OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 13 March 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 13 March 2018

CONTENTS

JUSTICE COMMITTEE
9th 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:

Professor Neil Hutton (University of Strathclyde)
Sheriff Gordon Liddle (Sheriffs Association)
Gillian Mawdsley (Law Society of Scotland)
Leanne McQuillan (Edinburgh Bar Association)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 13 March 2018

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Margaret Mitchell): Good morning and welcome to the Justice Committee's ninth meeting in 2018. There are no apologies.

Agenda item number 1 is a decision on taking in private item 3, which is consideration of our approach to scrutiny of the Management of Offenders (Scotland) Bill at stage 1. Do members agree to take that item in private?

Members *indicated agreement.*

Remand

10:00

The Convener: Agenda item 2 is an evidence session on remand, focusing on the decision-making process around the use of bail and remand in Scotland. The committee has held two sessions on remand already, on 16 January and 6 February. Today's session is the first of three further evidence sessions to further explore the issues that have been raised. I refer members to paper 1, which is a note by the clerk, and paper 2, which is a private paper.

I welcome Sheriff Liddle, a sheriff in Edinburgh, Lothians and the Borders and president of the Sheriffs Association. Thank you, Sheriff Liddle, for your written submission, which sets out the views of the Sheriffs Association—as always, the submission is very helpful. It is probably worth pointing out that in Sheriff Liddle's submission, paragraph 3 emphasises that the Sheriffs Association is a judicial body and does not debate matters of political controversy.

I will start the questions. The committee is aware that possible reasons for remanding a person in custody include concerns that, if released on bail, they will fail to appear in court, or will engage in criminal activity or interfere with witnesses. To what extent do those and other grounds feature in decisions to remand people?

Sheriff Gordon Liddle (Sheriffs Association): I draw the committee's attention to the terms of sections 23B and 23C of the Criminal Procedure (Scotland) Act 1995, which was fairly recently amended. This may seem fairly simple and straightforward, but what we do is apply the law that is made by politicians. At section 23B, you will see that there must be good reasons for refusing bail—that is entirely appropriate; the public interest and public safety are also particularly mentioned.

We then go on to 23C, which sets out pretty comprehensively the grounds that are relevant to the question of bail. On each and every occasion when bail is applied for, that is the checklist that we go through in considering whether someone should be admitted to bail. Of course, that is the statutory checklist, but as part of the equation we have to take into account personal circumstances, and those are all different. That is why a robot could not do the exercise: we have to take into account such myriad things that it would be to the exclusion of some to mention others that we have to take into account.

The Convener: We will dig down as we go on with our questioning. Those are the statutory considerations. As you say, every case is considered on its own merits and there may well

be a pattern that is formed with certain individuals who seem to be repeat offenders and are always on remand. Perhaps that will be developed and flushed out in our questioning.

Liam Kerr (North East Scotland) (Con): Good morning, Sheriff Liddle. I will follow on from that point. During previous evidence sessions, we have been told that there is a lack of robust data to show why judges decide to use remand in individual cases. I can understand from what you said to the convener that those are the things that you have to consider, but there does not appear to be data to show which were the main considerations and what the conclusions were. Are you able to tell me why?

Sheriff Liddle: First of all, if I may say so, there is not a separate issue of remand; there is only the question whether or not someone is to be admitted to bail. Remand is the expression that has been used, but I think it is worth keeping in mind that we apply statutory criteria. As far as data is concerned, you will see within the statute itself that we are required to give reasons for admitting to bail or for refusing bail, so data is available, if anyone cares to collect it, on every single consideration of bail.

Liam Kerr: Is it fair to say that the breakdown—the data—exists, but that that nobody has collated it up to this point?

Sheriff Liddle: I do not know; certainly, it is not something that I or the Sheriffs Association would do because there would be no point in doing it. Each case is decided on its own merits to some extent, although there may be similarities in that consideration. For example, being a repeat offender or repeatedly breaching bail conditions might be issues that recur in a number of cases, although the personal circumstances would change.

I return to the fact that it is a statutory requirement to provide reasons for bail or refusal.

Liam Kerr: I will stick with the records. In a previous session, we heard from Community Justice Scotland, which told the committee that the legislation requires a record to be kept when bail is granted or refused. I am aware that that happens in some cases but not in others. Do you concede that it happens in some cases and not in others? How is that possible?

Sheriff Liddle: No, I do not concede that. However, it is not a question that I can answer because—and I come back to this again—reasons have to be given. It is a requirement. As far as I am concerned, reasons will be given in each case where bail is refused or someone is admitted to bail.

Liam Kerr: It would be your view that Community Justice Scotland appears to be mistaken.

Sheriff Liddle: I do not know whether it can get its hands on the information; all I can say is that for every case reasons exist, and they have to be given by the sheriff.

The Convener: Can I tease that out? Is it not the case that reasons are given orally if the judge is going to withdraw or refuse bail, but that, if there is an appeal, there is a written record of the reason and that written record is retained?

Sheriff Liddle: It is a bit of both. Reasons are given orally. I would need to check this, but my understanding is that the clerk to the court is obliged to keep a record, which goes into the minute, of the reasons for bail or refusal of bail. That may be fairly shorthand. If an appeal is lodged, an expansion of those reasons is set out because an appeal means that the sheriff has to write a note for the appeal court.

The Convener: I refer you to the submission from the senators of the College of Justice, which says:

> "Reasons will be given orally by the judge in court, in any decision to refuse or withdraw bail. Judges only provide written reasons when a bail appeal is lodged—see section 32 (3C) of the Criminal Procedure (Scotland) Act 1995. Any report is retained with the bail appeal papers. It is not with the indictment."

You would really have to know where to look. Would it be your position that, because we can learn so much from data, it would be helpful if there was also a written record of the reasons for withdrawal or refusal of bail in the first instance?

Sheriff Liddle: I think that there is. What is being said in the submission, and I agree with it, is that if there is an appeal the judge will write a note. However, the record of what happens in court—the minute that is kept by the clerk to the court—is a different thing altogether, and the clerk has to write down whether bail was refused or granted.

The Convener: Right. The clerks have just passed me some further information. We asked the Scottish Courts and Tribunal Service, which said that reasons are given but that there is no obligation on the clerk to the court to record them. Perhaps there should be an obligation so that a written record is available.

Sheriff Liddle: That is a political question.

The Convener: Is it a political question?

Sheriff Liddle: I do not think that I would be inclined to answer it. Let me look at the practicalities in relation to reasons. If I make a decision on bail, I give my reasons there and then. That is subject to appeal. If I have got it wrong or if

I am considered to have got it wrong—there can be an appeal on both sides, as I am sure that you are all aware—that is a matter that will require me to write a note and extended reasons. I would not want to be responsible for suggesting that more pressure is placed on clerks to write more and more into the minute each time that a case calls in court. Frankly, that would take up a lot of time and would have a resource implication.

The Convener: But it would provide somewhere to make information available when you come to look at someone before you. You could look at the notes, and you could see quite clearly if there was written evidence from a previous judge on why bail had been refused or withdrawn. Would that not be helpful for you?

Sheriff Liddle: To whom?

The Convener: To you, when you look at someone's record in making a decision.

Sheriff Liddle: Looking at a previous decision?

The Convener: Yes.

Sheriff Liddle: Oh, no.

The Convener: Not at all?

Sheriff Liddle: I have to look at a decision fresh. I cannot take into account what a colleague has done.

The Convener: What if they have been convicted but are awaiting sentence?

Sheriff Liddle: I can explain exactly what happens in court. When the question of bail comes up and the Crown wants to oppose bail, the Crown will provide a notice of previous convictions. That does not stay with the court papers; it is handed up and then taken back. At that point, the court would become aware of the convictions that a person might already have. Up until that point, it would be entirely inappropriate for the court to be aware of previous convictions. That might happen if you knew about a previous decision that had been made.

The Convener: What would happen if there was a gap between someone being found guilty and their sentencing, and the question of bail came up?

Sheriff Liddle: In those circumstances, yes, the previous convictions would remain with the papers.

The Convener: Would it be helpful to know the reasons why bail had been refused in a previous case? It would not influence the case because that would have been decided already. I am asking about bail pending sentencing.

Sheriff Liddle: I do not think that it would be helpful. Those who make such decisions might be criticised for taking into account something that they should not take into account. At the point when we make a decision on bail, we are faced with background material in relation to previous convictions, so we can see whether someone has been convicted. For example, we can see whether someone is a repeat housebreaker. If you look at the convictions, it is quite easy to see whether they have committed further offences while on bail—while they have been on trust. It is not very difficult to read through to understand the data that is included in the previous convictions. However, I then have to take into account the snapshot in time of the personal circumstances of the individual. I might allow myself to be influenced by the decision of another sheriff if I looked at what happened on a previous occasion. I would have serious discomfort about going through an exercise where I looked at what a sheriff had done before and followed that lead when I am supposed to look at the matter afresh.

