OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 22 May 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 22 May 2018

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JUSTICE COMMITTEE
16th 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)
Jenny Gilruth (Mid Fife and Glenrothes) (SNP)
*Mairi Gougeon (Angus North and Mearns) (SNP)
*Daniel Johnson (Edinburgh Southern) (Lab)
*Liam Kerr (North East Scotland) (Con)
*Ben Macpherson (Edinburgh Northern and Leith) (SNP)
*Liam McArthur (Orkney Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Roddy Flinn (Scottish Courts and Tribunals Service)
Ruth Inglis (Scottish Courts and Tribunals Service)
Chief Superintendent Garry McEwan (Police Scotland)
Colin Spivey (Parole Board for Scotland)
Stewart Stevenson (Banffshire and Buchan Coast) (SNP) (Committee Substitute)
David Strang (HM Inspectorate of Prisons for Scotland)
John Watt (Parole Board for Scotland)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 22 May 2018

[The Convener opened the meeting at 10:00]

Management of Offenders (Scotland) Bill: Stage 1

The Deputy Convener (Rona Mackay): Good morning, and welcome to the 16th meeting of the Justice Committee in 2018. We have received apologies from the convener, Margaret Mitchell, and Jenny Gilruth. I welcome Stewart Stevenson, who is substituting for Jenny today.

Our only item of business is our fourth evidence session on the Management of Offenders (Scotland) Bill. I refer members to paper 1, which is a note by the clerk, and paper 2, which is a private paper.

I welcome our first panel: David Strang, Her Majesty's chief inspector of prisons for Scotland; Chief Superintendent Garry McEwan, divisional commander in the criminal justice services division of Police Scotland; Ruth Inglis, director of development and innovation at the Scottish Courts and Tribunals Service; and Roddy Flinn, legal secretary to the Lord President.

I thank those who provided written evidence—it is very useful. We will move straight to questions.

Daniel Johnson (Edinburgh Southern) (Lab): Broadly, the bill's approach to electronic tagging is concerned with two issues: the need to update things because of new technology and the issue of trying to keep people out of prison. In situations when it might otherwise not be possible to release someone, tagging can perhaps provide the security that is required. However, concerns have been expressed—by the Howard League for Penal Reform and others—that that approach could lead to people who would otherwise be given non-custodial sentences or be released simply being up-tariffed. What are the panel's thoughts on that? How can we prevent people who would otherwise be out of prison from simply being tagged?

David Strang (HM Inspectorate of Prisons for Scotland): There is a high level of imprisonment in Scotland. In my view, that level is disproportionate and unnecessarily high—we have the second highest level of imprisonment per head of population in the whole of Europe, behind only England and Wales. We imprison too many people, particularly on short sentences.

Prison is absolutely necessary for those who have committed serious crimes and who pose a serious threat to the public. The purpose of the criminal justice system is to reduce crime, keep people safe and reduce the number of victims. However, our use of short-term imprisonment contributes to an increase in crime—locking people up for short periods actually makes Scottish society less safe. In January, when I gave evidence to you on the use of remand, I told you that about a fifth of people who are in prison in Scotland today are unconvicted and untried—they are on remand.

I welcome the use of electronic monitoring where it will reduce the use of imprisonment. I am thinking particularly about people being held on remand and about having early release back into the community as a disposal that is available to the court. Crime and offending behaviour should be dealt with by the court, and the use of electronic monitoring as an add-on to a community payback order is useful as long as it is an alternative to someone being in custody.

Behind your question is a suggestion that courts might just add electronic monitoring as a way of ensuring that someone stays out of trouble. The Howard League is right in saying that there is a risk that, if the measure is used too widely, people might be returned to custody who otherwise would not have been. Therefore, the implementation of the policy is important. The tag alone is not sufficient; the person must also have support and supervision in the community in order to keep them out of the criminal justice system, particularly if they have addiction issues or problems with their mental health.

Daniel Johnson: I am interested to know whether other members of the panel agree with those comments.

Chief Superintendent Garry McEwan (Police Scotland): Yes—I do not disagree with anything that has just been said. If the court so decides, serious high-risk offenders and criminals should be kept in custody and should serve a term of imprisonment. However, for those who are convicted of lower-level offences, a short period of remand leads to massive disruption to family, employment, housing and all the other associated factors. It is important to note that we are discussing electronic monitoring, not control. It is not a catch-all, and it will not prevent reoffending; it will allow us to monitor somebody's behaviour—more likely, in a retrospective fashion.

