation in other fields. Mediation started in family cases in Scotland back in 1985—the papers that are before the committee refer to that fact. Others who are here can speak more eloquently about the huge amount of mediation that takes place in the community and neighbourhood spheres and on

relationships and employment and so on. The committee should in no sense feel that mediation has been used solely or principally in the commercial field—that is a matter of information.

I will pick up a point that Craig Connal just made, because I think that it goes to the heart of much of the discussion. The proposition is that there is a benefit to wider society in having a justice system and compelling people to use the courts. I understand that proposition in theory, but we need to think about each individual case. Why should each individual litigant be compelled to use a court system for the benefit of wider society if that individual litigant could find an easier, more effective and quicker way of resolving disputes by negotiation? We must be careful about preserving a system for its own sake and recognise the needs of individuals and the value to them of having a more effective system.

A final point for information is that there are a huge number of English cases of high authority discussing all the points that we are discussing—the principle of mediation, access to justice, article 6 of the European convention on human rights, costs, incentives and compulsion—with regard to not just English cases but cases around the world. I know that the committee is exploring matters initially at this point, but I suggest that that might be an area for further exploration.

The Convener: That is helpful.

Ben Macpherson: Good morning. I am still registered on the roll of Scottish solicitors and, before entering the Scottish Parliament, I practised for a brief time, mostly in commercial contract drafting. A point was raised about solicitors being gatekeepers, but perhaps that is going too far, although they certainly have a significant role in providing guidance. I wonder whether we need to shift the conversation to initial contract drafting and preferred avenues for agreements when relationships break down. For example, I worked on a contract that had a clause that obliged the parties to consider arbitration after a certain period, which gave us leverage to consider involving an expert if the parties did not want to use arbitration—Craig Connell mentioned that situation earlier.

Do we need to think more about the conception of agreements instead of focusing on their end? Do we need to view dispute resolution beyond the main categorisations of mediation and arbitration and think about the role of legal opinion and other creative ways in which solicitors and others in practice can resolve disputes?

I have another question about a matter that we might come on to later. Are there spheres in which we can think more creatively about using alternative dispute resolution in relation to not just commercial contracts but issues around communities, as John Sturrock mentioned? For example, I am looking at how we can assist owners and owner-occupiers of tenement flats to undertake communal work in a tenement property. Is that an area where alternative dispute resolution could play an important role?

There are a lot of different points there, but I think that they are all useful to the discussion.

The Convener: Absolutely.

Robin Burley: Those points are very useful. On the point about focusing on the conception of an agreement, it would be very valuable if a mediation clause went into contracts at an early stage, as it sometimes does. There are examples around the world of mandates or pledges that organisations make to put mediation into their contracts. Scottish Mediation has a plan to introduce a Scottish mediation charter on a voluntary basis for organisations in Scotland, part of which will encourage them to put mediation clauses into their contracts. There could be some exploration of that and how it could be supported by legislation.

There are a lot of other innovative ideas, which are sometimes discovered by organisations that provide mediation for one purpose. Anyone who looks at the “Friends Of The Scotsman” section of *The Scotsman* will have seen that our director, who is sitting in the public gallery, wrote in that section last week or the week before. He wrote about a community mediation organisation that has started to get involved in owner-occupier problems around agreement to carry out repairs—which is exactly what Ben Macpherson is talking about. Something that started out as a mediation service for neighbour disputes has moved into that area and, in some councils, it has moved into workplace mediation as well.

As mediation moves into an organisation, the organisation starts to find ways in which it can be used. The ingenuity of organisations starts to come into play in using the skill of mediators not necessarily in full mediation but in what I would describe as a mediating way of dealing with difference and issues so that they do not escalate. It is a valuable contribution.

Andrew Mackenzie: Ben Macpherson makes a good point about contracts. That is, in effect, the agreement that should determine what the dispute resolution mechanism will be. I am afraid that it is not a matter of putting in a mediation clause; it is a matter of making sure that those who are drafting the contract understand what the agreement is about and, therefore, what would best suit the parties—or, indeed, their client—in respect of that agreement. It might be mediation or it might be mediation and arbitration. There could be a tiered

clause or the view might be that there should be litigation. I return to the point that it is about our practitioners and contract drafters understanding the differences and being able to advise properly.

We certainly find it more challenging to get to contract-drafting lawyers, who are generally not interested in dispute resolution matters. We find it more difficult to persuade them to think about a particular clause, which might be in a 300-page contract, and to recognise the value of taking time to think about the consequences of what goes into the agreement because, if there is a dispute, what will count is in that clause.

The point is well made. We must do more to get general counsel of companies—in-house lawyers—and private practice contract drafters to think more about what they are putting into contracts.

Angela Grahame: The committee should be cautious about seeking to limit the choices that are open to clients or potential clients. At the point of either the contract being entered into or a dispute arising when there may not be a contract, it is important for each individual to consider all the available options and to make an informed decision about the best option for them.

The key is education, raising awareness and allowing people to find that information. It is a question of how best to do that. One example that may be of interest relates to personal injury arbitration. Personal injury work is commonly conducted through the courts and litigated. FoA arbitration is promoting and raising awareness of the possibilities of arbitration as a means of resolving personal injury claims. The process has been used effectively in Scotland in the past. Many of the claims that were made by men who were injured during the Piper Alpha disaster, 30 years ago, were resolved through personal injury arbitration, but many lawyers in Scotland, both in the Faculty of Advocates and in the solicitors' profession, are not aware of that. They are not aware that that method has been used, although Scotland is unique in that regard.

John Sturrock: I am trying to think of what would be most helpful to the committee. I am aware that many of us around the table work predominantly at the commercial end of the market, where one hears quite a lot about mediation. However, in Scotland, the reality is that most folk with problems and disputes will never get near a court or a lawyer, not least because they do not have the resources but also because they do not know about the options.

10:45

There is real potential and a need for awareness raising in the commercial community, which is important for business and the generation of wealth in Scotland. However, we are also talking about family, neighbourhood and community matters—small claims, as we heard earlier—that will require different approaches because they involve different financial, educational and resource needs. The committee would be astute to think about the differences and to differentiate rather than seek one approach that would fit all situations. That goes back to the diversity of it all and how we must focus on the diversity of needs among the people who have disputes.

Mairi Gougeon: I want to go back to some of the earlier comments. I am interested in the difference between the consensual and adversarial approaches. When we started our discussion, Mr Connal said that he would not want us to be in a situation similar to that in England and Wales. From what I have gathered—please correct me if I am wrong—you may not want to see a different system operate in Scotland, but there could be ways in which we could utilise ADR methods better. I am interested to hear how it works in England and Wales and to hear your different opinions on that.

Craig Connal: I can say something about the English experience—although not in any great detail. Broadly speaking, in England and Wales, parties in civil litigation are in effect told that they must mediate under pain of being penalised in costs if they do not. That is an oversimplified picture but, even when a party considers that they have a cast-iron, open and shut case, they feel obliged to go through a mediation process in order to avoid the ire of the judge later on, who would ask why they have not mediated. John Sturrock would tell you that there is no case that cannot be mediated to a solution. In theory, that is correct.

I endorse the view of horses for courses. Someone mentioned family mediation. Every day of the week, we get court decisions that say that A is right and B is wrong. That is necessary in many cases, because that is what has to be decided. However, in a dispute following family breakdown—I do not pretend to be an expert in that—it is pretty obvious that there is no winner and there ought not to be a loser either, so there is great scope for family mediation to be effective.

I endorse what Andrew Mackenzie said about the difficulty of getting to the contract drafters. I am forever trying to persuade contract drafters to listen to people such as me who have been through the humps and bumps of the consequences of not getting it right, and it is quite difficult. The psychology is quite simple: if you are entering into a contract, the last thing that you want to think about is things going wrong—you are being positive, you are about to do the deal and you shake hands and get the paperwork done and

then someone comes along and asks whether you have thought about what you should put in your dispute resolution clause.

There are now some more sophisticated contracts that require tiers. At the first tier, the managing directors of each company should meet to try to find a solution and there are second and third tiers and so on. There are some more elaborate versions out there, but it is a challenging task to persuade people to focus on that early on. Of course, not every dispute arises from the contract, so that approach deals with only one aspect and not all of them.

As John Sturrock said, it comes back to treating mediation as a system that works best if the parties have agreed to be there and want to be there, rather than having mediation thrust upon people when they do not want it. That issue is still out for discussion.

The Convener: Family law has been mentioned, and there is scope for what you described in that context. We are very conscious that mediation is not appropriate in all family law cases. For example, it would not be appropriate in a case that involved domestic abuse. If we get that out of the way, we know what we are talking about when we are talking about family law.

John Sturrock: Mairi Gougeon asked a very legitimate question. Sometimes in Scotland we are a wee bit wary about looking south of the border for help, but there is a lot of information to be obtained by doing so. Since the late 1990s, the English civil justice system has been much more inclined towards finding ways to achieve early dispute resolution. That is incorporated into the rules of court, the way in which judges approach cases and the encouragement and information that clients are given.