The Convener: I am just wondering about personal issues such as a person being homeless, and homelessness perhaps being the cause of the breach.

I think that Liam Kerr wants to come in again.

Liam Kerr: Yes, just briefly—to aid my understanding of the record keeping. Sheriff Liddle, when you promulgate an oral decision on whether to grant or refuse bail, what obligation is there on the court to keep a record, in the same way as we keep an official record here? Presumably, the clerk to the court writes down the significant points, but is there a separate obligation on the court to record everything that happens in that court?

10:15

Sheriff Liddle: If it is a summary matter, it is not recorded, and so there is no digital record of it. If it is a solemn matter, everything is recorded. Staying away from the politics, I have been pushing for many years to have digital recording in all courts at all times, but so far I have not had much success.

Liam Kerr: Thank you.

The Convener: Liam McArthur has a supplementary question.

Liam McArthur (Orkney Islands) (LD): I can certainly understand the rationale behind the need to take each case on its own merits and your concerns—you are quite right to have them—about decisions being influenced by matters outwith the determination of a single case. As we will probably come on to discuss shortly in relation to alternatives to remand, having an evidential base would show whether there was a pattern of

bail decisions seeming to suggest a lack of confidence in alternatives within a sheriffdom. It may be easier to dissect and interpret such a pattern on the back of having the sort of information the convener was suggesting might be recorded in the minute of the clerk to the court. Would that not be, perhaps, a more useful deployment of the requirement on the clerk to the court to record the justification for refusal or withdrawal of bail?

Sheriff Liddle: I do not think that we have a difficulty in having information before us. I think that there is adequate information before us.

If the Crown wants to rely upon, and chooses to rely upon, such a history, and if it is relevant, it is open to the Crown to put that forward when it opposes bail. Sometimes, the Crown puts forward a number of things, saying, "This individual has breached bail on half a dozen occasions"; sometimes, you can see that from the record, depending on whether they have been prosecuted for breach of bail or whether they have just breached it, without that leading to prosecution under section 27(1)(b) of the 1995 act. That information is usually made available at the hand of the Crown in the court on the day in question.

On the other hand, the defence solicitor might say, "Well, that is all very well but the circumstances have changed. He has got the offer of employment for the first time with an uncle, starting in a week's time, and he would not be able to take that up", or, "He has just got a tenancy; he has been asking for a tenancy for years—he's been homeless". Such things crop up regularly and we have to take them into account. We are fed a lot of information, there and then, from—admittedly—antagonistic sides.

I can feel that there is an appetite for a written record and perhaps that is because data is something that is looked on as being important, but I cannot see that we would find it very useful when it comes to the question of bail.

Liam McArthur: I was driving more at seeing whether, if there was a pattern of decisions to refuse bail that seemed to be taken because of concerns about public safety or whatever, it might be possible to look at the provision of housing or support services for homeless people, for example. In a sense, it is less a decision for you, your colleagues or the court and more a decision for other services, which would be under more pressure to up their game in terms of the services that they provide.

Sheriff Liddle: Perhaps I could make reference to what was said by the chief inspector of prisons when he suggested—and I thought that it was an ill-judged suggestion—that sheriffs were heavy handed in relation to the question of bail. I think that he meant heavy handed in relation to refusal of bail, but if one looks at it, he suggests that bail should be refused only in exceptional cases, when it is absolutely necessary to protect the public from serious harm or where there is clear evidence of a flight risk. It is open to legislators to change what is contained in section 23C and sheriffs will simply apply it. That is what we do.

It is perfectly reasonable to think that if you reduce the criteria that you provide for sheriffs to take into account when considering bail, of course you can alter the number of people who get admitted to bail and the number of people who are remanded. That will have consequences either way. It is not a question that I can really address.

The Convener: Daniel Johnson has a supplementary question.

Daniel Johnson (Edinburgh Southern) (Lab): I want to go back to a couple of your previous answers. Margaret Mitchell noted that a number of submissions that we have had suggest that, essentially, the reasons for not granting bail are not recorded. Do you agree with that statement? I was far from clear about your position from your answers.

Sheriff Liddle: I thought there was more of a recording done, rather than just a note that someone was admitted to bail or refused bail.

Daniel Johnson: But you do not know whether it is recorded?

Sheriff Liddle: It is recorded that—

Daniel Johnson: I am sorry, do you know or not?

Sheriff Liddle: I understand your question. I would have to go and look at minutes because my understanding was that there is a recording of some sort. It might not be a—

Daniel Johnson: I find it rather alarming that you are not sure whether that is recorded. Do you not think that it is pretty important that reasons for not granting bail are a matter of public record?

Sheriff Liddle: It is a public court. It is open to the public.

Daniel Johnson: But it should be recorded, should it not?

Sheriff Liddle: It can be recorded by anyone in the court. I am unhappy about the level of criticism that is being levelled here because it is not a secret what goes on in the court. It is a public hearing.

Daniel Johnson: Excuse me, Sheriff Liddle, but this is a very serious matter. We are talking about people being deprived of their liberty and I think that it is a fundamental point of principle that, if

people are being deprived of their liberty, those reasons should be a matter of record, and that that record is capable of being interrogated. So far, we are not clear from your evidence whether those reasons have been recorded. I think that that is very serious. Do you not think that that is serious?

Sheriff Liddle: You are entitled to your view about whether you think that it is serious. I am not here to make political comment. You ask me whether I think that the issue is serious. The system that exists, as you no doubt know, is a system whereby many, many decisions are made in busy courts day in and day out. Reasons for those decisions are required to be given, and reasons are given, in open court.

Daniel Johnson: The question is whether those reasons are recorded and whether or not those decisions can then be interrogated as a matter of data.

Do you understand the difference between records and data? A piece of statistical information is different from a record. Statistical information is information that is gathered at the aggregate level and can be interrogated at the aggregate level rather than at the level of individual cases. First, do you understand the difference? Further, do you understand the need to have that aggregate data so that we can look at what is happening at a system-wide level?

Sheriff Liddle: I am not sure what you are asking me.

Daniel Johnson: Do you think that it is important to understand in terms of the generalities how bail is granted or is not granted across the court system, rather than simply within individual cases?

The Convener: We are looking at the reasons for decisions to refuse bail. As Liam McArthur said, it might be that some of the information that would be recorded would be helpful to the services that should be kicking in at that point. Information about those reasons might or might not be available, but that will come out as we continue our line of questioning.

With regard to our earlier exchange, the issue that we are discussing is not a political matter; it is a matter of the interpretation of the legislation. Perhaps the legislation could be clearer and could give a strong indication that the reasons should be written down. That might be helpful.

Sheriff Liddle: I rather think that you would be far better with a recording than a written record, frankly, because a written record requires someone to take a note, and they might not catch everything that was said.

I come back to the point that, when a decision is made, it is made in open court. There might be a court reporter there to write down the decision or there might not be—sometimes there is. The clerk to the court takes a note of the decision. I never read the minutes afterwards because they do not come to me for signing. A minute is taken by the clerk to the court and it goes into the court papers and it does not come out to me. I only ever see the court papers again if an appeal is taken. If an appeal is taken, I write a note on the reasons that I have already given in court.

Sorry, there was something else you wanted to ask.

Daniel Johnson: Forgive me, but I think that you are going back to record keeping. I agree that that is absolutely important, but that is a different question from that of the issue of statistical data that would enable us to see how bail is granted across the court system at an aggregate level. We are being told that that data simply does not exist. That is not a question about record keeping; it is about aggregation of the data so that the information about how bail is being granted or otherwise can be examined across the system as a whole.

Sheriff Liddle: Different courts operate in slightly different ways. In my court, every time that I make an adverse decision on bail—every time that I refuse bail—I there and then write the note that would form the basis of an appeal, and it goes with the court papers. That happens in quite a lot of courts. In many cases there is a written record that is written by the sheriff.

Daniel Johnson: I just think that you do not understand the difference between statistics and records.

Sheriff Liddle: I am not a statistician.

The Convener: Mr Johnson, I think that that is a bit harsh, to say the least, and probably unwarranted.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Good morning, Sheriff Liddle. You mentioned that you had a checklist of criteria for either granting bail or deciding on remand. I do not have that checklist in front of me so I do not know what is on it. Does the fact that children are involved in an offender's case—I am thinking of an offender who is a single mother, for instance—influence your decision?

Sheriff Liddle: All those issues are taken into account. There is no point in me talking about what I would do in a particular case, because that would tell you only how one person would make a decision. However, I can say that everything that is said in court before a decision is made is taken into account one way or another.