Electronic monitoring is a tactic and an innovative practice that we should be considering, although it must suit the needs of the offender. There should be wraparound services, with other measures in place to support the individual. It

cannot be used in isolation but must be used with other tactics, with partners and others.

Daniel Johnson: What is the view of the Scottish Courts and Tribunals Service?

Ruth Inglis (Scottish Courts and Tribunals Service): I thank the committee for inviting the SCTS to give evidence today. I am appearing on behalf of the SCTS regarding its role in providing efficient and effective administration to the courts; my views do not reflect the views of the judiciary, and my comments will be confined to the operational impact on the courts, without delving into matters of policy.

I am not sure that I could usefully add anything in response to the question that was asked.

Daniel Johnson: David Strang, in your written submission, you highlight some concerns around consistency. Can you explain what those concerns are and set out some of your thoughts about how consistency could be improved? I presume that that relates a little bit to my initial question about the need to ensure that electronic monitoring is used to help people get out of prison as opposed to being used to tag people who would already be out.

David Strang: My comments on consistency are about the support that is available for people across Scotland in different local authority areas. I am thinking, in particular, about bail supervision. Different courts will tend to use community payback orders in different ways, and the support that is available is not necessarily consistent among local authorities and courts. That is what my comments on the support that is available for people in the community were about. The situation varies across Scotland.

Daniel Johnson: Can I put that point to the Courts and Tribunals Service? We have heard a number of times, both on this subject and regarding remand, that there is variation between different areas, which is based on sheriffs being aware of what is available to them. What steps can be taken to ensure that the full information is provided and that the proposed legislation, if it is passed, will be used as effectively as possible?

Ruth Inglis: To ensure consistency and availability, that might amount to the provision of additional training, including staff training and judicial training. That is how the measures would impact on the court service—and that, in turn, would require additional funding.

Daniel Johnson: Do you think that that funding is contained in what has been set out, particularly in the financial memorandum? Is the proposed funding adequate for that?

Ruth Inglis: We contributed to the financial memorandum to the bill as introduced. We assumed a 50 per cent increase in the number of relevant orders, with an associated increase in breaches and miscellaneous applications. The cost of that increase is estimated to be in the region of £800,000 per annum for the sheriff court and in the region of £9,500 for justice of the peace courts. Very few relevant orders are made in the High Court. The financial memorandum is structured around the bill's current provisions, and it sets out a fair estimate of the costs.

Daniel Johnson: My final question is for Garry McEwan. In your first response, you said that electronic monitoring is about monitoring rather than preventing behaviours. By the same token, however, if the policy was successful and was used more widely, your workload could increase, because you would have to respond to the behaviours of people who were out of prison but who might otherwise have been inside. What operational impact would it have on you and the police more widely if you had to follow up electronically monitored offenders?

Chief Superintendent McEwan: Additional back-office support would be required to update the various systems, including the police national computer and the criminal history systems, but the numbers would not be significant. You are talking about penny numbers of staff—perhaps one or two additional members of staff, depending on the throughput. If electronic monitoring were considered for those on bail, there would be a greater increase in the back-office workload, including administrative work, because there are many thousands of people on bail across the country.

We do not have the power to arrest those who are currently on restriction of liberty orders or home detention curfews for breaching the monitoring. That is a matter for the court. If a breach is reported to the court, it can, if it chooses to do so, issue a warrant. That is when there would be an impact on police officers across the country, who would aim to arrest those individuals and present them back to the court. There would be an impact only if those individuals breached curfews or orders.

Daniel Johnson: Have you assessed what the impact might be on response officers?

Chief Superintendent McEwan: No, we have not.

The Deputy Convener: Mr Flinn, do you want to comment on anything that you have heard?

Roddy Flinn (Scottish Courts and Tribunals Service): No, I have nothing to add at this point.

John Finnie (Highlands and Islands) (Green): The Government has indicated its hope that the monitoring requirements will be appropriate to the

circumstances, and it has talked about creating a response framework to ensure consistency of approach. It was helpful to hear Mr McEwan comment on what happens at the moment. Do you imagine that the police will be involved in putting together a framework? What are Mr Strang's or Ms Inglis's views on the matter?