With great respect to Craig Connal, I think that the approach to mediation is much more nuanced and sophisticated than he might have characterised it as being. If someone has a completely cast-iron case—very few cases are completely cast iron; if they were, they would not be litigated—they have nothing to fear from the English approach, which is that if a party unreasonably refuses to participate in mediation, having been encouraged by the court to do so, that might have implications for expenses, or costs, as they are called in England. That is a way of trying to adjust the risk balance, if you like, when people might choose not to try something that might be useful for them.

The reality is that in England it is well established that many cases—but by no means all—will go through mediation, and the structure is set up to accommodate that. The information and research over the years show repeatedly that in 85 to 90 per cent of instances that produces a settlement. The parties are out of the court system and everyone is happy.

Of course, every now and again that does not work, and of course that will mean that parties incur some additional cost. However, even then, parties tend to find that the approach has greatly enlarged their knowledge of the case; it often reduces the scope of the issues at discussion. Very often, cases settle a month thereafter, because of that further thought; mediation has helped to focus the issues in the case.

Of course, mediation is not perfect. The benchmark here is the extent to which a new approach might be at least marginally more effective and helpful for clients than the present approach, among a range of options. Some cases, quite understandably and quite rightly, will still go to court. However, the committee needs to be mindful that in Scotland only about 5 per cent of cases in the court system are adjudicated on—decided—by a judge. The statistic raises questions about the use of resources.

The issue is much more nuanced. There is much more to be discussed, and Mairi Gougeon is right to suggest that we look at the experience south of the border.

Robin Burley: I have been thinking about things that could be done in Scotland in future. When legislation is being examined up here, consideration can be given to whether mediation is relevant to it. Two areas in which I think that mediation has been successful, in terms of its take-up and use, are the Scottish Legal Complaints Commission and young people's special education needs. The legislation in both contexts contains sections on mediation.

Providing for mediation in legislation can be a constructive way for the Parliament to add to what is there and maybe to take away some of the obstacles that get in the way of mediation, given that in many cases the obstacle is that the opportunity for mediation is simply not well known. Legislative provision helps to raise mediation's profile and make it available.

Liam McArthur: I have a couple of points to make, one of which is about the commercial side of things. When witnesses were speaking, it occurred to me that, although when a contract is drafted the psychology is that its failure is not envisaged, nevertheless a company's insurers must have an interest in ensuring that the contract is written in a way that minimises the potential risk to the company. Is there a way of exploring the issue by appealing to the interests of insurers?

The convener quite rightly cautioned against taking too broad brush an approach in the context of family cases, given that issues to do with

domestic abuse clearly need to be handled with great sensitivity. It is invariably suggested that the only winners in relationship breakdown and divorce are the lawyers, but I imagine that many will make strenuous efforts to dissuade their clients from going down a route that will simply bog them down in more emotional and financial difficulties. Nevertheless, a firmer requirement for mediation would at least strengthen the hand of solicitors that clients need to consider it more seriously than they often do because they are so fixated on getting back at the other partner. I recognise the nuances, but could we find a way to reinforce that?

The Convener: Before I bring in Andrew Mackenzie, George Adam has a point to raise.

George Adam: I look at the matter from a practical point of view—Craig Connal has mentioned that. In my constituency, 1,300 fans backed the community purchase of the local football team, St Mirren FC, and put money into a pot to work with A N Other. The lawyers kept asking us how we would deal with things if they went wrong. They asked whether we had considered a dispute resolution process, but we were of a mind to move things forward and get the deal done because everything was rosy. The paper from the Scottish Parliament information centre refers to the view that solicitors act as the gatekeepers; in my experience, sometimes solicitors have given advice in cases but people are at a stage where they need to make progress. In this case, I have taken on the 10-year programme and I will have to manage it.

John Sturrock spoke about normal day-to-day constituency matters when people get involved in mediation. A lot of constituents and members of the public see mediation as a block to getting resolution. They do not get the benefit of it. They feel that they have to go through it before they can get a resolution of the issue. That is connected to the idea of buying into the whole idea of mediation.

Andrew Mackenzie: Family mediation is a success story in Scotland, and family cases have moved towards it. Bodies such as Relationships Scotland are involved in that work and family law practitioners are aware of the mediation options, which are always at the forefront of their minds.

However, mediation is not always the right way to go. Some family practitioners will tell you that arbitration, for example, may be right for a client, and the submission from FLAGS—the family law arbitration group Scotland—to the committee talked about family law arbitration. Litigation may also have to be considered. The general point is that each case is different. For a family in which there is no way that the two people involved will even be in the same room, it will be difficult to mediate. They might not want to go to court, because they do not want their private business discussed in public. Arbitration may be an alternative that allows a decision to take place when the two people cannot come to a mediated decision.

It is all about making sure that people have options, rather than requiring people always to go down a particular route.

Liam McArthur: Andrew Mackenzie is absolutely right. I declare an interest, in that I have connections with Relationships Scotland and I know about the work that it does and how it has expanded. Is the way in which referrals are made to mediation still patchy in some circumstances? Are some sheriffs more predisposed to it? May sheriffs even lay an expectation of what they expect to be achieved by that route?

Heloise Murdoch: I go back to the comment about mediation being a barrier to clients getting a resolution to a case. In my experience in the simple procedure court, quite a few party litigants have unrealistic ideas of how the court system is structured and what it can do for them. A lot of clients do not realise how difficult it will be to get their decree or the amount of evidence that is required. I suppose that that takes us back to the issue of information and advice, and we have an advice system that we refer people to. People need to be aware of the reality not just of mediation but of litigation.

11:00

On the comment about the patchiness of referrals, the sheriffs in Edinburgh tend to be pro-mediation. Judicial encouragement can be very important in encouraging people to get mediation, as long as it is not been seen as being mandatory.

The Convener: You have a dedicated mediation unit in Edinburgh, which is not the case throughout Scotland.

Heloise Murdoch: No, although there is also one in Glasgow. However, different courts seem to be taking very different approaches to the simple procedure rules that were brought in.

Colin Lancaster: I will pick up on Liam McArthur's question. It is important to recognise that, even in family cases, the majority are not litigated. Most family cases are resolved by way of negotiation and settlement, and only a minority end up in the courts in any form, with a minority of those possibly ending up being mediated.

The court has long had the power to refer parties to mediation in family cases, so it has gained a bit of a foothold in family work. Referrals are probably patchy, with enthusiasts for mediation in some local bars and among sheriffs.

Many years ago, when we started funding mediation through legal aid, we monitored its take-up. There were definite hotspots, and we could identify individual practitioners who had made it a priority and individual sheriffs who emphasised its benefits in their local courts, which encouraged more take-up locally.

On the question of making people aware of mediation as an option rather than simply ploughing on to litigation, I suppose that we perform a gatekeeper role when we consider legal aid applications for litigation, which are another subset of the picture. Before we grant legal aid to litigate family matters, we ask the parties what efforts they have made to negotiate in order to try to find a settlement and whether they have considered mediation. However, we must be mindful of the appropriate balance and not stand in people's way of appropriately litigating where that is the right thing for them to do. Although, we are mindful that we avoid becoming a barrier ourselves, we put it to the parties that they should consider whether mediation is an option for them.

For some, mediation is undoubtedly an option, but others do not see it as being for them. Part of the experience of mediation is that it is hard work for the parties. They may get more out of it—they may get back what they put in in terms of a more lasting relationship or a resolution that works for each party. There is no win or lose, because mediation tries to find a mutual solution, but the parties have to give of themselves to the process in a way that many people feel that they do not have to with litigation, where their solicitors might be seen to be doing battle for them. Particularly when emotional issues are involved, mediation is quite difficult for the parties and some may be reluctant to do it.

The Convener: Rona Mackay will raise a stand-alone issue that we have not covered but want to hear evidence about.

Rona Mackay: My question about funding has two strands. The first is about the funding framework. How are arbitration and mediation funded? We have heard that they can save the public purse money and reduce legal aid costs, but how does the framework work? Secondly, does it cost the client less to go to arbitration or mediation than it costs to litigate?

Robin Burley: I will focus on the issues relating to the simple procedure. We have heard from Heloise Murdoch about what is happening in the Edinburgh sheriff court. Funding is provided only for the co-ordination of the service. The mediators who work there do so on a pro bono basis.

In the west, the University of Strathclyde provides a service in seven sheriff courts through its mediation clinic. It has carried out between 70 and 80 mediations throughout the period of simple procedure. All that work has been done on a pro bono basis; the co-ordination is subsidised through the university.

Elsewhere in Scotland, as far as I am aware, there is no mediation service other than to refer people to Scottish Mediation's helpline, which refers them to mediators who make a charge. It is not a high charge, but the problem is that in some courts people are asked to pay for mediation while in other courts they get the mediation free, and different arrangements for the co-ordination of mediation operate across Scotland.