On the issue of females, I am of the firm belief that there exists a positive discrimination in favour

of females with regard to bail. If someone turns up in court who might well be a candidate for bail being refused because, for example, they have repeatedly offended, and we are told that the person has two children waiting outside the court who need someone to take care of them, that will be taken into account.

I think that care would have to be taken if it was the intention of Parliament to ring fence a particular group of individuals and give them special rights in the form of a get-out-of-jail-free card, effectively, because it will be used—

Rona Mackay: We know that there is a high number of women offenders who are remanded and that about 75 per cent of them do not go on to be charged. I hear what you are saying but there seems to be a wee bit of an imbalance somewhere in that line.

Sheriff Liddle: They are charged, so it is not a question of their going on to be charged. If they come into court, they have been charged.

Rona Mackay: Yes, but they do not go on to—

Sheriff Liddle: I know what you mean; I did not mean to pick you up on that.

We do not have control over what the Crown does, and neither should we. When the Crown decides to charge an individual, we are simply presented with the individual who has been charged. We do not know anything more about the circumstances or whether the case is ever going to prove. There are occasions when, on the face of it, it seems that bail has to be refused to an individual, but, when it gets to a trial, something goes wrong over which we do not have control, and neither should we have control. I do not have control over whether the Crown leads the right evidence and the right witnesses, and makes a good job of leading the evidence, or over whether the defence is superb at defending the case. These are matters that are outwith the control of the court.

You might have statistics, but the problem with statistics is that they do not tell the story. Statistics might well say that 70 per cent—is that what you said?

10:30

Rona Mackay: I said 75 per cent.

Sheriff Liddle: There might well be a statistic that says that, out of all the women who are remanded—they make up an extremely small number of the whole amount of people who come through our courts—a high proportion do not end up being convicted. It would be a distortion of the analysis of that data, albeit an unintentional one, to say that that data means that the courts are being hard on women when they come before them and the question of liberty arises. You might have to analyse the data if that is what you are inclined to do and find out from elsewhere why a conviction did not follow. You might find some really interesting information about how that happens.

Rona Mackay: I am encouraged to hear you say that children are at least taken into account when you are making your decision.

Sheriff Liddle: Of course they are.

Rona Mackay: Ten years ago, the Scottish Prisons Commission produced a report, which said:

> "Sometimes people are remanded in custody because that is the only safe thing to do, but often remands are the result of lack of information or lack of services in the community to support people on bail."

In 10 years, in your experience, have things improved in that regard?

Sheriff Liddle: First, there is not uniformity throughout Scotland. You realise that.

Rona Mackay: Yes.

Sheriff Liddle: What might be available in one place is not available in another place. Supervised bail is available to some courts. If it is available, supervised bail can be used as an option to avoid remand. David Strang is of the view that we are all a bunch of zealots who want to remand people. In my experience, that could not be further from the truth. If someone can be left at liberty, I think that the courts want to leave them at liberty, but it is a really difficult balancing act.

With one type of case, we have to look at the danger that is involved. In Edinburgh—I am not sure about other courts—we have a group called the Edinburgh domestic abuse court support service. Clearly, domestic violence is an issue that the committee is familiar with. EDDACS will provide us with a report at the initiation stage of a domestic violence case, so it feeds into the system another layer of information.

Of course, there are other layers of possible disposal, but EDDACS could tell us that there would be a serious risk to a woman if the individual who is accused of something were at liberty—he has only been accused; he has not been convicted—and we might see that three out of the last four previous convictions had a domestic aggravator attached to them. If there is a history of domestic abuse and a number of disposals, which EDDACS says is only the tip of the iceberg—the woman needs some respite—the choice is quite a stark one. If bail is refused and the liberty of that individual is interfered with, for a short period of time, which might be two weeks—it has to be within 40 days; the length of the period

depends on whether it is at the post-conviction stage—he will not be able to offend against the woman, because he will not be at liberty to do so.

If I decide to admit the individual to bail, I can impose special conditions in addition to the standard conditions, which you all know about. I can impose as a special condition of bail that he does not contact the woman or attempt to contact her; that he does not approach her or attempt to approach her; and that he does not enter the house, the street or even the area where she lives. That will provide a level of protection, but it will do so only if the individual will adhere to it. If he will not adhere to it, I can pile on as many other factors as I like, but they will not work if he is inclined to breach bail.

If, in going through that exercise, a judge looks back at the record and sees that there have been a number of breaches of the bail legislation and a number of bail aggravations in the individual's previous convictions, they can make an assessment of whether the risk is too high for that individual. That is what we do.

Rona Mackay: Thank you.

The Convener: We are already over time, so I ask for brief questions and brief replies.

Maurice Corry (West Scotland) (Con): Good morning. Professor Hutton at the University of Strathclyde suggests that remand is most commonly used when a person has

"a significant history of failure to comply with court orders, probably often combined with a significant criminal record",

which you referred to in relation to domestic abuse. He also said that such people are

"likely to have chaotic lives characterised by some combination of alcohol and drug addictions, homelessness, unemployment and mental health problems."

He concluded that,

"In effect the court is being asked to apply a criminal justice solution to a problem which many would see as public health or welfare issues."

Do you feel that that is correct? In other words, is it the case that the court is doing the job of social services?

Sheriff Liddle: In a limited way, I would agree with that. The issue is not one that I am entitled to take a view on, because I would be addressing a political question. I would be addressing a question of whether there is something socially wrong with the set-up, which is entirely a matter for the committee.

A better example to give would be that of the mental health of people who come before us when it is absolutely clear that there might be another way of dealing with them.

Maurice Corry: We are obviously talking about remand. What do you see as being the main drivers behind the use that is currently made of remand?

Sheriff Liddle: Offending.

Maurice Corry: When would you use remand?

Sheriff Liddle: I do not use remand. I decide whether I am going to admit or refuse bail. We do not use remand as a tool, although I know anecdotally that we fairly regularly have circumstances in which an individual has been refused bail post-conviction. If sentencing has been deferred for two weeks for reports, they might be remanded because the case is so serious.

Maurice Corry: So you do use remand.

Sheriff Liddle: No. In those circumstances, bail has been refused. A report would not normally be asked for unless custody was being considered, because there would be no point. A fine could be imposed there and then; the person could be placed on a curfew or a deferred sentence there and then; they could also be ordered to do up to 100 hours of unpaid work in the community there and then. Generally speaking, additional information is sought only if a custodial sentence is being considered or if the social circumstances are extremely convoluted. If the latter was the case, it is very unlikely that someone would be refused bail. If the former was the case, they might be refused bail because they posed such a risk.

Maurice Corry: If you were concerned that there was a danger to community safety, would you not err in favour of remanding the individual in case he did not appear in court or endangered the public?

Sheriff Liddle: It would not be an error in favour of remanding; in those circumstances, it would be entirely appropriate to refuse bail. It is measured—

Maurice Corry: Yes, but if someone is refused bail, I presume that that means that they will be remanded.

Sheriff Liddle: Yes, but it is not—

The Convener: I think that there are statutory grounds that have to be looked at. Being a danger to the public is one of the things that would be taken into account.

Sheriff Liddle: It goes back to where I began. We are talking about section 23C of the 1995 act and applying the criteria that Parliament has provided, which is what we do.

Fulton MacGregor (Coatbridge and Chryston) (SNP): You mentioned mental health problems. I will not ask you what you think the solutions to that might be, as that would probably

be a political question. Are you and your colleagues seeing an increase in people with mental health problems coming through the court system?

Sheriff Liddle: I cannot speak for my colleagues, because I do not know the answer to that. There are more such people coming through the court system than I think there ought to be, but I cannot really say whether the figure has increased over any particular period of time.

Mairi Gougeon (Angus North and Mearns) (SNP): I have a couple of brief questions that are based on previous answers. One is about the appeals process, which we touched on earlier. Do you have a rough idea of the number of appeals that go through? How many of those are successful?

Sheriff Liddle: I am afraid that I do not, although that information cannot be difficult to get hold of.

Mairi Gougeon: That is fine. I completely understand your not having that information to hand.

I have a question about young offenders, in particular. We have heard about female offenders and how a higher proportion of women tend to be held on remand. I am looking for figures on young people, although, again, I will understand if you do not have that information to hand.

With regard to what happens to young people when they are held on remand, is consideration given to where they are held? I ask that question because, when I visited Rossie Young People's Trust in Montrose yesterday, I heard examples of young people being held on remand in the likes of Polmont prison, when a residential secure facility might be more appropriate, because they would get more support there. I would like to hear your thoughts on what is taken into consideration when young people are dealt with.

Sheriff Liddle: It is not within my control to say that they should go to one institution or another—that decision is made elsewhere.