Chief Superintendent McEwan: I would certainly be interested in getting involved in the discussion, although the vast majority of the work is for the prisons and the courts. The Scottish Prison Service issues home detentions and curfews. The police become involved at the tail end, after individuals have breached their conditions, reports have been submitted and warrants have been issued. The reality is that it is more a matter for the prisons and the courts.

David Strang: It will also be more a matter for the social work services that will supervise the monitoring in the community.

Garry McEwan mentioned that thousands of bail decisions are taken, but I do not anticipate that electronic monitoring will be envisaged for those people. The bill is about people who would otherwise be remanded in custody being able to remain in the community through the introduction of electronic monitoring. Therefore, the numbers would not be massive. It is hoped that only small numbers would be involved. The impact will be felt more by social work and the support agencies in the community.

John Finnie: Ms Inglis, you were asked whether you considered gender when you put the figures together. We have had representations about the disproportionate impact that electronic monitoring could have on women—particularly those with childcare responsibilities—and what that would mean for the children, who would, in effect, be confined to the house, too.

Ruth Inglis: I do not have any data on that aspect of monitoring, and I am not sure whether the SCTS could provide data on it. Our case management systems are set up on the basis of operational need as opposed to research or statistical analysis needs, so there are limitations on what data we could provide in that area.

10:15

John Finnie: Has your service been involved in the development of the response framework?

Ruth Inglis: I have no detail about the response framework.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): My question is for Mr Strang, and it is about the statistics. They might not be your statistics, Mr Strang, so you might not be able to answer this question.

You said that Scotland has the second highest proportion of people in prison—England and Wales has the highest—and that a fifth of them are on remand. Do the figures from other parts of Europe include remand prisoners? In other jurisdictions, remand prisoners are often held separately in places such as bail hostels, which restrict their liberty but are not prisons. Are the figures as comparable as your answer would suggest?

David Strang: There are international standards for comparisons across the globe. There can be different counting mechanisms, but the figure for the prison population per 100,000 of the population is accepted. It is not an absolute number; it is a comparison with the size of the population. The European average is about 100 prisoners per 100,000 people. Scandinavian countries have been mentioned, and they imprison between 60 to 70 people per 100,000. Scotland's figure is 130 and England's is about 140.

There might be minor variations. One of the differences relates to whether psychiatric patients are held in a secure hospital setting or a prison environment. There might be some variations at the margins but, in terms of the broad scope, we imprison 50 per cent more of our population than the European average. That is an accurate figure.

Stewart Stevenson: My quick arithmetic says that, if all remand prisoners were not held in prison but were instead released using some form of tagging, Scotland's figure would go down to 105 per 100,000 people.

David Strang: Yes, but there is absolutely no suggestion that no one will be held on remand. I am not arguing the case for every prisoner who is on remand. If someone is charged with a serious offence, they absolutely need to be locked up from the day of arrest and throughout the court proceedings—and, if convicted, they should be kept in custody for a long time. It is important not to think that I am arguing that all people who are in prison on remand should be held under electronic monitoring—I am not saying that at all. I am talking about a certain proportion of such people who could be better supported in the community.

Tagging could also ensure that they turned up at court. Quite a lot of people—especially women, whom Mr Finnie talked about—are remanded to ensure that the court case can go ahead. I understand that. I am talking about a smaller number than 100 per cent of the people who are on remand.

Stewart Stevenson: I was merely seeking to explore the limitations. Getting the Scottish figure down to the European average would require doing a lot more than simply dealing with remand prisoners. That is all that I was trying to say. I was

not taking the view that you might have thought I was.

David Strang: It is also about prison sentences. I am a big supporter of the presumption against short sentences.

Liam McArthur (Orkney Islands) (LD): Mr Strang, you talked about the additional workload pressures on social work departments as a result of electronic monitoring. I do not think that there can be a social work department in the country that is not already experiencing severe workload issues.

This might not be for this panel to determine—it might be more for the minister and others—but, in your view, is there an inherent risk that we might apply further pressure to an already overburdened service that will make the success of electronic monitoring more difficult to achieve?

David Strang: I do not have a view on resourcing of social work services. However, to take the long view, if we accept that electronic monitoring is likely to lead to fewer people being imprisoned and a reduction in crime overall, it is the right thing to do and will reduce the impact on police, courts, prisons and criminal justice social work.

Liam McArthur: To expand on the question of monitoring, what are the panel's views on the primary motive behind and benefits of alcohol and drug testing? Does it give the courts more flexibility to deal with those who come before them and provide greater reassurance for the public? Does alcohol and drug monitoring support efforts towards desistance on the part of people who have addiction issues? I am wondering whether there is a primary motive behind the policy or whether there is a blend of different benefits.