Over the past year, there has been quite a mixed bag in relation to funding. I hope that tomorrow's seminar, which will bring together, under the auspices of Scottish Mediation, people who are interested in this area, will address some of those issues.

The Convener: So there is an issue about access to justice.

Angela Grahame: There is legal aid funding for litigation and mediation but, as I understand it, the current position is that there is no funding from the Scottish Legal Aid Board for arbitration, which limits parties' choice. In domestic abuse situations, where there has been control or physical abuse or such like, parties need a decision to be imposed on them; they cannot reach a resolution themselves. That does not happen in mediation, but it could happen in arbitration. A significant number of people working in the field are interested in family law arbitration and have educated themselves in working towards that. However, there is no doubt that a lack of legal aid funding for arbitration limits parties' choice and means that they are pushed towards litigation if they cannot resolve their dispute through mediation.

Colin Lancaster: We have long funded mediation, effectively as an outlay on a solicitor's account either prior to litigation under advice and assistance or as part of a grant of civil legal aid. We started doing that in 1995-96, at which point there was a great hope that making funding available through legal aid would unlock mediation because a lack of funding had been holding it back, but I do not think that that was the case.

We have been funding mediation now for more than 20 years and the take-up has not been enormous. As I explained earlier, it has been geographically differentiated depending on local cultures or behaviours by sheriffs or solicitors. I do not think that making funding available was the thing that was going to allow it to flourish, because there are other structural or cultural barriers to moving in that direction.

The Convener: Are people aware that that funding is available? Is lack of awareness part of the problem?

Colin Lancaster: It is one of the tools available to solicitors in advising their clients and enabling them to make informed choices. It goes back to what advice people are provided with, what options they are presented with and what preference is expressed by their adviser. Lack of awareness of the option and understanding of what it might involve might hold things back as much as, if not more than, the availability or otherwise of funding.

We are meeting the Faculty of Advocates on Friday to discuss arbitration generally; we have previously met Andrew Mackenzie and his colleagues. I do not think that we have ever had a case presented to us for how arbitration could fit into the legal aid system. Mediation sometimes exists alongside litigation proceedings, which are what legal aid is available for, whereas arbitration really is an alternative to litigation. It sits distinct from litigation, so its ability to be integrated into the legal aid system, particularly as it is directed towards litigation, is a bit more of a challenge.

We will discuss that on Friday, when I will be interested to explore just what the funding mechanism could or should be that would enable arbitration to happen, and what rules would have to be placed around that. We have detailed rules around access to legal aid funding for litigation and, in a similar way, we would have to consider what the position would be for arbitration.

John Finnie: The research that SLAB published in 2014—I believe that it was based on research experience from 2012—has been alluded to already. First and foremost, I wonder whether there is a catch-22 situation, because one of the findings of the research was that there was

"a lack of publicity about ... ADR as an option".

Is there a role for SLAB to promote it?

Secondly, given that the landscape has changed slightly with apologies now being another option, is there any plan to review your role or to do further research?

Colin Lancaster: We have been involved in general discussions about ADR over many years, although they have often focused on mediation. Our experience has been that something is holding ADR back. The research that we published and other research that we have contributed to, such as the Scottish Civil Justice Council's access to justice committee's work on ADR, suggest a long list of potential barriers, many of which are cultural or based on knowledge or understanding.

There are opportunities to use online sources of information where different options can be presented alongside one another and, if people use those as they initially try to work out how to resolve a dispute, there is no influence placed on their viewpoint by an adviser who might encourage them to go in a particular direction. The mygov.scot website, which is a growing and useful resource in terms of information on dispute resolution and many everyday matters, presents information about advice services, legal aid, alternatives to court and court alongside one another. It also has links to many mediation and other ADR organisations.

The information is out there but, as John Sturrock referred to it, there is a culture in which the default mode for many people is to go to see a solicitor. By the time they do that, they probably already have an approach in their mind and it is difficult to move them from that if they have a particular focus on wanting to litigate the matter or to be proven right. That approach is not the most amenable to mediation, so it is important to get information to people early when they are considering their options and before they are part-way down a track from which it is hard to retreat.

The Convener: I am very conscious of the clock, as we have about five minutes left.

John Sturrock: In response to Rona Mackay's question, there is evidence available from other jurisdictions about the savings that might accrue from, for example, the use of mediation. If the committee would like to have access to that, I will provide some information.

Rona Mackay: That would be helpful.

John Sturrock: Certainly, the evidence from England is that very substantial savings are being made through, for example, the use of mediation. It would be useful to think about whether a comparative study could be carried out, but it is also important to look at it not just from the point of view of finance, as there is a danger that we look at it as a way to save public money. That is an appropriate factor or criterion, but there are other issues that I have mentioned, such as stress, anxiety, time, relationships, contracts and so on, for which the use of ADR would have benefits and disadvantages, and all are worthy of consideration.

In my submission, I suggested as one of my recommendations that Audit Scotland might be invited to carry out a review of the civil justice system from a value-for-money point of view. It would be interesting to develop that.

Robin Burley talked about mediation and the provision of pro bono services. That has been great and people have sacrificed a huge amount of time over many years. However, if mediation

and mediators are to be perceived as a valuable part of the dispute resolution framework, there comes a point at which some value must be placed on the provision of those services and an appropriate level of remuneration must be made available, not least if we want people to develop those skills and their careers in that way.

11:15

I will finish these remarks by picking up on what Colin Lancaster said, and what I said earlier. However much we discuss the matter, we are back again to consideration of the structural, societal and cultural ways in which we deal with problems in Scotland. There is often perceived to be a culture of win-lose adversarialism and polarisation in this very building, and that sends signals.

We are, of course, in some ways biologically and psychologically geared up for the fight-or-flight mechanism to prevail, particularly when we are under pressure. It is a matter of working with those ideas and the idea of what it might be like to have a society in which we can understand how people act and react under pressure—particularly when things become very emotional—and how, nevertheless, we can help people to work more effectively.

That was really the context of the Apologies (Scotland) Act 2016. It was an attempt to put a different approach into the culture of problem solving, because apology is a well-recognised way of achieving that. This session has opened up all sorts of possibilities and interesting questions for inquiry.

Liam Kerr: For reasons of time I will ask two very direct and targeted questions. John Sturrock talked—quite rightly, in my view—about the nuances, and access to justice has come up. Is there a danger that we talk about access to justice when what we really mean is access to the courts? I am not sure that the two concepts are synonymous and I think that they are often wrongly conflated. I would be grateful for your thoughts on that.

I will put my second question to Robin Burley, although I appreciate that others may want to respond. Mr Burley talked about how these approaches are not well known. Given that they are cheaper than the courts and solicitors and that, from the evidence we have seen, the success rates appear to be high, it seems odd that people are not availing themselves of these approaches and do not know about them. A cynic might suggest that members of the legal profession would be reluctant to recommend them, given that they would effectively be talking themselves out of money. Would the cynic be right?

The Convener: As if, Mr Kerr!

John Sturrock: Liam Kerr has raised a very important point, if I may say so. The issue about justice and what we mean by that is one that would take up the whole hour and a quarter and more. He may be right that access to justice is perceived rather more narrowly than it could be. However, I would like to reframe the question and suggest that what we are really considering is availability of early, effective, efficient and useful processes to help people to resolve their problems—disputes, differences or whatever they may be. Justice is a much wider concept or understanding than merely a reference to rights as defined in the law. That itself is a contentious issue and needs to be discussed further.

Robin Burley: I do not think that the cynic is right. We need two things—leadership and education. On leadership, it would be great if people within the Scottish Parliament availed themselves of the opportunity to learn about mediation and took courses in it. It would help to show that there are other ways of handling difference and dispute.

On education, when I leave here I am going to the University of Strathclyde to do some tutoring in mediation as part of the university's diploma course for lawyers. Edinburgh has a diploma course that includes a mediation module, as well. If there were modules in mediation in all the law schools in Scotland, we would see a change coming in. Education is key to making that change, but it is a generational thing. We need leadership now to make the change.

Andrew Mackenzie: Mr Kerr's point about access to justice is right. We should look at all the different options, and mediation clearly falls within that. On the point about costs, if we want to see more mediation and arbitration and—particularly at that lower level—to keep that work out of the courts, we have to have a way of making it cost effective.

We have talked a bit about legal aid—the committee will not be surprised that I do not agree with SLAB on arbitration—but I think that we need to be a bit more radical and look at things such as online dispute resolution and telephone mediation. There have been successful schemes elsewhere. Thinking about rural areas in particular, where people might have to travel hundreds of miles to their nearest court, we need to think seriously about how we ensure that people can get access to dispute resolution, whether that is through the court, mediation or arbitration, and that we have proper ways in which people can do that, possibly even from their own home if it is by telephone or on a computer.