I entirely accept the proposition that there is very little that can be done with individuals when they have been remanded for another court hearing, which might be in two weeks or less than 40 days, depending on what stage they are at. I know that the committee considers a short sentence to be one of 12 months rather than one of three months, but the reality is that a short sentence of 12 months is not a sentence of 12 months, although the public might think that that is what it is; it is a sentence of around three months. Nothing can be done in that time, because with the automatic entitlement to release after serving half the sentence, we are down to six months. Given that the prisons have the ability to release someone after about three months, which they exercise, the reality is that nothing practical, as far as I can understand it, can be done in relation to reforming someone or putting them on a regime. It is different if it is a solemn matter and they have been imprisoned for years.

Mairi Gougeon: I have serious concern that we might do more harm than good to our young people when we hold them on remand, if they do not go on to be convicted or they are given a shorter sentence as a result of that. That follows on from my colleagues' questions.

It has been suggested in evidence that more use could be made of stand-down reports, where criminal justice social input is needed. Do you agree?

Sheriff Liddle: It depends on the court. I sometimes use stand-down reports. That is partly tied up with a request for supervised bail, which is in some ways linked.

I come back to the same point. In effect, if we apply the act—we do; we apply the statute—we should look to admit people to bail unless the circumstances are such that we cannot reasonably do that in the public interest.

John Finnie (Highlands and Islands) (Green): I will be very brief because you have already touched on the consistency of support services across Scotland. Has your association ever commented on that? The greater the range of options at your disposal, the better. Does a lack of availability of bail supervision have a significant impact on decisions about remand?

10:45

Sheriff Liddle: I cannot comment on what support there is in each court, because I do not have that information available.

As to whether a lack of availability of bail supervision is a significant influence, I am not sure that it is very significant. I go back to the example of being told by EDDACS that there is a high risk of further offending in a domestic case. Even if a myriad of provisions are put in place, that will not stop a determined offender. That is the judgment call that we have to make. It is pretty rare to find that the lack of availability of a particular provision was significant, because we have the ability to impose special bail conditions if we believe that they will be adhered to.

John Finnie: I want to come back to the checklist that you talk about. Would the availability of bail supervision offset anything in that list, or is it just another factor that the presiding judge would consider?

Sheriff Liddle: It is usually used for younger people. It provides a level of supervision that you would not otherwise have. If you admit someone to bail, nothing happens until they come back, unless, for example, they have offended in the meantime, but with bail supervision, there will be someone in the social work department, I think, who will keep an eye on them. Usually, there is a three or four-page document that sets out precisely what they will be expected to do. They will have to make sure that the person checks in on a daily basis and that they go to interviews, and that the social inquiry report is prepared and so on. Bail supervision provides a level of supervision that you would not otherwise have. It might influence, to some extent, the question of whether you expect that the individual will be back the next time round. The report will mean that you can dispose of the case.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): I have a question that follows on from John Finnie's questioning. We have received evidence on organisations that go beyond the criminal justice system—I am talking about services and organisations that support on-going rehabilitation or support. How important is it that more general services are in place, particularly to support vulnerable people? In your experience, is that an important aspect of your decision making, given what you said earlier about considering all the circumstances and then making a decision in the public interest?

Sheriff Liddle: It is more a disposal question than one that relates to the question of whether someone should be admitted to bail. Once it comes to disposal, you take into account all the personal and social circumstances.

The bail question is, to a greater extent, a cruder consideration than that. It is to do with public safety. I think that the provisions in the act are particularly good, because they give us a very clear steer on what we are supposed to do and how we are supposed to apply the act. It is open to Parliament to change what is in section 23C—to put in other provisions or to take out some of the provisions. Those changes will have consequences, but that is the intention. If you change the provisions in order to adjust the number of people who might have bail refused or granted, the consequences of that are for you, not for me.

Ben Macpherson: I appreciate that this supplementary might be slightly political. In order to allow more bail disposals to be made, is investment in and bolstering of general services in the criminal justice system not required in order to provide the support for vulnerable people, or is that a policy decision rather than a judicial one?

Sheriff Liddle: It is not an issue that I can comfortably comment on.

Ben Macpherson: I appreciate that.

Sheriff Liddle: I am sorry about that, but I do not think I would be entitled to comment, because it depends on what you want to happen.

Ben Macpherson: That is understood; thank you.

The Convener: Could I put it another way? You are here not just in your capacity as a sheriff in Edinburgh, Lothians and the Borders but as the president of the Sheriffs Association. Are you aware that the number of alternatives that are available in the various districts is patchy? If we look at the situation geographically, certain disposals might be available to you, which might help in deciding whether remand is the correct way to proceed, while other colleagues might not have the same suite of disposals. Is that problematic?

Sheriff Liddle: I do not think that it would make a great deal of difference, given the provisions in sections 23C and 23B. In a way, the question is sharper than that. If you are persuaded that an individual cannot be trusted to be at liberty because they present a danger to the public from reoffending or whatever, it comes back to the provisions that you might put in place to try to persuade them to adhere.

The Convener: I understand.

Daniel Johnson wants to say something.

Daniel Johnson: I recognise that some of my earlier comments were insufficiently well tempered, and I want to put on record an apology if that was the case.

Thank you for letting me do that, convener.

Sheriff Liddle: That is completely unnecessary, but thank you very much for that.

The Convener: Thank you very much for being prepared to give evidence today. It is tremendously helpful to the committee to get the views of an active judge, which you have given us today.

Sheriff Liddle: It was my pleasure. I hope that my evidence has been of assistance.

The Convener: I suspend the meeting for a change of witnesses.

10:53

Meeting suspended.

10:56

On resuming—

The Convener: We will now hear from our second panel of witnesses. It is my pleasure to welcome Leanne McQuillan, president of Edinburgh Bar Association; Gillian Mawdsley, policy executive with the Law Society of Scotland; and Professor Neil Hutton, from the University of Strathclyde. I thank the Law Society and Professor Hutton for their written submissions, which, as ever, were very helpful to the committee.

I will start with much the same question that I asked the previous witness. The committee is aware that the possible reasons for remanding a person in custody include concerns that they will, if released on bail, fail to appear in court; engage in criminal activity; or interfere with witnesses. To what extent do those and other particular grounds feature in decisions on remand?

Professor Neil Hutton (University of Strathclyde): I refer to my written submission and the very small pilot study; to call that study "research" is probably a bit strong, but it was a pilot study that was done in a court. Along with the reasons that you stated, the seriousness of the offence and previous convictions are regularly used by the court to justify decisions about failing to admit bail.

The Convener: Will you elaborate a little bit more on the pilot?

Professor Hutton: Very frequently, judges give more than one reason. One of the difficulties is that, often, bail is not granted for a number of reasons at the same time. Often the people concerned are those who have significant records and have failed to comply with court orders before, who have no fixed abode, who have breached bail, and who have chaotic lifestyles. That is true not of all of them, but of a significant number. It is difficult to know exactly why bail was not granted, or whether it was not granted for one reason or another—it tends to be for multiple reasons.

Gillian Mawdsley (Law Society of Scotland): I endorse what Professor Hutton said. As he said in his submission, it is difficult to measure the effect of any particular reason. From my practical experience, a multitude of factors tends to influence the decision in one way or other. As we said in our submission, in the majority of cases the decision is probably clear cut one way or other, but the cases that you are directly concerned with are those that lie in the middle and in which the balance could go either way.

I echo the point in Police Scotland's submission that, obviously, holding someone in remand is a breach of article 5 of the European Convention on Human Rights, which should be done only where it is proportionate, necessary, legitimate and subject to appropriate scrutiny. The various factors to which Professor Hutton referred should be able to be ascribed to that reasoning.

11:00

Leanne McQuillan (Edinburgh Bar Association): I agree that usually there is a combination of factors, and I also agree with what Ms Mawdsley said about most cases being quite clear cut. Generally, it is possible to tell if someone will definitely be remanded in custody or if they will be admitted to bail. There are some cases in the middle that are not quite so clear cut. However, I would say that the main factors that would result in remand would be someone's record of previous convictions, which can include failures to appear and previous breaches of special conditions of bail. Often, people who are charged with a criminal offence can be on multiple bail orders already; sometimes they are still being released on bail when they have four, five or six bail orders. It gets to the point at which, no matter what their personal circumstances, those people could not possibly be released on bail again.

Liam Kerr: You may have heard my question to the first witness. Throughout these sessions, I have been concerned about the lack of robust data on why bail is being refused. Do you have any view on the lack of data and what can be done about it?

Professor Hutton: As the sheriff said earlier, I suspect that a note is made in the record and there is probably data there somewhere but nobody actually collects and analyses it. We do not know whether the data is accurate and we do not know what the data is, but there may well be some information there.

The pilot study that I referred to earlier was an attempt to deal with the lack of data, and to find out what the reasons are. I suspect that a larger study would find that in much larger numbers. That is probably a fairly accurate reflection of what is going on.