David Strang: There is a parallel here with drug treatment and testing orders, which are overseen by the courts as part of the criminal justice system. People who are on DTTOs have said that they find the discipline of the supervision and support, and the requirement to appear before a sheriff, helpful in trying to manage their addiction.

As you know, the level of addiction among people who are going through our courts is very high. More than 50 per cent of people in prison say that they were drunk when they committed their offence. There is a huge correlation between addiction, whether it involves drugs or alcohol, and people's lifestyles, offending and so on. We can take encouragement from the fact that DTTOs, which are a disposal of the court, are seen as supportive.

To answer your question, electronic monitoring for alcohol can potentially provide additional supervision and support for people who are trying to change their ways. It can only be a voluntary disposal, and it is not about catching people out and giving them more punishment; rather, it is a way of gathering information that may be helpful in supporting people so that their outcomes are likely to be better in the long run.

Liam McArthur: I will ask Garry McEwan for his thoughts in a moment.

Is there a balance to be struck in ensuring that the measures that we apply do not become so intrusive that they create other issues with regard to how the data and whatnot that is held on individuals is stored and shared?

David Strang: I understand that point, but there is nothing in our criminal justice system that is more intrusive than sending someone to prison. People are taken from their home, they lose their job if they have one, their family relationships are broken and they are incarcerated in a prison for however long. That is the highest level of intrusion that the criminal justice system provides. You are right to raise issues around data and information and the potential for intrusion, but, as an alternative to incarcerating someone in prison, monitoring involves a much lower level of intrusion. Those issues will need to be looked at, but I do not think that they are a barrier to the use of electronic monitoring as an alternative to custody in the way that is proposed.

Liam McArthur: Mr McEwan, do you have a view on that?

Chief Superintendent McEwan: I would probably echo what has just been said. Alcohol and drugs are a significant causal factor in much of the crime that happens in the communities of Scotland. Alcohol and drug monitoring is an alternative and an additional wraparound for monitoring individuals who have a propensity to commit crime, or who have committed crime, under the influence of alcohol or drugs. It could well be advantageous in addressing their needs and protecting the public retrospectively. As an alternative to people serving short-term sentences in prison, monitoring is certainly a viable option.

Liam McArthur: Are there concerns that, depending on global positioning system availability, the disposal may be available only in some parts of the country? Should we be concerned about that, or is it expected that technology will allow us to apply the measures across the entire country, including in remote and rural areas?

Chief Superintendent McEwan: I am not sure about the issues at that level of detail. I have heard it discussed that GPS is not great in some areas of Scotland and is better in urban areas and rural areas, so the issue is worthy of further consideration.

Liam McArthur: I suppose that it is partly a technological issue and partly an issue of geography. Presumably, consideration is given to the fact that, in using electronic monitoring, we are managing a risk. For example, in island settings, such as those that I represent, there may be concerns among Mr McEwan's colleagues that monitoring is going on in an area where there is no police presence and, therefore, the ability to respond to issues is more challenging. Will that be a factor when decisions are taken about its use?

Chief Superintendent McEwan: It will be interesting to see the technological advancements. The committee will not have missed the fact that monitoring is not control and is retrospective. If somebody does not adhere to the bail curfew, we are not aware of that in real time; it becomes apparent many hours later—if not longer than that—via the company, which reports the matter. The question that concerns me is what the individual is doing during the time when he or she is breaching their curfew or other conditions. It is not real-time control; it is retrospective monitoring, unless there are technological advancements that will bring the information to the fore more quickly. Those would be really important.

Liam McArthur: We touched briefly on data protection, and there are provisions in the bill that grant ministers powers to set this by regulation. Is that sufficient? Obviously, a range of parties will be involved the electronic monitoring process, and they may require to share that data. There will be a mix of public bodies and private companies, and possibly voluntary organisations, operating in the area. Does that give rise to any concerns?

Chief Superintendent McEwan: Certainly not from any of the information that I have read. We need to share information as widely as possible, within the limits of the legislation. I am comfortable that that has been covered and discussed.

David Strang: Is the question about ministers being able to make regulations in relation to data protection, rather than that being done by primary legislation in Parliament?