We need to be much more radical about ensuring that people have access to different dispute resolution methods and how that actually happens. Do we start to integrate it into the wider court and justice system? Does it become an option in a sort of triage approach, in which people get a choice as they come towards the court door about the different options open to them and the different costs involved? Telephone mediation will obviously be cheaper than having somebody in court for a number of days. We need to be quite radical about what options there are, such as those that are being tested elsewhere in the world, and we need to think about the possibilities for using technology to ensure that people have real access to justice in Scotland.

The Convener: With that, I am afraid that the clock has beaten us. I thank all the witnesses for what has been an excellent session. ADR—or RDR, if we want to refer to it as that—has not been given the prominence that it could have been given, and today has helped to resolve that to an extent. It has also raised lots of issues and the panel will be pleased to hear that we will look at those during our work programme to decide whether we want to move forward and do more. In the meantime, thank you all very much for attending. I suspend the meeting for a change of witnesses.

11:21

Meeting suspended.

11:28

On resuming—

Remand

The Convener: Agenda item 5 is an evidence-taking session on remand, on which the committee held a round-table session on 16 January. Today's session provides an opportunity to explore in more depth some of the issues that were raised at that round table.

I welcome the witnesses. Karyn McCluskey is the chief executive and Keith Gardner is the head of improvement at Community Justice Scotland; Thomas Jackson is the head of community justice at Glasgow City Council, and is representing the Convention of Scottish Local Authorities; Tom Halpin is the chief executive of Sacro; and Kathryn Lindsay is the chief social work officer for Angus Council and a member of Social Work Scotland.

I thank all the witnesses who supplied written submissions. That is always extremely helpful for the committee in advance of an evidence-taking session.

I refer members to paper 4, which is a note by the clerk, and paper 5, which is a private paper. We will commence our questions with Liam Kerr. [*Interruption*.] I am sorry—Liam McArthur. I looked at Liam McArthur and I said "Liam Kerr".

Liam McArthur: You keep throwing me that dummy, convener.

The Convener: Of all the committees that both Liams could end up in, it would be the Justice Committee.

11:30

Liam McArthur: I offer a quotation from the Scottish Prisons Commission from 2008, which said:

> "often remands are the result of lack of information or lack of services in the community to support people on bail."

I ask for your reflections on whether things have moved on since then. Is the quotation still apposite?

Thomas Jackson (Convention of Scottish Local Authorities): It is fair to say that we have watched remand numbers grow. They have not reversed, so from that perspective it is still an issue. The question whether it is about more information or support could be discussed. The critical issue is that we have good evidence that where we provide supports in the courts, there is a shift in judicial confidence and sheriffs decide for bail and community options. We know what we can do to make that shift.

Tom Halpin (Sacro): There is no doubt that the Scottish Prisons Commission reflected what everybody knew was the issue. Fundamentally, that remains the same.

You asked whether the situation has changed since 2008: that is a good question. People do not comply with bail and other conditions because of a broad range of circumstances: it is not just about them not wanting to comply. We must consider the whole picture and the availability of supports.

The answer to your question is that the picture is different in different parts of Scotland. However, the Prisons Commission's statement is still right and we should stay focused on it.

Liam McArthur: If the picture is patchy, it is perhaps invidious to pick out the exemplars or to name and shame. However, is there evidence that shows what the people who get it right more often are doing that others are not doing?

Tom Halpin: In Sacro's view, structured bail supervision services are effective. The service in one sheriff court accepted short adjournments with the full support of the sheriff principal and the sheriffs to ensure that there are packages around people. In 13 months, the service worked with 30 women who were selected because they were already going on remand. The adjournments during the hearings were because breaches of conditions had occurred and drug treatment and testing orders were not working: there was history. Of the 30 women, 25 complied with the support. Of the five who did not, four breached conditions and one did not comply because she moved out of the area.

That is one example; I could give many. We know that bail supervision is effective and works.

Karyn McCluskey (Community Justice Scotland): Community Justice Scotland is a relatively new body and has been looking around Scotland.

Knowing that I was coming to give evidence to the committee on remand, I spent some time in the custody courts. We are dealing with the most damaged and chaotic people in our communities. Bail supervision is not the only answer. Most of the people involved live in chaotic accommodation—in bed and breakfasts, for example—so letters do not follow them from one place to another. We will have to look more widely for solutions to the issue.

Colleagues will be aware of the work that is going on around homelessness; we seem to be able to occupy opposing moral universes on the matter. With remand, we are often dealing with the same people that we deal with in respect of homelessness. Indeed, one leads to the other: many rough sleepers have just come out of jail.

There is an evidence base from the housing first model, through which we put people in a home. Maslow's hierarchy of needs would say that the most essential things are that people have a stable situation and reduce some of their more abhorrent and damaging behaviours. That does not happen yet, as we can see from cases in the courts. The people in our communities who are most dangerous need to be remanded, but we need to think of different ways to deal with the chaotic people.

The picture is very patchy around the country. I hate to use the term "postcode justice", but it exists. In some areas, people may be diverted or there may be a great bail supervision pilot programme, which is more likely to be the case for women than for men. Therefore, there is a mixed picture, and it is no surprise that the use of remand has continued unabated.

Liam McArthur: In that case, are we perhaps misdirecting people by focusing on what social work departments could do to provide information that would give prosecutors and sheriffs the confidence to take on alternatives to remand?

Karyn McCluskey: I listened to Sir Harry Burns giving evidence to the Health and Sport Committee. The majority of people whom I saw in the custody court last week need a care package. They are people with alcohol or drug problems. We look for the propensity to reoffend, and people who abuse drugs are more likely to reoffend. In the Netherlands and Germany such people are provided with immediate access to detox, which would be much more effective here than remand is: people would achieve much more and would achieve better outcomes.

Liam McArthur: You referred to "postcode justice". Are the options that you have just mentioned, among others, being woven in in relation to housing allocations and so on?

Karyn McCluskey: That is happening in some places. Not too far from here is LEAP—the Lothians and Edinburgh abstinence programme—which is absolutely outstanding. I cannot tell the committee how good it is. I asked LEAP whether it could take more people: it probably could. I know of defence agents who have been desperate to get people on to the programme. We need to consider the matter as a public health issue in respect of the great majority of people who are in a cycle in and out of our prisons. If we look at it solely as a justice issue, we will not achieve the paradigm shift that we require in order to put in other measures to keep people from offending and to reduce victimisation.

Kathryn Lindsay (Social Work Scotland): I want to pick up on Karyn McCluskey's point by saying that, in working with the most vulnerable

people across society—whether or not they are on remand—our observation is that the issue is often about the stickability of universally available services. We tend to find that our more chaotic individuals continually struggle to engage with such services. That might be because changes of address mean that correspondence about appointments is missed.

It is often the case that the level of chaos in an individual's life means that trying to hold on to them and support them to get to a point at which they can effect change is very challenging. That is when we see people yo-yo in and out of custody or remand situations. Rather than focusing specifically on the criminal justice social work element of the response—bail advice and provision of services to courts—we need, across health, the third sector and local authority provision, the partnership element that is much broader than a justice response.

Liam McArthur: I will draw on the example of my constituency. Is that happening because we are seeing more integration between social work and healthcare provision? I presume that you have housing colleagues co-located with you. Are local authorities and health boards now grasping the fact that a multipronged approach to more complex cases is the only way of getting the "stickability" that you mentioned?

Kathryn Lindsay: It is about having a multi-agency approach and looking at people's circumstances in the round. Individuals exist in families and communities, and they have a range of issues that lots of different services can help to resolve. I think that the challenge is, as Social Work Scotland observes, that often our systems around appointing substance misuse support, for example, are not as flexible as they need to be to encourage continued engagement by the most vulnerable and chaotic individuals.

For example, if I have a general practitioner appointment on Friday, I know that I need to keep it. I would remember that and would have lots of different things that would help me to get there. However, a lot of the people with whom we work might not even know when Friday comes, so their ability to keep appointments with GPs or other services is limited. Even if we can tap them into services, the problem is often about the follow-through and on-going engagement that they need to make changes in their lives.

Tom Halpin: I will be brief; my comment follows on from that. The traditional view of bail supervision is about compelling, compliance, curfew and those rigid things. What we are talking about here is much more holistic, and the social work part of it is absolutely crucial.

The pilot of the project that I talked about was undoubtedly successful, and it was successful because the court, the social work service and the third sector worked together as one team. For example, I know of a woman who breached her DTTO and everything else. Everyone had had enough—there was only one place she was going, and that was adjournment.

The first conversation between the court social worker and the third sector was on the need to put a plan around her. They said, "Tomorrow we'll start that, but today we need to get the court to accept that this is a credible solution". The court's first response was that the woman could not comply, and had not complied, so it asked why that should be done. That point was made. The third sector's response was that the woman had to comply because she was in the last chance saloon. It was a really honest conversation. The woman kept 11 of 12 appointments, and had a reason for not keeping the one that she missed. She then went back on a DTTO.