Liam Kerr: I found all the submissions extremely useful and I found the pilot study fascinating. On a very small scale, it suggested to me that sheriffs are handing down clearly sensible and supportable decisions, guided by section 23. The sheriff was quite clear, if the committee seeks to reduce the incidence of remand, that that is a decision for Parliament on section 23. Presumably, the committee needs to understand very clearly what the drivers are. If I am right about that, somebody should be collating that data and doing the study. Which agency should be doing that? Why has it not been done?

Professor Hutton: I could not really say why that has not happened—it is always difficult to say why something has not happened. You asked who should be responsible for doing it, and I suppose that the data will be collected by the Scottish Court Service. It has the data, but it would not be required by any other body to produce an analysis.

Liam Kerr: Where a reason has been given and recorded for bail being refused, or someone being remanded, do you know how much information is recorded? Is there any common practice or does it vary across the board?

Leanne McQuillan: It varies. As the sheriff indicated, if bail is refused the reasons that are given in open court can be quite brief—they might be, "It's because of your record", or, "It's because of this, or because of that." If there is no appeal to the Sheriff Appeal Court, nothing further is done with regard to those reasons.

If an appeal is made to the Sheriff Appeal Court—in my experience, that happens quite often when someone is remanded—the sheriff compiles a report. I appear quite regularly in the Sheriff Appeal Court and I see reports from all over Scotland, as well as from Edinburgh. In some reports, a box has been ticked to say, "Risk of reoffending", or, "Schedule of previous convictions." Other reports go to two or three pages and provide a lot of information, perhaps because the sheriff feels that the reason to remand might need to be justified because that person might have difficulties.

Part of the difficulty in having reliable statistics and information is that, if bail is granted—unless the Crown appeals it, which is very rare—the sheriff does not have to do a report that explains why they granted bail. It is a matter of, "Right, that's fine. Bail is granted; on you go."

The focus is on the people who are remanded. A lot of those cases are appealed to the Sheriff Appeal Court, so I expect that it might not be too difficult to get more information about the reasoning behind remands. I have seen countless reports by sheriffs, most of which contain enough information for their reason to be clearly seen.

Liam Kerr: Would it be a good idea if sheriffs were more closely guided on having to give reasons and what the extent of those reasons should be? We heard from the sheriff this morning that he goes through section 23, and that he is very clear about what he is doing and why he is doing it. Should we consider asking for their reasons in reaching their decision to be set out very clearly?

Gillian Mawdsley: The reasons are quite well articulated in open court—I agree with what Ms McQuillan said on that—and are stated by the sheriff or the judge. You must remember that this extends across the judiciary, so justices of the peace also make these decisions; that is a factor, too. The reason is well articulated in open court, out of fairness to the accused if they are going to be remanded.

One of the problems is the correlation of statistics. Everybody has the information that you want, but it is not put from the person who is being remanded to the prison. There is a tie-up with criminal justice; it is not so much that the reason would not be articulated, but perhaps that it would not be recorded in a way that would enable you to see the person's journey through the court.

Last night, in my preparation for the committee, I found that there had been a 10-country study—including England and Wales—funded by the European Commission, on the practice of pre-trial detention. A research report from the University of the West of England, in Bristol, by Ed Cape—I will bring it to your clerk's attention—includes a lot of research on the methodologies of going to court. That document could be useful because it translates across; it is obviously divided. That might be a useful document for you, because it looks at a number of the provisions as part of a European Commission road map and it might give you some of the methodologies you are talking about.

Liam Kerr: That will be very useful. Thank you.

Professor Hutton: Asking judges to record their reasons for granting bail, and collecting that data, suggests that there is a feeling that the judges are not making proper decisions, or that they are making decisions without justifying them properly. The little research pilot study that I mentioned would suggest that judges can find plenty of reasons under the 1995 act for remanding people in custody. I do not think that they do it lightly; they try to keep people out of custody as best they can. Given that there are multiple reasons, there would be no problem in judges finding many reasons to justify not granting bail. I am not sure what would be gained by having those reasons given more publicly.

The Convener: I should just say that the committee has no preconceived opinions on this.

Professor Hutton: Of course.

The Convener: We are aware that the amount of remand is increasing, so we are delving into that and trying to find out why. We are certainly not making any judgment on the judicial decisions. We are trying to tease out what is available to the judge on the day.

Professor Hutton: My point is whether it would help to try to reduce the number of prisoners who are currently remanded in custody. I am not sure that it would.

Rona Mackay: In the previous session, I asked Sheriff Liddle about decisions that are being taken with regard to women offenders. I was encouraged to hear that children and family are taken into account when it comes to decisions on remand. Notwithstanding that, the number of women who are being taken into remand is increasing and is probably at an all-time high.

Ms Mawdsley, your submission says that the reason for that is not known. This is a serious issue, and I wonder whether you have any ideas beyond that. Do you think that too many women are being held in remand?

Gillian Mawdsley: If you look at the straightforward statistics, usually the number of women who are convicted is less than the number of men. Proportionality tells me that, from the numbers that have been quoted, clearly a number of women are being remanded. I suspect, when that is broken down, that there will be multiple reasons why women are being remanded. Perhaps the breakdown of the reasons that Mr Kerr talked about would help to shed greater light on the reasons.

I have gone to Cornton Vale and met people who are on remand. I am not sure why the number is increasing. Where women have mothering duties, there is a dramatic effect on the family; that is very clear from the work of Families Outside. However, Victim Support obviously has to look at the other side of the equation. Decisions should not be directly influenced by the sex, if you like, but clearly there are other family circumstances. Ms McQuillan might have more direct recent experience than me.

Leanne McQuillan: I do not know why the number of women who are being remanded is increasing. Certainly, as Sheriff Liddle said, being a mother with children is not a get-out-of-jail-free card. I do not see females being remanded regularly when I think that it is unfair. Obviously, females offend a lot less than males. My female clients tend to have an awful lot of issues and tend to have mental health problems. To be honest, if one of my clients still has the care of her children she is unlikely to be in a position where she will be remanded. Most of my clients, when they get to the point at which they might be remanded in custody, have lost the care of their children some time ago as the result of chaotic lifestyles, offending, bad relationships, drug habits and mental health problems. I would say that women who offend regularly tend to have a lot more of those issues than men.

Rona Mackay: Are the women a danger to the public? Does that not suggest that more support is needed for them?

Leanne McQuillan: There is a lot of support in Edinburgh, although I do not know about other places. There are some really good projects in Edinburgh, such as the willow project, which are really good for vulnerable women. Whether the women are a danger to the public, I do not know. That is only one factor.

One particular client of mine, who has been released on bail multiple times because she has so many issues in her life, constantly reoffends. She is given opportunity after opportunity. It is not high-level offending. It is nuisance offending, such as disorderly behaviour; there are alcohol issues and she might get drunk and cause a disturbance. She is not a danger to the public, but her behaviour can be a real nuisance and a disruption for the public.

Rona Mackay: The fact that she is repeating that behaviour suggests that remand is not helping.

Leanne McQuillan: She very rarely ends up being remanded.

Rona Mackay: Does she get bail?

Leanne McQuillan: Yes. In general, sheriffs are very sympathetic to people with problems. I do not think that she has ever been on supervised bail. She is lucky, in that she has lots of support. However, sometimes people can have all the support in the world but it does not work.

11:15

The Convener: You mentioned the willow project. Would somebody be able to access the willow project as an alternative to remand or would it be an alternative to imprisonment?

Leanne McQuillan: It is a voluntary service that a lot of women access because they want help. A sheriff might make it a final condition of a community payback order that the lady continues to engage with the willow project, which is very good at providing reports. Alternatively, the sheriff could defer sentence and one of the conditions of that deferral would be for the lady to engage with the willow project. It is not particularly an alternative to remand but, in making a bail application, we would tell the sheriff when someone goes to the willow project. Sometimes someone from the service will come along. Occasionally we might have a report from a recent case that we can give to the sheriff. It is relevant to the question of bail, but it is not a bail condition.

The Convener: There is some latitude to get into a bit more detail on the conditions that could be put in place, such as going to the willow project or attending something else, depending on the services. Is a criminal justice social work report always available?

Leanne McQuillan: No. Sometimes, because someone has been through a recent case, we will have a criminal justice social work report that is maybe a month old. If we know the person is going to be appearing from custody we might make arrangements to have a copy so we are fully aware of the woman's situation, and we can sometimes give it to the sheriff. That is really just an extra thing we can do to try to make sure that the sheriff is fully aware of all the circumstances. Those reports will refer to any agencies that the woman—or man, as the case may be—is seeing and how they are getting on with that.

The Convener: I referred to criminal justice social workers because the recent submission from the Senators of the College of Justice says that they

"are in attendance at the Sheriff Court and may be available should the High Court request their attendance".

The position is the same in Glasgow, Livingston and Aberdeen:

"This situation makes access to information and options in respect of bail or remand more difficult to achieve."