Liam McArthur: It is a combination of both. The concerns around data protection have been addressed, with the bill taking up the way that information will be shared, and guidance is to follow. There is an on-going debate about the level of scrutiny of that process. Do we need something more explicit in the bill about how information will be handled, or are you comfortable that the process will arrive at a solution that will address the concerns that inevitably arise about the way in which data is shared?

David Strang: The latter, I think. It is sensible to have the ability to introduce procedures and protocols for data sharing, storage and so on. As we know, the electronic world is changing very rapidly, and I do not think that you would want Parliament to have to legislate every time there was some new app or way of sharing information. The provisions are sufficient, but you are right that there is an issue about what happens to the data. The companies that are responsible for electronic monitoring, particularly with GPS and the alcohol monitoring bracelets, will capture a huge amount of data. It is really important that there is sufficient oversight and scrutiny of what happens to that data.

Liam McArthur: I absolutely take your point about the way that technology will change and how the issues arising from it will evolve over time, but is there perhaps a need to set out broader principles that will adhere for some time to come, in terms of the way in which monitoring data is used and shared?

David Strang: Not in my view.

The Deputy Convener: I ask Ruth Inglis whether the SCTS has protocols with regard to data sharing, and whether it is planning to change those, given the new regulations.

10:30

Ruth Inglis: Which regulations are you referring to?

The Deputy Convener: The new regulation that is coming into force on Friday—the general data protection regulation.

Ruth Inglis: Oh, the GDPR. Yes, the courts are responding to the GDPR. Various practices are being implemented to ensure that the service follows the new regime. I am not in a position to provide much detail on that, but I can certainly write to the committee, if that would be helpful. Are there any particular aspects that you have concerns about?

The Deputy Convener: I would just like a general overview of what you are having to do in that regard. If you could update us on that, that would be great.

Ruth Inglis: Okay.

The Deputy Convener: Stewart Stevenson has a supplementary.

Stewart Stevenson: As we have talked about GPS, I thought it would be useful to put on the record the fact that GPS works better in rural areas than it does in urban areas because, to get a two-dimensional fix, it is necessary to be able to see three satellites. In urban areas, buildings will obscure the view of satellites, whereas in rural areas they do not, albeit that most of the GPS-enabled equipment also has supplementary fixing using mobile phones and devices that make

possible interpolation between adjacent GPS captures.

My basic point is that GPS works better in rural areas than it does in urban areas, and it is important that we do not think otherwise.

Liam Kerr (North East Scotland) (Con): I want to ask the witnesses about resourcing but, before I do, I will go back to another of Stewart Stevenson's interesting interventions, in which he asked about the statistics. Mr Strang, you said that the stats on prisoner numbers across Europe were broadly comparable and that the number of remand prisoners was included in those stats. You said that about 20 per cent of our prison population is on remand. Do you have any idea whether an equivalent level of the prison population is on remand in other European jurisdictions? Do the stats show, for example, that there are significantly fewer people on remand in the rest of Europe?

David Strang: I do not have those statistics. The international centre for prison studies at Birkbeck College at the University of London puts out those statistics, and the information that it provides is comparable across not just Europe but the globe. All that data is available, but I do not know whether the remand rates in other countries are comparable.

Liam Kerr: Thank you.

I will move on to the general issue of resources. The introduction of electronic monitoring will represent a pretty significant change in how we do things, and implementing it will put a call on resources. That might include the provision of equipment, the training of staff, changes in the way in which the courts operate and changes to social work departments, which Liam McArthur mentioned.

Do any of the witnesses have views on whether the whole area of electronic monitoring has been appropriately costed and whether sufficient resources will be made available? Can I throw that to you, Mr McEwan?

Chief Superintendent McEwan: You certainly can. As I mentioned earlier, we have looked at what we anticipate will be the back-office support requirements, which will not be significant. However, we have yet to fully understand what the impact will be at the tail end of the pipeline. We are not sure whether the number of reports to sheriffs with a view to the issuing of warrants will increase as a consequence of individuals breaching electronic monitoring conditions, and we need to do some more evaluation to understand what will happen. It is very difficult to know, because a fair proportion of the people in question would previously have been put in prison. If they come out on electronic monitoring, the likelihood of them breaching that is finger in the air stuff, to be honest.

David Strang: My answer is that we need to take a long-term look at costing.