It is crucial that we do not write people off. The system is not currently flexible enough or holistic enough. People need wider supports.

My final point is that we talk about whether housing and health are at the table: very often, they are in the conversation, but from the third sector's perspective, referrals between services are pretty rigid and systematic, which is why things fall between the cracks. You need someone who can go into those spaces because they are not aligned with just one service, so that they can make appointments and make sure that the person is there on Friday, or whenever. That is the holistic bit, which is not about a process diagram.

Fulton MacGregor: I have a point about bail supervision, which we were going to raise later on, but this is probably a good time to bring it in. I declare an interest as a social worker who is registered with the Scottish Social Services Council.

One purpose of the community payback order was to bring in a more holistic approach. When a person is convicted and given an order, it sometimes includes conditions including that health services and so on are to be involved. In relation to remand, we are in a totally different position. On what Tom Halpin just said, does the panel know of anything that could work universally that would give bail supervision officers, for example, teeth, which would enable them to get the various agencies involved? Where I worked as a social worker, bail supervision was very effective and was regarded as being particularly successful in that area. I know, however, that its effectiveness is patchy across the country. Are there any suggestions on that?

Tom Halpin: There are a number of examples of people who have successfully moved through bail supervision to community payback, because of a disposal of the court. The real crux of the matter is that it is not simply about supervision and unpaid work—it is wider. There are great examples of that happening in all authorities, so the point that Fulton MacGregor made is right. However, there must be an end-to-end pathway so that everyone understands what is to be achieved.

Keith Gardner (Community Justice Scotland): My answer will speak to the first and second points about the response to people who are on bail.

The committee will know that the new model of community justice has been rolled out across the 32 local authority areas. Each area is required to produce, and has produced, a community justice outcome improvement plan. Many of the plans speak to the issues of remand and bail.

The purpose of the plans is the development of comprehensive and cohesive local services that are a response to individuals who are in the justice system. I think that sometimes the justice element obfuscates the fact that such individuals do not have a level playing field. They are people who, by and large, have numerous complex difficulties that arise from a range of previous traumas.

As Tom Halpin suggested, those people do not comply or find compliance difficult, but the system generally demands 100 per cent compliance 100 per cent of the time. The idea behind the community justice outcome improvement plans is for all local partners to have a common vision of what community justice means in their area, which includes what it means when people are bailed to the community. What is our collective response? Let us help people not to lose their accommodation and employment, but help them to stay connected to their families. We know that those things have impacts, so that response can help to improve people's lives.

11:45

Although we need to think about the structures, it is much more important to take a more people-centred approach because this is a public health issue. If we do not address those people's issues and instead just keep seeking to punish them, we will simply marginalise them further. Although there are some dangerous and harmful individuals out in the community, the vast majority of people whom we deal with through criminal justice social work and associated services are in need of care and assistance. They represent as much of a risk to themselves as they do to other people.

Maurice Corry: What I am hearing is music to my ears. I visited Her Majesty's Prison Barlinnie on Friday, and that is exactly the point that came out of my discussion with the lead and support for outcomes and the deputy governor of the jail. There is clearly an issue, because 40 per cent of the prisoners are in a revolving door situation. We talked about the co-ordination between social services, local authorities and the police.

Last year, I visited North Devon Council—I was on holiday, but I was interested in what it was doing. The council has a multi-agency team in its headquarters, which has reduced the problems by 50 per cent, because the police are next door to social services and other people.

My question is for Thomas Jackson. What is COSLA doing to encourage local authorities to take that approach?

Thomas Jackson: There is a varied picture, but I have a better knowledge of Glasgow than I do of all the other local authorities, so any answer that I give will reflect that.

We need to ensure that, alongside discussion about bail supervision, we talk about voluntary opportunities. In Glasgow—although it is not unique to Glasgow—we have a partnership between three third sector organisations that are based in a social work office and provide a bail support option for women. It is a women's service. That option is entirely voluntary and without conditions, but we have had some very positive outcomes from it. We need to broaden the opportunities for people.

We must also consider the overall impact. You mentioned the constant churn at Barlinnie, which is a unique situation. The committee has received evidence that about 20 per cent of the daily population of individuals in custody are there on remand, although the daily reception for women is well over 60 per cent. We are talking about a huge volume of individuals with, as we have heard today, very complex needs.

That raises the issue of where the resources will come from. We know what works and we have the evidence for that. However, in 2012, an Audit Scotland report identified that only 16 per cent of a £3 billion spend on reoffending in Scotland was spent on rehabilitation. Our shift in justice spend needs to focus on what we can do in the community. There are plenty of good examples across the third and public sectors, and we can do a lot more of that work if we think about how we can take some of the investment that is currently locked up in prisons and put it into the community.

Liam Kerr: During our previous evidence session, we were told that there is a lack of data on why judges are still putting people on remand. I find that odd. Do you have a view on why that data is not captured? Do any of you have anecdotal

evidence of why judges are still putting people on remand?

Tom Halpin: We have figures for outcomes from the projects that we have done. For example, in one local authority area, there were 250 cases over a certain period and I can give you the breakdown of what happened in each case. We can give you sufficient evidence to draw inferences from, which I think would be helpful. That information is available.

In the project that I told you about, which involved 30 cases, there was great support from the sentencers. They conducted a survey of their own courts in that sheriffdom over five weeks, and there were 70 remands of which only two were women. Of course, those two women are important, but, if we are talking about numbers, that project was not touching the large number of males who were going through remand.

What came out of that project is that the courts are supportive as long as the community alternative is credible, consistent and there. If sentencers are faced with someone who is breaching all the time and who is reappearing before them and they do not have an alternative, that forces them down a route. It is about ensuring that the support that we provide in the community actually supports the aim of the court, which is not to put someone in prison at that stage.

Liam Kerr: Just to clarify, I am going to reflect back what I heard. It might sound quite pejorative, but I do not mean it in that way. I take it that judges are saying that they are going to hold people on remand because they have concluded that the community alternatives are not credible. Is that why judges are deciding to use remand?

Tom Halpin: In that particular case, when someone was presenting not for the first or the second time—when they were not complying—and there was no wraparound or holistic service and no report or resource in front of the court, the judge knew that, if they just released the person as they did the last time, they would be back next week—that is my phrase. That is not a credible position, whereas we had an adjournment, a court social worker and a third sector partner. A needs assessment was done and a care plan was put in place, and we came back and said, "This is what is going to happen." If there is no compliance with that, it is then a different discussion.

Liam Kerr: In effect, the judge was saying, "What else am I supposed to do?" Is that correct?

Tom Halpin: That is certainly the impression that I had in that case.

Keith Gardner: I would not disagree with any of that. I preface what I am about to say by saying that it is not meant as a criticism of any sentencer or procurator fiscal.

The legislation is difficult in and of itself because the driving legislation behind it, the Criminal Procedure (Scotland) Act 1995—section 23C for the pedant in me—talks about taking into consideration factors such as a substantial risk of failure to appear and a substantial risk of reoffending.

Those are unquantifiable statements, and it is left to the court to make decisions in a very complex and speedy process. The situation is further complicated by the fact that the legislation requires the court to ask whether the person has previous convictions and whether they have previously failed in relation to an order without any recognition of how "previous" that was.

The overall picture is that, if a court is going to make an assessment of the risk that an individual presents at the time, there is a question around how that process is driven, what the outcome of that process is and what evidence drives the decision making in the court.

Another part of the legislation requires that, when bail is granted or refused, a record should be kept of that. I am aware that that happens in some cases and not in others. Liam Kerr asked about the lack of data. He is right to do so, because we do not know whether it is the same individuals we are remanding time and time again. Is there a difference in remand being used in solemn and in summary cases? There is a dearth of data on that, as the two elements are compounded.

Karyn McCluskey: I absolutely agree with Liam Kerr. It is an area that is ripe for problem solving. When I was at the court on Monday, I picked up a procurator fiscal form. It is a report by a sheriff and a bail application, and it goes through criteria—yes or no—about why they are granting or refusing bail. I do not know where that form is kept or whether it is always filled in, but it would be useful to start to look at it.

Another point that I highlight is our tolerance for risk. We are so used to applying risk models for some of the most dangerous people in our society—as is absolutely right—that we tend to apply them to some of the more chaotic people, and that is impacting on remand. I have sat in court in numerous custody cases and have noticed a lack of knowledge about some of the options that are out there. We are looking forward to electronic monitoring—I am heavily involved in that—particularly around bail. The use of the global positioning system, as opposed to the radio frequency that is currently used, will make a big difference. However, there is a lack of knowledge.

I have to say that the people who are really good are the defence agents. I was impressed by the quality of the defence agents that I saw in the court. They knew their clients well and understood their journey, and they represented them very well. They highlighted opportunities in third sector services and other services that are out there. I came away thinking that I must contact more defence agents to tell them what is available.

Liam Kerr: For the avoidance of doubt, did you mean to say that you want to contact solicitors, not defence agents?