Leanne McQuillan: Certainly when I first started appearing in Edinburgh, a social worker was present in the custody court throughout. If a criminal justice social work report was called for, the social worker would make notes and be involved that way. They would not get involved in the decision of the sheriff, but sometimes they had information.

The system was changed quite recently. Before coming to give evidence I spoke to one of the social workers based in Edinburgh sheriff court who told me that the reason for the change was that they felt that their time could be better spent doing other things, although they are available and, if asked, they can come down to court. They are very rarely in court these days but they are in the building.

The Convener: The report would be available, almost certainly, and I presume that it would contain information that might help the sheriff to decide on appropriate conditions.

Leanne McQuillan: A criminal justice social work report will only be called for once the person has been convicted. There will not be an actual report unless, as I said, the defence solicitor happens to have one from a recent case that could be of assistance—that is not an official way forward.

Stand-down reports are, again, post-conviction. There is not much information available from the social work department, unless the defence solicitor happens to be aware of it.

Maurice Corry: Ms McQuillan, would it not be sensible if that information was available to assist the sheriff to get a more accurate view of that person through his deliberations? For example, we hear that mental health problems feature more and are probably not being understood.

Leanne McQuillan: It is a logistical and practical issue. In Edinburgh, the custodies have gone down recently because of the new act, but prior to January, there could have been 30-plus custodies a day. Not all of those would obviously have a problem with bail; for a lot of them, bail would not be opposed. To have that information available for everybody would be really difficult. A lot of the time the sheriff depends on the defence solicitor advising them of the situation. Our information can also be outdated. It can often be difficult to get a clear picture from an accused, who perhaps is not in the best frame of mind when they are in the cells and being told that they might be remanded in custody.

The Crown obviously has to decide whether to oppose bail although I know that the sheriff ultimately makes the decision. If the Crown does not oppose bail, the sheriff can remand but that is exceptional and it very rarely happens.

The procurator fiscal in court is not the person who has decided whether to oppose bail in a case. The case might be marked in a different city, in a central marking hub, or at best upstairs in an office. The papers come down to court and the fiscal just says, "Bail opposed, bail opposed".

Sometimes defence agents try to speak to the procurator fiscal and say, "Look, this person has these mental health problems. They have seen a psychiatrist and they have a report. Is there any chance you could change your mind and not oppose bail?" Years ago, the procurator fiscal in court felt that they had some discretion and would say, "Okay, that is fine," or they would speak to someone else. I do not work for the Crown Office so I would not like to say whether that is still the case, but fiscals now feel that they have no discretion. They say, "No, I am opposing bail", and then you have to put the position to the sheriff, who might or might not grant bail.

If the Crown felt that it had a little bit more discretion, we could give the procurators fiscal information. While the court is adjourned, we could have a chat and say, "I know this person has a bad record but they are going through this and they have children", and the fiscal can change their mind. The perception is that they do not want to get into trouble if they change their mind.

Daniel Johnson: This question is for Neil Hutton. We are looking here at the aggregate picture where, of the average daily male prison population, 18 per cent are remand prisoners as opposed to convicted prisoners; likewise , the figure for 2016-17 for women is 24 per cent.

Coupled with the evidence from the Prison Reform Trust, which said that the proportion of prisoners on remand in Scotland is higher than in England and Wales, those combined figures lead us to ask whether we are doing things differently in Scotland. The proportions are very high, especially given the fact that a significant number of prisoners will not be given custodial sentences, or even found guilty. Is that reflection correct, given that you said earlier that, even if we had more data, it might not show us anything or point to any areas where we might be able to reduce the levels of demand?

Professor Hutton: I was on the Sentencing Commission for Scotland when we reported on bail remand. That was in 2006, which is a long time ago, but I do not think that the situation has changed a great deal since then.

If our figures are higher than those in England and Wales, it is not by much. There are other European countries that manage to use remand less frequently than we do although I am not sure how they manage it. I suspect that you will find that the countries that make less use of remand also make less use of imprisonment generally and spend a greater proportion of their gross domestic product on welfare than they do on the criminal justice system. The Scandinavian countries are an example of that.

There is no simple, easy answer. We cannot just say "We will take this policy and transfer it over here". Different places have long histories of different cultural change.

That is a rambling answer but you are dealing with a tricky problem here. It has been around for a very long time. The way the legislation is set out gives judges lots of reasons why they should not grant bail. As the sheriff said to you earlier, if you want to change, it is for you to look at the criteria and see whether you would like to downgrade any of them in particular and say, "These may be less important than we used to think they were".

Daniel Johnson: Given the aggregate and comparative data, is it correct to examine whether we are overusing remand?

Professor Hutton: I suspect that the Government is trying to reduce the use of short prison sentences. The two things are, of course, very closely related. The people who are remanded in custody are similar to the people who get short prison sentences. We use short prison sentences in Scotland disproportionately more frequently than other countries.

There was an evaluation of the community payback order when it was first introduced. I managed to ask sheriffs a few questions about what they meant by prison being a last resort. It was only a couple of questions and I interviewed 24 sheriffs so, again, it was a small study.

There were two groups of offenders, one of which I called "wilful non-compliers" and the other "feckless non-compliers". The feckless non-compliers are people who simply cannot manage to comply with orders, for one reason or another—the kind of person that Leanne McQuillan was talking about. For whatever reason, their lives are so chaotic that they simply cannot comply with orders of the court, whether it be community payback orders, bail orders, licences, or whatever. They keep reoffending, breaking bail conditions and so on. Giving them an order with more conditions does not help because they cannot seem to comply with them.

The others are wilful non-compliers, or people who say, "I am not doing it. I am not going to turn up." Ultimately the court then has to say, "This is a court of law, not a welfare institution". There has to be an unavoidable consequence at some point and prison is that unavoidable consequence.

Those two groups are not necessarily distinct; they might well overlap from time to time. That is the complexity of the problem. It is the same for short prison sentences as it is for decisions about remand. It is about what the court can do with people who will not comply with orders.

Daniel Johnson: In our previous evidence session, I expressed concern about the consistency of record keeping, the ability to interrogate the data and whether decisions are being made consistently. Are you confident that decisions about the granting of bail or otherwise are being made consistently in the courts?

Professor Hutton: I cannot answer that because there is no benchmark against which one might compare practice. Even if we had the data, we would not have a benchmark against which to compare practice. What does consistency mean? Does it mean that the judges are complying with the legislation accurately or something like that? According to the little study that I mentioned earlier, judges give legitimate and lawful reasons. It is therefore difficult to say whether they are being consistent. You can speak to people who are more familiar with the day-to-day system who might have different anecdotal answers.

Liam McArthur: Professor Hutton, I am interested in your responses to Daniel Johnson. One of the things that has changed since 2006-07 is that crime levels have reduced, which has thrown into starker relief what is happening in relation to remand. We are being told that all the evidence underpinning the argument for extending the presumption against short prison sentences is the same sort of evidence that underlies the concerns around increasing remand, and that

reoffending is more likely on the back of short spells in prison. On the basis of that, and recognising what a knotty problem it is to unravel, what would you say is a correct policy response? It is all very well to say that people have chaotic lifestyles and it is not for the criminal justice system to try to unravel them, and I think that we all accept that. You might not be bound by the same strictures as the sheriff in terms of what you can comment on. Where are the policy remedies in that?

11:30

Professor Hutton: This is a criminal justice issue that we are dealing with, in the sense that we are talking about decisions that are made by the courts. Could the courts' decisions be different? Possibly the courts could be more tolerant of or more patient with people who do not comply with orders, but it is difficult to say how that would work. For example, sheriffs would say, "I am very sympathetic. I know this person is very likely to not turn up for their supervision but if I give them a community payback order and they do not turn up for their supervision, that means that somebody in the social work department has to go and find them, write a report about them, then come back." If a sheriff gives that person a community payback order, they are just creating extra work for somebody else to do. It would keep the person out of prison and it would get them out of court, but is it in the public interest to have social workers chasing up people who the sheriffs know are not going to comply with orders? Is that a good use of their time?

Liam McArthur: If the evidence suggests that short stints in prison, whether on remand or under custodial sentence, result in a heightened risk of reoffending, the counterargument is that the alternative to this rather unsatisfactory situation is even more costly and negative in terms of public interest.

Professor Hutton: Yes. The other thing is that we have very strict guidelines for what happens if someone breaches an order, so there is very little discretion left to community payback supervisors, criminal justice system social workers, or third sector organisations if people do not comply with orders.

In times past, we might have trusted their judgment and said, if somebody had not turned up, "They do not have a really good reason for that but they are really trying their best to comply with this order; let us give them another chance". It is harder to do that now so people tend to come back to court more frequently. We are making an effort to make community payback orders appear to be tough sentences that have a consequence for people, but the downside is that when people fail to comply and you apply those conditions very strictly, they are back in court again.