One prison place for a year costs roughly £35,000 so, if we reduce the number of people who occupy prison beds, there is clearly an economic benefit. I am sure that the Scottish Prison Service would like me to say that that resource is not freed up immediately—I am not saying that, if there is one person fewer, the service can hand over £35,000 a year. However, for society, it is much more expensive to keep someone in prison than it is to supervise them on electronic monitoring. I suppose that we need a spend-to-save approach because, if we invest in community supervision that is successful and reduces the number of people in prison, that frees up resource. It is a much broader issue but, in my mind, we need a resource shift from spending on prisons and custody to spending on community disposals and community support. It is a longer-term solution.

Ruth Inglis: As I mentioned, we contributed to the financial memorandum. I referred to the costs of approximately £800,000 per annum for the sheriff courts and £9,500 for the JP courts. However, I did not mention the additional new intimation duty that schedule 1 to the bill places on the clerk of court, which will also have resource implications for the SCTS. We indicated in the financial memorandum that, taking into account the anticipated increase in the number of community disposals that will be made in consequence of the bill, and estimating that 20 per cent of relevant community disposals relate to persons who are already subject to an existing order, there will be additional staff-time costs for the SCTS of around £232,000 per annum.

On your question about whether the bill has been sufficiently costed, from our perspective, the disposals that are listed in section 3 have been sufficiently costed. However, if the list of disposals is extended by way of the regulation-making powers, those new measures will need to be costed by the SCTS as well. If the list of disposals is extended to include things such as electronic monitoring as an alternative to remand or fines, those measures will have significant resource implications for the SCTS, and we will need time to cost them and ensure that funding is available. That may well come further down the line when and if ministers exercise the regulation-making powers.

Liam Kerr: Is it fair to say, then, that it is not possible at this stage to say how much the changes will cost the country? Specifically on Mr McArthur's point about social work departments, that exercise has not been done.

Ruth Inglis: Obviously, I can comment only on the SCTS. The disposals that are listed in section 3 at the moment have been costed for the SCTS. However, further down the line, ministers could choose to exercise their powers to add to the list of disposals things such as electronic monitoring as an alternative to remand or fines, and the details of that have not been costed. In response to the consultation, we provided estimates on that. With regard to electronic monitoring as an alternative to fines, we gave a figure of £2.2 million per annum. There could be a big impact on the SCTS, so we would need to be involved fully in the costing of those measures further down the line.

Liam Kerr: Let us just say that there are fairly significant costs. I accept Mr Strang's point that it is almost front loading the costs for payback later, but does any of you have an idea of where that resource will come from? I ask Mr Strang specifically whether there is any suggestion that it could come from the prison service.

David Strang: It is not for me to comment on resourcing. My job as the chief inspector of prisons is to inspect prisons and to report on the conditions and the treatment of people in them. I see it as a bigger challenge that we need to shift more resourcing towards prevention and support and away from imprisonment and punishment. However, as with any funding decision, it is a political decision about priorities. Politicians have to decide about health, education and justice; I am just advocating that more investment in electronic monitoring and supervision in the community will, in the long run, produce better outcomes for society and lower crime rates, and it will save money because we will be incarcerating fewer people. It makes sense to me in both the long and the short term.

Liam Kerr: Does anyone else have any comments on where that resource should come from? The Courts and Tribunals Service has laid out some fairly clear costs, but have you any idea where that money will come from?

Ruth Inglis: Yes. We have laid out the costs and hope that, if we are required to implement the policy, the funding will be made available for that.

Maurice Corry (West Scotland) (Con): We have received evidence highlighting the importance of decisions about electronic monitoring being based on professional assessment of support needs and risks to others. Do you have opinions on whether certain types of offending, such as domestic abuse, give rise to particular difficulties with such monitoring?

Chief Superintendent McEwan: Are you asking whether I have a concern about that?

Maurice Corry: Yes. Is such monitoring more problematic in domestic abuse cases, given that the guilty party is in the community and is around although they are being monitored?

Chief Superintendent McEwan: Domestic abuse is not my area of expertise. Your question goes back to my original point that serious and violent offenders should be kept in prison—there is no doubt about that in my mind. However, we should perhaps have a different, more innovative approach to those who commit offences that are less serious, and electronic monitoring seems to be one viable option, but it really must have wraparound support.

The bill talks about sex offenders and the introduction of electronic monitoring in relation to sexual offences prevention orders and sexual harm prevention orders. Electronic monitoring is now another viable technique to be considered, but it cannot be implemented in isolation; rather, it must be used with other measures of control that are at our disposal under the SOPOs and SHPOs. Monitoring is an additional tool that we can consider using as part of our tactics.