Karyn McCluskey: Sorry—I meant defence solicitors.

John Finnie: My question relates to the same point and the example that Mr Halpin gave. In previous evidence, stand-down reports have been commended to the committee. Given what Ms McCluskey said, there seems to be a pivotal role for the criminal justice social worker in the court in the context of sentencing. Are sentences being meted out when a criminal justice social worker is not present in the court? If so, could that be addressed?

Tom Halpin: There will be a broader perspective on criminal justice social workers in courts. In our experience, whether a social worker is available on the day is very much subject to demands on the local department.

In reforming the system, we must be careful that we do not just move the deck chairs. People talk about reform and say, "We'll do it with that team," and then, "We'll outsource it," when, in fact, they are still doing the same thing.

Karyn McCluskey's point about risk was very relevant. A lot of the risk assessments were brought in before austerity, at a time when there were resources. It might be time to have a look at what we mean by risk assessment and think about whether assessments are still relevant in the context of the resource that we have today. We have to ask whether the resource that is tied into risk assessment is changing lives or administering justice. There is something to be said for going back and looking at what we are doing more broadly. Whether there is someone who can get a person to their housing appointment is important, but when we talk about reform we need to think about the whole system.

Kathryn Lindsay: The original question was about decision making in courts. There has been research into sentencing decision making in a number of jurisdictions and, during my career, I have had the opportunity to talk to a number of sentencers. The response that I can share is that every case is an individual case and the courts are often weighing in the balance risk, the seriousness of the alleged incident and the person's history of compliance or non-compliance with court orders or other orders. How the person presents on a given day also features. There is no doubt that greater availability of information to courts to help them to contextualise the individual would be of great assistance.

There is some variability in how criminal justice social work is delivered in practice. Not every court is created equal, and not every criminal justice social work service has the same funding available to it. The reality of delivering court-based social work services might be that a single social worker is on duty, perhaps covering more than one sitting court at a time. They might be running from one court to another, trying to capture the people that they want to engage with.

12:00

In our written submission, we give a flavour of some of the tasks that criminal justice social workers undertake in the court. At any given point, a criminal justice social worker might be the only person who is doing that work across several courts in one building, and they will also be in demand from various solicitors who are looking for updated information so that they can inform the court about their individual clients' circumstances. It is therefore a really complex situation and one that involves a lot of juggling and decision making in real time about where best to use the time.

If someone's time is taken away, perhaps to interview someone who has just received a custodial sentence or who has been remanded in custody and whose family is very distressed as a result of that decision, they cannot be in court and available to provide information about someone else. There is a real-world issue about how we can provide sufficient cover in those circumstances so that, in every instance, real in-depth and meaningful information is at the court's disposal to help with decision making.

Thomas Jackson: Kathryn Lindsay picked up on some of the issues around stand-down reports, but 3,700 were issued in the most recent year for which we have full records, and more than half of them were oral reports. As Kathryn said, a range of informal information gets to the court's ears via social work through solicitors and other means. Social work provides that resource, although it does vary across Scotland—that is a fair point.

The issue is about the judge's decision. As Keith Gardner highlighted, they are trying to make a rational decision in a complex setting with a complex set of individuals. How do we shift that confidence? More information is one way of doing that, but it is also about the community options that we have available. In our written evidence, we present some information about our investment in

women's services. When a woman goes to court and, maybe, faces a decision between remand and bail, we can now provide greater support. We do not have the same resource investment in relation to men.

We have invested well in aspects of the justice service so a judge will have every confidence that, if they send somebody to custody, they will reappear in court, but we have not necessarily made the same investment in our community services. That needs to be a crux of today's discussion.

The Convener: Fulton MacGregor has a supplementary question.

Fulton MacGregor: How important are the local courts in that regard? There have been changes to the local courts system recently. How can the situation be resolved? In my experience, having local knowledge in local courts was very effective because the courts did not always rely on the court social worker to provide information, as the local office could also provide it. How can the problem be resolved?

Karyn McCluskey: The evidence from places such as Red Hook and community courts is that having a stable sheriff who sees the same people can have positive outcomes for some of the most difficult people that we are seeing day in, day out. It is a challenge when numerous courts are sitting, and in big places such as Edinburgh and Glasgow they might see different people each time. The evidence base tells us that some of the community court models definitely work, although they are incredibly expensive. People tend to focus on the building and not the process, but things such as the drug court are successful. There is about to be a new alcohol court in Glasgow, and there is an alcohol court in Edinburgh. Such things show real success because the people who are sitting on the bench are absolutely invested in them, and so are the people who are coming in front of them.

Liam Kerr: Karyn McCluskey mentioned electronic monitoring. At a previous meeting, we heard the chief inspector of prisons say that that is not currently available as a condition of bail but that it might be available in the future. Can you help me to understand why it is not available now and how likely it is to be available in future? Can anyone on the panel say what difference it would make to remand numbers if electronic monitoring was available?

Karyn McCluskey: My understanding is that there used to be provision for EM to be used for bail. Of course, that was via a radio frequency signal, so the person needed a box in their house, which was cumbersome. I have just come off the expert group on electronic monitoring, which has recommended the use of GPS monitoring and alcohol monitoring. The legislation is being drafted at the moment, and it will have to go through a process. We have proposed that monitoring be used in a range of areas—for example, for people on bail and people coming out of prison.

Electronic monitoring is an extra tool, but the issue is about more than just the technology. It is a bit like wearing a Fitbit and expecting to lose weight and become fitter as a result. People who are being electronically monitored must also be supported. If I put an alcohol bracelet on someone, for example, I need to help them to avoid alcohol, which is about finding sober friends and sober places. It cannot be about just the technology, although I have great hopes for it, given the very positive evidence from Germany and America. We should be able to use monitoring for bail, but we must also support people. If the housing first model or bail supervision was being used, electronic monitoring could be an extra tool in the sheriff's toolbox.

Kathryn Lindsay: From Social Work Scotland's perspective, electronic monitoring, or any tool that could help us to reduce the unnecessary use of remand, would be very welcome. However, I add a word of caution about the potential risk of up-tariffing existing bail supervision cases. Following the original pilots, we have had bail supervision for many years and its use has grown, but the use of remand has grown exponentially alongside that. Our concern is about more punitive and restrictive measures being added to bail supervision with no corresponding reduction in the use of remand. We would support the use of other, more restrictive measures, but we would welcome that being tied to a use of remand that reflects that shift. We need to be mindful of the risk of bringing people on ordinary bail or bail supervision up to bail supervision-plus.

Liam McArthur: I am just trying to get my head around the trajectory that we have seen in the statistics for remand. We are constantly told that, across a range of measures, crime figures are down, and we have a presumption against shorter sentences, which seems to have been extended further; we also have the various supportive measures that we have talked about, and we are also talking about electronic monitoring. It seems counterintuitive that, at the same time, we are seeing an increase in the remand figures. We have explored quite well the complex issues that certain individuals have that explain the cases in which they are involved. The picture seems to be that trends do not necessarily follow the trajectory that we would expect them to follow, given the crime figures and the presumption against shorter sentences.

Tom Halpin: I am sure that I will not give you the answer as to why that is the case, but I can

confirm that your concern is valid. The shine women's mentoring service works with 800 women a year across Scotland. It works with women serving short sentences or women on remand, so it is for those spending less than four years in prison, who make up a big part of the women's prison population. We know that 76 per cent of the women who would be eligible for shine engage with the service, so it is not as though we are not getting a fair representation. However, half the women who use shine are on remand, which to those who work with them in prison on throughcare or integration seems awfully disproportionate. The reality is that there is a disproportionate use of remand, but 70 per cent of those who are on remand do not get a custodial sentence. That takes us to the issues that you were talking about, which we are all very aware of.

To go back to your question, the answer is to do with our inability to deal with the chaos. That is the fundamental point; it is not about the seriousness of the offending and it is not about the legal process; it is about our inability to deal with the chaos and do what is required, and we do not know how to tackle that.

Karyn McCluskey: Liam McArthur is absolutely right: crime is at a 42-year low and the movements that have been made on youth offending are spectacular—we should not forget how far we have come. However, at the moment, 80 per cent of calls to the police are not about crime; they are about vulnerability, and that is exactly what we see in the courts.

The problem is that the issue is seen through the lens of justice, not through the lens of vulnerability. Police Scotland is having to look at the issue completely differently. It is upskilling officers' understanding of mental health and providing training and a whole range of other things.

We are dealing with a different situation. Many of our services are not fit for purpose and we do not have the level of services that we need. We have defunded services, although that is because of austerity so it is understandable. However, community justice, returning people to communities and improving their health outcomes must be priorities when our budgets are set.

Thomas Jackson: Tom Halpin made the point well when he said that we are dealing with chaos—that must be a feature in any interpretation of the issue.

We must also look at the whole justice trail. In the same period, we have also seen a reduction in police undertakings and reductions in police disposals and procurator fiscal disposals. We are not taking people out earlier in the system and we are not providing the right support to make those viable options.