Mairi Gougeon: I would like to cover a couple of areas that we raised with our previous witness. Do any of you have information about the success of appeals for those who are being held on remand?

Leanne McQuillan: By and large, when the High Court heard bail appeals, they would not be granted routinely. The problem is that you do not go into an appeal and say to the judge, "This person should have been given bail"; you have to say that the original decision maker was in error. Judges have wide discretion, and although the judge sitting on the appeal may think, "I would have given the person bail", you have to point to an error in the original decision maker's reasoning.

Generally, when sheriffs remand in custody they justify it fairly well and it is difficult to point to an error. Occasionally people will be released on appeal but it is certainly not the norm. The Crown occasionally appeals against people being granted bail. I have found more and more that Crown appeals are being upheld, so those people are being remanded in custody when the sheriff actually granted bail. However, that is just from my day-to-day experience. Sheriffs are good at justifying why they remand people, and I honestly do not think that they remand people lightly.

Mairi Gougeon: How do the populations that we have on remand compare with those of other countries?

Professor Hutton: I do not have the numbers with me but, from memory, we remand more than many European jurisdictions. We also use short prison sentences more than other European jurisdictions.

Mairi Gougeon: Rona Mackay asked about women who are being held on remand. One of my concerns is the number of young people that we have on remand—I do not know whether the number is quite high. As I said in the previous evidence session, I am concerned that we do more harm than good when we hold people on remand, especially young people. It also depends on where they are held. I am concerned about the impact that remand can have on their lives.

Professor Hutton: I do not have information on that but I share your concern.

Leanne McQuillan: Polmont young offenders institution is a bit of a shock for some of the young boys who go there. They go round Edinburgh causing trouble and then, when they go to Polmont, they sometimes get the shock of their lives. That can be a good thing for certain people, who may just need a bit of a fright. Polmont services a wide geographical area, so there are

people there from all over the central belt. I am talking about 16 or 17-year-old boys who think that they are adults, and then they go to Polmont and find themselves alongside people who are in serious trouble. It is very much a culture shock. Some of those boys should probably not be there.

Having said that, there is a problem in various areas of Edinburgh with certain younger boys who constantly reoffend. You see 17 and 18-year-olds on bail who already have more than one page of previous convictions. The courts take account of their age when deciding whether to remand them, but there comes a point when the courts really do not have much choice.

Mairi Gougeon: That goes back to some of the issues that we were talking about earlier. Why are they carrying out that behaviour? What is happening in their lives that has led them to that point?

I was going to ask about the average stay in remand. Are we doing more harm than good if we put young people in the likes of Polmont rather than, say, a residential secure facility, where they would at least have access to proper care and education and where they can start to address the problems that led them to that point in their lives?

Leanne McQuillan: It is very rare that a child who does not have any problems in their background goes on a massive crime spree. Most of them have multiple issues, and they are only children. I think that places in secure units are limited and tend to be used for under-16s who cannot go to Polmont—unfortunately, there are still some under-16s who end up being remanded to secure units. I agree, though. Places such as Polmont can cause more harm than good, although, if it is a summary complaint, they will be there for only a matter of weeks. It is more likely that a young person will be remanded if they appear on petition, and then the remand period is a lot longer. If it is pre-conviction, though, they are still presumed innocent, and there are not really the educational opportunities that there may be if they are in Polmont as a convicted prisoner.

Some of them think that it is all a great laugh for a while and then, a few years later, they might say, "I've wasted so many years thinking it was great fun going to Polmont and missing out on school and education." Remand should be avoided, if at all possible, but if someone is on multiple bail orders there are few alternatives.

Professor Hutton: You will be aware that the Sentencing Commission for Scotland has just started preparing a guideline on the sentencing of young offenders, which should outline a new policy for such sentencing.

Liam Kerr: Professor Hutton, I have a couple of points. First, you said that we remand more than some European jurisdictions, although I accept that you did not base that on data in front of you. Why do you think that that is the case, if our refusal of bail is an objective decision based on the criteria in section 23? Is our legislation more prescriptive? Is it more robust? Secondly, do we remand more individuals, or do we remand the same individuals multiple times?

Professor Hutton: On your second point, it could well be the case that the same individuals are being counted several times. On your first point, I do not know why remand is less in other jurisdictions. I suspect that there are probably different services and options available in other jurisdictions.

John Finnie: I asked the sheriff about bail supervision and we clearly outlined the criteria that the sheriff is required to consider in relation to bail. However, we have heard concerns from a number of witnesses about the consistency of the availability of services, particularly bail supervision. Do you share those concerns? Do you have a view on whether that inconsistency ultimately affects decisions on bail and therefore remand?

Leanne McQuillan: I can speak only for Edinburgh, where we have bail supervision. We used to have Sacro bail, which was quite widely used—I was always referring people to be assessed for that. Sacro provided a bail hostel situation, which meant that someone who was homeless, between addresses or staying with friends could get a bail address. Sacro does not do that anymore, due, I assume to lack of funding and services. There is now a supervised bail scheme in Edinburgh, which is a bit underused, perhaps because of a lack of awareness. I asked some of my colleagues, before coming here, "When was the last time you referred someone for supervised bail?" It could be used a bit more.

Defence solicitors can refer people, sheriffs can refer people—that happens rarely—and procurators fiscal can refer people, which happens even more rarely. Supervised bail can help some people, because one of its aims is to help people to co-operate with turning up at court and for reports and so on. However, one of the criteria is that you have to have a stable address, and one of the main reasons for failing to turn up or to comply with court orders and so on is a chaotic lifestyle and not having a fixed address, so that is a limitation. It may help some people to get bail who would otherwise not get it, but there are certain people who, even if they were assessed as suitable for supervised bail, would still not be granted bail by the sheriff because their suitability for supervised bail is outweighed by the negative points. Supervised bail is certainly not at capacity

in Edinburgh, because the social workers I asked said that they could take more referrals.

John Finnie: As a defence solicitor, is that a submission that you would make to the sheriff prior to a decision being taken on the granting or otherwise of bail?

Leanne McQuillan: Let us say that there was somebody for whom the Crown had opposed bail, but who I thought was particularly vulnerable, for example someone with mental health problems. One of the criteria for supervised bail is that it cannot be given to someone whose mental health problems are too serious, because they still have to be able to comply. The supervision is quite onerous—I think that it starts off three times a week. If I had someone who I thought was particularly vulnerable, I would go to the social work department and ask the social workers to assess the accused there and then. If they were assessed as being suitable for supervised bail, I would say to the sheriff, when applying for bail, "I have a supervised bail report and this person has been assessed as suitable for that." The sheriff would take that factor into account.

John Finnie: Would the Crown do that, too? Would it make a similar representation?

Leanne McQuillan: It can, but it does not.

Gillian Mawdsley: I was a procurator fiscal depute, and my experience in Glasgow—again, a big city with a very busy court—is that the Crown just would not have the time, with the number of custodies, to have detailed referrals. However, if somebody had that sort of background, social workers used to be available in the court. There were certainly a number of projects—the 218 project comes to mind—in Glasgow. There are different projects across Scotland and, just as the sheriff alluded to in the first evidence session, sheriffs will be aware of the projects in their area. More collectively, I am fully aware that, as part of judicial education, a number of those initiatives are talked about and used in judicial training.

This is a personal opinion rather than a professional one, but no one is looking at all the good practices and initiatives across the country, saying "What's good here? What's good there?", and trying to develop a model. That is possibly a role for the community justice organisations, because the provisions are there for supervised bail. I referred to community courts, where sheriffs are developing relationships with people going through the system and are able to encourage and support people with a background of alcohol and drug dependence. There is a lot of very good work, but perhaps it is not always being spread about.

11:45

Professor Hutton: The research evidence suggests that bail supervision schemes can make a very modest difference to the use of remand. One of the reasons for that might be that judges use supervised bail where they would use bail anyway and do not use supervised bail instead of remand. It is the same with introducing community penalties as alternatives to imprisonment. Judges are very keen to use community penalties, and they use them in Scotland much more than they ever did before, but they still use prison to roughly the same extent that they have always done. The community penalties have not replaced prison sentences, and I suspect that that is the issue with supervised bail, too.

Fulton MacGregor: Leanne McQuillan mentioned that you know when somebody is going to get remanded or not remanded, and there is then a grey area. Do you feel that bail supervision is just using the grey area, or are you finding that it is used more and more when somebody would have been more likely to get remand? Conversely, are there situations in which people get bail supervision when previously they might have just got normal bail? I think that that issue came up in a previous evidence session.

Leanne McQuillan: I practise mainly in Edinburgh, and bail supervision is definitely underused. The situation is not that, every day, there are three or four people being assessed for supervised bail. It is not used that often.