David Strang: I understand the concerns of victims of domestic abuse. There is comfort in knowing that the accused is in custody—I understand that. However, electronic monitoring provides a greater ability to supervise people in the community. Exclusion zones can be set up, so it can be a way of protecting a victim of domestic abuse for a certain period; it would not go on forever. If someone remains in the community and they have a job, they can carry on working and may still be able to see their children and so on. The approach can be tailored to the individual circumstances of each case.

Maurice Corry: Do you think that there are positives to it?

David Strang: Yes, I think so.

Maurice Corry: Are there any other comments?

Ruth Inglis: As it is a policy issue, the SCTS would not have a comment on that question.

Roddy Flinn: I agree.

The Deputy Convener: Chief Superintendent McEwan, do you think that the police will have a role in responding immediately to breaches in domestic abuse cases? Will that put a strain on your staff resources?

Chief Superintendent McEwan: It might do. That is the vital element of electronic monitoring. Unless it is something that I have not seen, there is no real-time ability to report a breach, which is, arguably, the most important part of such terms. If someone breaches their curfew, DTTO or geographic boundary, the questions are about why they are doing so at that particular time. Someone should immediately be alerted and there should be

some sort of proactive response to understand why the individual has breached their terms. To my knowledge, that does not happen currently. I am not sure whether that will be part of the future technology, but it should be.

10:45

John Finnie: I will follow up that issue with Mr McEwan. It seems to me that the risk assessment would always be an important factor in cases of domestic abuse. Would Police Scotland be involved in any risk assessment associated with a decision to allow a person to be subject to electronic monitoring? If so, there would be the potential to say that electronic monitoring might be inappropriate, particularly in domestic abuse cases, given the circumstances or the depiction of past conduct.

Chief Superintendent McEwan: I do not anticipate that Police Scotland would be part of the risk assessment. My understanding of how it would work is that somebody would go to court and be convicted of an offence or granted bail and we would report the circumstances to the Crown and the court. It would then be for the sheriff, or the Scottish Prison Service in relation to a home detention curfew, to decide, on the basis of the risk assessment, whether it would be legitimate, proportionate and right to impose electronic monitoring. Police Scotland is at the far end of that response.

John Finnie: I will clarify my question. There would be a role for criminal justice social work in that decision, and it would inform the court.

Chief Superintendent McEwan: Absolutely.

John Finnie: Would there be liaison at that point? I appreciate that it is not your area of work at the moment, but do you understand that there would be liaison between criminal justice social work and the police service at that point?

Chief Superintendent McEwan: There would be criminal justice social work reports, and we would submit a police report. The Crown, the courts and the sheriff would assimilate and comprehend those reports, I guess, and make their decision.

John Finnie: I will move on to a question about compliance and enforcement, which may be for Ms Inglis or Mr Flinn. What categories would be exempt from consideration for electronic monitoring? If someone had previously breached court undertakings, would that mean that, by default, they were unsuitable?

Ruth Inglis: I am not entirely sure about the answer to that question. I could write to the committee about it.

Roddy Flinn: I suspect that the matter is for the decision of the individual judge.

John Finnie: Having regard to what?

Roddy Flinn: There would be a number of factors to take into account. Obvious factors would be the seriousness of any breach and whether the breach was repeated. Another factor would be the advantages of continuing with whatever regime was trying to help the guy. It feels like a judge-led decision.

Stewart Stevenson: We have covered electronic monitoring quite a lot. The first 16 sections of the bill cover that subject, but they do not cover the electronic monitoring of people who are on bail and who will be on remand. Should they do so?

David Strang: In my view, yes, they should. I am disappointed that the bill does not say more about the electronic monitoring of people who are on remand and awaiting trial. There is scope to benefit from extending electronic monitoring to include people who would otherwise be in custody on remand.

Stewart Stevenson: Looking at those 16 sections, it strikes me that the section on infringements, which applies to offenders, might have to be cast differently for people who are on bail. Perhaps Chief Superintendent McEwan has a view on whether that is a reasonable proposition.

Chief Superintendent McEwan: Will you expand the question a bit?

Stewart Stevenson: Well, I do not have an idea—that is what it boils down to. The infringements section talks about recall for someone who is on parole. However, the bill cannot talk about recall when a person is on bail, because they have not been convicted of any offence at that stage. Therefore, the provisions around infringements will need to be different. I wonder whether the panel has a view on the matter. They may not. Perhaps I will have to ask the minister or others that question in due course—if so, we can move rapidly on.