Rona Mackay: I am very interested in women in the justice system, including women on remand. We have heard that 70 per cent of women who are remanded in custody do not receive a custodial sentence; we have also heard that women are pretending that they do not have children in case their children are subsequently removed from them, which is shocking.

The 2012 report of the commission on women offenders included recommendations on issues such as bail supervision and electronic monitoring. To what extent have those recommendations been implemented? I suppose that, in a way, the panel has answered that question. However, I would be interested to hear more about the Glasgow monitored bail system, which seems to be successful, if Thomas Jackson could expand on that. Is that similar to the shine service, which Tom Halpin talked about?

Thomas Jackson: Following the commission's report in 2012 and the Government's response to it, we saw a hive of activity across Government to support women. In Glasgow, we have been very fortunate because we have established a women's justice centre, as defined in the Angiolini report. Tomorrow's women Glasgow has been operating for three and a half years and has a proven ability to work with a range of vulnerable individuals and those who have not previously engaged with services.

We have also started a new supported bail project, which is delivered by three third sector organisations that each provide slightly different areas of expertise—Turning Point Scotland, Aberlour Child Care Trust and Ypeople, which is an accommodation specialist that targets women. The project came out of a reinvestment of justice moneys. The Government identified £1.5 million, which was top-sliced from the SPS budget and distributed across Scotland.

We have a rich response to women, and we are starting to see the fruits of that work in the outcomes. We do not have nearly the same response for men.

Have we achieved everything that was set out in the Angiolini commission? No, we have not. Even now, almost six years on, it is worth keeping an eye on that.

Rona Mackay: Is the project specific to Glasgow, or is it provided elsewhere in Scotland?

Thomas Jackson: There are other projects. Sacro leads on some projects—and has led on others where funding has ceased—but the project that I am talking about is unique to Glasgow.

Karyn McCluskey: There are projects everywhere. There is a great service in North Lanarkshire and there are services in Ayrshire—they are springing up all over the place. In addition, the Inverness justice centre will be opening soon.

I see really good work taking place, but provision is still patchy. I worry for women in rural areas. The position is great for those who live in town centres, where there are probably enough people to justify having a service. However, for those who live outside those areas, services are lacking.

I must say that I was very impressed when I went to Orkney, where services are very thoughtful in how they support their women even though they probably do not have a great many people coming through. However, I slightly worry about the patchiness of service provision.

Rona Mackay: Do professionals who, like you, work in the system recognise that, given women's needs—they might have families, for example—they present a unique case? I do not want to men to receive a lesser service, but is it recognised that there is a problem with women on remand?

Karyn McCluskey: I think so. I have not met anyone who has underestimated the damage and trauma experienced by many of the women. From my previous experience of working with lots of women who have been involved in violence, domestic abuse and many other things, I know that they take much longer to get to a good outcome—it takes years and years of work. Sometimes, people think that that can happen over a short period and that you can get an outcome in six months, so some of my colleagues in the third sector are funded only for very short periods. However, those women will take a long time to get to a place where they have a life that is predictable, understandable and manageable and where they can have a sense of hope.

12:15

We also recognise and are very understanding of adverse childhood events and the impact of trauma. Parental imprisonment is another adverse childhood event, so we are passing that trauma on to people's kids. There is no greater reason to try to change the outcome for women than to try to make it better for their kids, because we cannot pass that on to the next generation.

Tom Halpin: We know from the experience of the shine mentoring service and the work that followed the Angiolini commission that there is a gender difference. The evidence for that goes beyond the anecdotal—there are Ipsos Mori evaluations and so on, which we can give you. Let us accept that that has been established.

If you go around the country, you will see many great examples of initiatives, but there is still gender inequality in Scotland, because those things are not universal. That is fundamental.

Kathryn Lindsay: I can tell you about my experience of some of the services that are delivered in Tayside—my day job is at Angus Council. We have a really good success rate, particularly in the Glen Isla project in Angus, which is a very rural area. There are considerable challenges in delivering a service for women there, given that the number of women involved with Angus criminal justice services is small. We have found that it is not the criminal justice social work part of the intervention that is important. We do outreach with the Glen Isla service—we do the compulsory parts that are not needed by the court. However, it is the community-based support elements, such as the wraparound health care and support and the packaging of support to help women to access services that you or I would take for granted, that are important, along with the longevity of that support.

We find that women do not leave us. That is a real challenge in terms of the sustainability of that approach. The approach grew from a justice perspective but now there is a recognition that there is a cohort of women in our area—and no doubt in other places in Scotland—who need extra support in order to make and sustain changes in their lives, for their own benefit, for the community's benefit and for the benefit of their children and families.

Keith Gardner: The fact that women face specific issues is recognised, as you will see if you look at the community justice improvement plans. Having connected with the 32 local authority areas in the creation of the plans, I see that that is absolutely recognised, and it is something that many local areas toil with. There are other factors. I was a justice manager and the erstwhile chief social work officer in one small local authority, and those authorities do not have many women coming through their service, so there is an issue for them in having bespoke individual plans for those women and their families.

Although I recognise the sterling work that has been done in women's services in Glasgow, we need to share how and why those services work. For example, we need to understand how they get the buy-in from other partners, such as health, and how that could be transferred. I am not suggesting that we just transplant the Glasgow model; I am talking about learning from the research about why things work and why they have made an impact so that we can share that.

Collective buy-in is particularly important. The issue of buy-in and leverage in community justice is something that the 32 local authority areas are

toiling with just now. For example, there is the relationship between community justice partnerships and integration joint boards and the service that they deliver through health and social care partnerships, as well as the relationship between those two entities and community planning partnerships. We are at the start of a local journey on that. However, it is recognised that there are specific issues for women in the justice service.

Thomas Jackson: What I wanted to say has mostly been said, but it is a given that there is no women's service in Scotland that is not trauma informed, and training will be involved in that. The psychologist at the tomorrow's women Glasgow project is based in the trauma team, and we are sharing that training. For example, tomorrow's women Glasgow has provided training to Victim Support Scotland in Glasgow, because it recognises that the project has built up unique expertise.

I want to pick up on a point that Karyn McCluskey made, which was about how long we have to work with people—women, in particular—before we see changes. That is an important issue for the committee to hear about. After 12 months of monitoring the tomorrow's women Glasgow project, we had seen very little movement in things that we thought would change, such as offending levels, health issues and relationships. During that period, it was challenging to keep the public sector partners on board and to keep their social workers, nurses, psychologists and prison service staff involved. They were there thanks to the good will of the public sector, which believed that the project was the right way to proceed. It took another year before we started to see substantial shifts, because we were targeting the most vulnerable individuals.

We must understand that if we target more people who face remand, whom we want to shift to bail, we will have to invest appropriately. We need to recognise that we are dealing with individuals who might live in extremely chaotic situations that it will take longer to unpick.

Mairi Gougeon: I was glad to hear the Glen Isla project being mentioned. I represent Angus North and Mearns, but the Glen Isla project falls within the Angus South constituency of my colleague Graeme Dey, and I know that he has raised it a number of times in Parliament.

Karyn McCluskey talked about the wider impact on families, and ACEs were mentioned. Gail Ross led a members' business debate on that subject the other week, which shows that it is high on the agenda at the moment. I would like to hear a bit more about the impact that being on remand has on the person themselves and their wider family. I am particularly interested in hearing about the effect on women, given that a higher percentage of women are on remand, the vast majority of whom go on to receive non-custodial sentences.

Karyn McCluskey: My colleague Nancy Loucks from Families Outside should be here, because she can talk incredibly eloquently about the ripple effects that women can experience when they are taken into remand, such as losing their accommodation, going into debt, their kids being taken into care and their mental health problems being exacerbated. I do not know where the impact ends—it is a spiral.

There is a lack of services for women on remand. Because they do not need to go to work, they can stay in their cells pretty much all day, which will exacerbate their mental health problems. The effect is catastrophic. Despite the presumption against short-term sentences, 98 per cent of women get a sentence of less than 12 months. We must do something about that; we need to design services that will make a difference. It would great if Scotland could lead the world and change the outcomes for some of our most vulnerable women.

Kathryn Lindsay: We know that a period on remand or in custody is devastating for not only the individual concerned but their family. Children will sometimes not know what has happened to a loved one in their lives, who will just disappear for a period. People will not always tell children the truth about what has happened, because they think that that is best for them, but children will know that something is not quite right. One day, someone will be loving them and taking care of them, and the next day they will simply not be there. They will get no notice of that. I have a small child and I dread to think what he would make of it if I was not there tomorrow.

We conceptualise these things as happening somewhere else to other people in the belief that, somehow, that makes it better. Such scenarios do untold emotional damage to children, which affects their understanding of the world as a place in which they can rely on people. Many of the children and young people who are affected by custody and remand will be children who have already suffered adverse childhood experiences. They might already not be in the direct care of their parents, and they might be in the process of being assessed for alternative care arrangements.