When someone's bail is going to be opposed before the case calls, I might think, "Right. I am going to get this person assessed for supervised bail." That person might have got bail anyway if I had explained their particular difficulties to the sheriff, and they might get supervised bail as an extra layer on top of ordinary bail. I do not know whether that is a bad thing, because it will give the person a bit more support. Some people might be on the cusp of being remanded and the supervised bail might just tip the balance in their favour, as some sheriffs are more amenable to things like supervised bail. In my experience, someone who has a terrible record of violence would not be assessed as being suitable for supervised bail anyway.

Ben Macpherson: Before I ask my substantive question, I want to go back to some of the responses to Mairi Gougeon's questions around youth offending. As the MSP for Edinburgh Northern and Leith, I know that we have some difficulties in this city with dangerous and antisocial joyriding of motorbikes. Is that a good example of the need to balance community safety with trying to use alternatives to remand? It is quite an acute and meaningful example.

Leanne McQuillan: That is right. In recent years, the antisocial riding of motorcycles has become a real problem. Young people are appearing on petition following some horrendous examples of dangerous driving. They can be given bail so many times, but bail is not like a post-conviction measure, of which sheriffs have a lot of choices such as community payback orders with various conditions and drug treatment and testing orders. There are all sorts of options available to a sheriff post-conviction, but they do not have the same measures available pre-conviction. Some of these young people might fall into the category of wilful non-compliers with court orders, which is a bit of a problem. Usually, they will be given bail and then, if they fail to comply again, the sheriff might consider a curfew or something like that.

The overuse of special conditions bail might have something to do with increased levels of remand. For example, a 17-year-old on a curfew is probably going to breach it and then appear for breach of curfew. Once they appear for breach of a bail order, they are much more likely to be remanded.

Electronic monitoring might be one thing to try. At the moment, the curfew relies on the police going round to the person's house in the middle of the night and banging on the door to check that they are in. They might have young siblings and a mum and dad who have to work in the morning, so it is a problem.

Antisocial behaviour is a problem that we have with young people in Edinburgh.

Ben Macpherson: I thought that, for the benefit of the committee, it might be worth others' hearing that. My experience in my constituency relates to many of the points that you raise. Thank you for that.

Going back to my substantive question, I note that Professor Hutton says very pertinently in his written evidence:

"Offenders are likely to have chaotic lives characterised by some combination of alcohol and drug addictions, homelessness, unemployment and mental health problems. In effect the court is being asked to apply a criminal justice solution to a problem which many would see as public health or welfare issues."

My question is similar to the question that I posed to Sheriff Liddle in the previous evidence session. The committee has received evidence arguing that significant reductions in the use of remand would require action beyond the criminal justice system—for example, ensuring that general services are in place for vulnerable people. Do you support that position, or is there anything that you would like to elaborate on?

Professor Hutton: Personally, I would support that. However, I am here to answer questions about the criminal justice system, and I think that the criminal justice system still has to respond to these people. As you say, there must be some kind of criminal justice system for the wilful non-compliers. It is an order of the court, and sheriffs would say that you simply cannot let people go on not complying with court orders. Much as I would like to say that there are welfare solutions—I am sure that there are welfare solutions around—there is still going to be a criminal justice issue to be decided as well.

Ben Macpherson: Could there be a wider focus on how the criminal justice system dovetails with those general services if we are seriously trying to reduce the use of remand—or not to grant bail, to put it how the Sheriff preferred?

Professor Hutton: I go back to the point that I made earlier. Looking at the big picture, jurisdictions that spend more money on welfare tend to spend less money on criminal justice, and vice versa, so it is a question of a cultural shift in the jurisdiction.

My personal opinion is that, over the past 10 to 15 years—I have been around for a long time—there have been a lot of positive signs in Scotland, so I am not negative about this or pessimistic about the potential. These are very difficult problems but I think that there are ways in which they can be addressed. It will be a slow process, but I am not pessimistic about it.

Ben Macpherson: Thank you for that. Do any other witnesses want to respond to that question?

Gillian Mawdsley: It is obviously part of a much more complex problem. In a lot of judicial education and so on, the question of health has been linked to the question of poverty, which links into social welfare and all these problems. In my experience, those aspects are fully addressed in the education of the judiciary, which relates to decision making and the justification of decisions, which you looked at earlier.

The Convener: That concludes our questions. Before you go, is there anything that we have not covered, which you want to say to the committee in relation to this whole subject? Or have we really covered everything?

Leanne McQuillan: I wonder whether I can say a bit more about special conditions of bail.

The Convener: Yes.

Leanne McQuillan: In recent years, special conditions of bail have been used a lot more. I have mentioned curfews and the problems with curfews. In the context of domestic abuse, it is often easy to breach a curfew, and, once someone starts breaching bail conditions, their bail will automatically be opposed and they are unlikely to get bail again. As Sheriff Liddle mentioned, there

is often somebody from EDDACS in the court who can give a bit of information about special conditions of bail and domestic circumstances. Often, it will be entirely appropriate to impose special conditions of bail in domestic abuse cases. The procurator fiscal will automatically ask for special conditions of bail in most cases—I am just using domestic abuse cases as an example.

Let us say that a couple have been married for 25 years, they have children and they both work. The man is the offender and he has no criminal record. He appears from custody and is told by the solicitor that he needs an alternative address. He might not have anywhere to go, but he will probably think, "I will go and stay with my mum," or, "I will go and stay with my friend," so he will give another address. The bail conditions will then be imposed.

The offence could have been one of serious violence. However, it could have been an argument that got out of hand, during which a neighbour phoned the police. All of a sudden, the male and the female are in a situation in which the man cannot contact her. He cannot go home and he cannot get his clothing. She may be thinking, "I didn't want this to happen. It was an argument," so she might text him and say, "Look, just come round and we'll sort it out." So, he goes round and a neighbour phones the police, and he has breached bail. Then it becomes a situation in which bail will be opposed.

That can happen to somebody who has no criminal record. He might have a good job and be the breadwinner in the family with children. That sort of situation can cause an awful lot of problems. There are situations in which people breach bail and—absolutely—should be immediately remanded, but it is sometimes not as simple as that. Nevertheless, because of certain policy issues in the Crown Office, bail will be opposed if the person has breached a special condition of bail.

Sometimes, the complainer—it could be a woman or a man—might want to speak to the procurator fiscal in court and say, "Look, I don't want this," but nobody will speak to them. Even if they do speak to them and they make it quite clear that they do not want the situation to happen, they will not be listened to because it is about the public interest. A lot of the time—absolutely—that is necessary, but sometimes it may be unnecessary and can lead to people who should not be remanded getting remanded in custody.

The Convener: I think that we came across the same problem. Sometimes, the procurator fiscal would like to use their discretion but, for some reason, they do not feel able to. It is an issue that we can keep in mind in the context of remand.

Leanne McQuillan: My personal view is that, if the procurator fiscal felt that they had more discretion, that would have an effect on the number of people being remanded.

The Convener: That is helpful. Is there anything else that anyone would like to add?

Gillian Mawdsley: Yes, very briefly. First, we understand that the 2006 act is reducing the number of custodies. Whether that continues, it will be interesting for the committee to look at the effects of things such as investigated liberation as that goes forward.

Secondly, I endorse what has been said about addresses. When I was a depute fiscal, one of the problems was that we had to have a bail address. In a busy custody court, if there was not an address readily available, the cases were continued without plea to the following day in order that we could try to get a bail address. I hope that that is not such a problem as it used to be, but not being given an address was certainly one reason why we had to oppose bail.

Thirdly, I draw the committee's attention to one of the conclusions of the English and Welsh report, which I have reflected on. Talking about practices, it mentions:

> "In the same courts depending on the particular day of the court hearing; a lack of sufficient bail hostel places; and a lack of routine monitoring of compliance with certain bail conditions, and timely reporting of breaches."

That was tied to the consistent provision of information. Those were some of the conclusions of the report—I will send it to you—that might be useful, because they seem to reflect much of your discussion today.

The Convener: That would be helpful. On bail addresses, did you say—or did someone else say—that, in the past, Sacro could provide an address but that is no longer the case?

12:00

Leanne McQuillan: Yes, that is no longer the case. In Glasgow, for example, they had the Hamish Allan Centre, which was essentially a bail hostel. It is still there, but it is homeless accommodation now. The social worker could get an address for people whose bail was being opposed only because they did not have an address, but we do not have that any more. I think that it would make a difference.

The Convener: That is helpful. Is there anything that you would like to add, Professor Hutton?

Professor Hutton: No.

The Convener: Thank you very much. That has been an excellent session, and I thank you all for attending.

Our next meeting will be on Tuesday 20 March, when we will take further evidence on remand.

12:00

Meeting continued in private until 12:43.

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

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

The Scottish Parliament
Pàrlamaid na h-Alba