A direct consequence of periods on remand or in custody is that there can be unnecessary delays to those assessments. Children's planning might not happen, because parents are not available to be tested on rehabilitation, for example. It is right and appropriate that we do not remove children from their home unless we are absolutely sure that it is not the right place for them, but, to be sure of

that, we need parents to be physically present and to engage.

We know that parents who are in a custodial setting often struggle to engage meaningfully in child protection case conference discussions about their children, and in children's hearings and other court arrangements, as they are more difficult. Parents are presented in handcuffs at those meetings, which sets a particular tone around their involvement. It is scary for children to see their parents in that way—turning up with two officers who have transported them in handcuffs—in the presence of the group that is making decisions about their lives. Those things are all very damaging for families. In addition, the missed birthdays, the missed first days at school and the missed goodnight stories all have a difficult impact for families to rationalise.

We also forget that every individual who is in custody is somebody's child. The impact on that individual's parents and their wider social support network is a real challenge. Even the practicalities of visiting people who are on remand are very difficult, as they are often expensive and time consuming. That all puts a lot of extra pressure on families. The resource that the person brought in, if they were employed before they were remanded, also stops. Access to benefits might need to be reassessed in light of someone not being in the family home. The ramifications are huge and affect every facet of an individual's life, and therefore every facet of their family's life. The average period in remand is something like 23 days—there is all that disruption for 23 days.

The Convener: Thank you very much. Those points were well made.

We are getting near the end of this session; we have only about another five minutes.

Daniel Johnson: I want to pick up on something that Karyn McCluskey mentioned in her previous response. She said that the reality for people on remand is that they spend long periods in a cell with nothing to do, because they do not have to participate in work. We have heard that story from other sources. We hear what you say in that we should try to stop people being held on remand, but, when they are, what should they do? Doing nothing does not sound like a terribly good activity.

Karyn McCluskey: It does not. They are untried and unconvicted. They are innocent, technically, because they have not been through the court system.

I want better health services and mental health services—of course I do; I am an ex-nurse. I want more support for women and I want women to be involved, and I want women to be seen not as a deficit but as an asset. We never ask people what they are good at; we tell them only what they are bad at. Everybody has an asset.

It is a teachable moment—Prochaska and DiClemente would say that the motivation to change model can start at any time. The period on remand should be looked at as motivation to change. People might be contemplating a change in their behaviour and we should support them. In custody is the wrong place for that change to happen, but if someone has to be held on remand—if they are a threat to themselves or other people—we should try to capitalise on that opportunity.

Daniel Johnson: Are you aware of any good examples of where that is happening?

Karyn McCluskey: It is probably just not happening enough. Do not get me wrong—I have lots of colleagues who work in the prison system and they do their very best in very difficult circumstances. Many of the people who come in—men and women—are detoxing from drugs. Their situations are incredibly chaotic, so trying to provide that level of support might be really difficult when dealing with a huge volume of people. The picture is scattered. The problem is that when there is such a big volume of people on remand, we cannot provide the service that we are talking about. If the number was reduced, the people on remand might get the service.

12:30

Tom Halpin: There are examples of good practice. I mentioned the shine project. Although that project is aimed at women, it would cross gender.

We have prison-based champions. When someone is on remand in prison and their peers are not coming out of their cells and are just lying on their beds, because that is the norm, to do something else would take the person outside the norm, which is a difficult place to be. It is hard to break the habit. A champion who works in the prison can engage with people, start interviews about what will happen beyond prison and speak to a person's defence agent about how they are engaging. They can start to get group activities going.

The Scottish Prison Service's resources in that area are fully utilised, so engagement with the third sector is important. Shine is a collaboration between a number of third sector organisations. It is about the ethos, not the organisation. Work inside a prison can be amplified to address the difficult cultural situation that people have described.

Maurice Corry: This evidence session has blown me away, to be frank. I am sorry to go on

about my visit to Barlinnie, but everything that we have been talking about was happening there. The support officers and the prison deputy governor were crying out for mental health support, which Kathryn Lindsay talked about. I am currently looking at a project about that in the Vale of Leven, because there are issues there. It needs to happen.

The champions are a good idea. In Barlinnie, guys are sitting on the top bunk, feart to get out of bed because they would be seen as different from the others. I saw people on remand in their blue togs. The people on custodial sentences were in red and there were people in grey who were doing jobs, such as catering. It was about integrating all that. The work of the support teams was incredible.

The other thing that blew me away was what happened at 5 o'clock in the family reception centre, which was stowed out with families of prisoners—I avoided using the word "prisoner", but the staff used it. People were in tears, and there was standing room only. The three staff who were there to work with the families were from non-governmental organisations; they were not prison staff. They were incredible.

I would really like to meet all the witnesses again, because there are more issues that I would like to raise.

The Convener: Before our witnesses respond to that, will they also address the issue from the other side of the coin? If we reduce remand and people who were expected to be in custody are not in custody, how can families and victims be kept in the loop?

Tom Halpin: The support that is offered as an alternative to remand is based on mentoring—it is not just about supervision—and we cannot mentor an individual without having the wider support of families, friends and the social capital that surrounds them. The fundamental issue is the holistic mentoring that is being offered.

The Convener: Will you respond to the point about keeping victims involved if they were expecting a person to be held on remand and suddenly that does not happen?

Tom Halpin: Sorry. I did not understand that part of your question.

The Convener: We are looking at measures to reduce remand, but there might be an expectation that a person will be held on remand. How do we address the interests of victims and families? There are two sides to the situation.

Tom Halpin: There absolutely are. There are people for whom remand is absolutely appropriate, and that will be tested by the court. That gives clarity. A third sector organisation does not come along to champion someone and say that they should be out there; that is a decision of the court.

Kathryn Lindsay: My view is that what victims would like is not about 20 days' respite. We know that the adversity that is generated by a period of remand contributes to almost all the facets of risk that we assess in determining the likelihood of further offending. If our aim is to reduce the likelihood of an individual causing further harm or annoyance in their community, however that might transpire, we need to take every opportunity to reduce the risk that they present, rather than increase the risk as a result of our systematic approach.

Ben Macpherson: A number of months ago, I hosted an event in Parliament with Circle Scotland and Addictions Support and Counselling. That was quite a remarkable evening, and the project is quite remarkable, too. I invite Karyn McCluskey to take this opportunity to say something about that project, because I think that it demonstrates how a different approach can be successful for all.

Karyn McCluskey: The service was incredibly supportive of the women. In a similar way to what I was talking about before, Circle viewed the woman as assets. Shine and similar projects do similar things for women. Circle gives them support with financial issues and everything else that affects them. It allows the woman to think about what a different outcome might look like and where they want to be, and it supports them along the way towards that.

At the event that you mentioned, there was a woman who had been supported in that way. The effect on her had been transformational. She was able to look after her family and engage in work again, and she was thinking about working. For her to be someone who can contribute to the wealth creation of Scotland and support themselves with money that they get squarely is quite a transformation. No one who was in that room could think that that was not a good use of money, that it was soft justice or that it was not the right thing to be doing.

Ben Macpherson: I agree. I would be happy to provide the committee with more information on that event.

Earlier, you made a point about prevailing issues of vulnerability combined with a lack of knowledge in the court process, but you also said that defence agents were extremely empathetic and informed. Were you therefore saying that there was a lack of knowledge on the part of the judiciary, the prosecutors or someone else, or were you saying that the system did not integrate enough?

The Convener: Please be brief, because Thomas Jackson still has to comment.

Karyn McCluskey: The procurators fiscal and the sheriffs did not always know everything that was available. The defence solicitors were very good. They had done research and knew exactly what was available, and they made suggestions to the court.

Thomas Jackson: On the convener's question about how we communicate to victims, consistency is important. As Kathryn Lindsay said, having someone out of sync for 21 or 22 days perhaps does not offer consistency.

Cornerstone demonstrates that there is a richness in the third sector. We have some leading examples that show that we know what works. The outstanding question is, are we going to shift our justice spend? If 15 per cent of the £3 billion that is spent on reoffending is focused on rehabilitation and the rest is spent on much more reactive and punitive interventions that do not deliver the same dividends, we are getting the balance wrong. We need to take a long-term view on how we get to where we want to get to. The timescale is not one or two years, but five to 10 years.

The Convener: That is an excellent point to end on. We are always looking at the spend and questions of one-year funding and three-year funding. People should be given the money to get on with doing the job that they do well.

This has been a worthwhile session. I thank everyone for attending.

Under agenda item 6, I ask whether members are content to delegate responsibility to me to arrange for the Scottish Parliament Corporate Body to pay, on request, witness expenses for the remand evidence session.

Members *indicated agreement.*

The Convener: Our next meeting will be on Tuesday 20 February, when we will hold a round-table session on Brexit and policing and criminal justice.

We now move into private session.

12:38

Meeting continued in private until 13:06.

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