Chief Superintendent McEwan: The element that is missing currently is the power of arrest, which goes back to the need for a proactive response. The police do not have the power of arrest, should any individual breach their curfew. For example, if we come across an individual who has breached a curfew—and if we are aware that they have breached a curfew—we do not have the power to arrest that individual at 3 o'clock in the morning. A report needs to be submitted to the respective sheriff, who then issues a warrant, so the individual is left to go on their way. The power of arrest should be considered.

Stewart Stevenson: It sounds as though you are talking about section 13(3), which states that

"No offence constituted by reason of breaching the disposal ... can be committed"

and then refers back to "subsection (1)", which describes it. There is a gap in the bill in relation to offenders that would apply equally in the case of bail.

Chief Superintendent McEwan: Yes.

Stewart Stevenson: Right. I do not have any more to say on that subject.

Liam McArthur: The issue is more fundamental. The name of the bill is the "Management of Offenders (Scotland) Bill", so it would not be competent to deal with the electronic monitoring of those on bail, as they are not deemed to be offenders. That was certainly the view of some of our witnesses at an earlier evidence session. Mr Flinn is nodding.

David Strang: That sounds like a technical legal point.

Liam McArthur: I have found that such technical legal issues tend to get in the way. Is that the view of the SCTS?

Ruth Inglis: We would simply make a point about the terminology and the use of the word "offender". Some of the orders to which electronic monitoring can be added, such as SOPOs and sexual harm prevention orders, are civil in nature. The Government will need to look at that. Also, if ministers made regulations to extend the availability of electronic monitoring to pre-trial situations, it would not be appropriate to refer to the individual as an "offender", because, at that point, they would not be an offender. That issue will need to be considered.

Liam McArthur: Is it the view of the Scottish Courts and Tribunals Service that that would not be competent in the context of a bill that is called the "Management of Offenders (Scotland) Bill"?

Ruth Inglis: I do not have a view on the competence of the bill. We simply make the point that the wording needs to be looked at.

David Strang: In the written submissions to the committee, others have said that "offender" is an unhelpful word and have suggested that the bill should have a different title. I do not know how easy or difficult it would be to change the title of the bill but, if that is a consequence of including bail, so be it.

Liam Kerr: I have a brief question for the SCTS. In your written evidence, you talk about a 2005-06 pilot scheme that involved electronic monitoring as a condition of bail. The Scottish Government concluded that it was not helpful. Are you able to share any more details of that scheme? Why was it not helpful? What went wrong, if I can put it that way?

Ruth Inglis: I understand that the pilot scheme in 2005-06 was carried out in four courts throughout Scotland and that, on the back of the pilot scheme, there was an evaluation report. My very general understanding is that, although the scheme seemed to work, there were limitations. Indeed, those limitations were referred to when the provisions that enabled the pilot to take place were repealed by the Criminal Justice and Licensing (Scotland) Act 2010. It was pointed out that electronic monitoring was not used very often, that a high cost was attached to it and that it placed a huge burden on enforcement agencies. Our written evidence simply makes the point that, as such pilots were run a decade ago and were deemed not to have worked, we struggle to understand the rationale for using electronic monitoring now. We are simply making that point without passing any judgment on the proposal.

Liam Kerr: That is useful. The committee will need to be cognisant of that going forward.

Stewart Stevenson: I make the observation that the short title can be amended by an amendment to section 50. The difficulty lies with the long title, because it attempts to capture the general principles of the bill and the Presiding Officer is often reluctant to allow it to be tampered with significantly, although that has happened.

The Deputy Convener: Thank you. We move on to disclosure of convictions, and the first question is from Liam Kerr.

Liam Kerr: As a general principle, the policy memorandum makes it clear that the aim of the bill is to balance the right of an offender not to have to disclose any criminal past against the protection of the public. Do any of the witnesses have a view on whether the bill, as drafted, achieves that balance?

David Strang: I am not sure that I see it as balancing two different needs, as if what is good for the person who has been convicted and what is good for the victim are necessarily opposed. It is good for everybody if rehabilitation works. If someone who has offended and been convicted manages to be rehabilitated and live a constructive life that does not include committing offences, that is in the interests of the potential victims who will not become victims, and in the interests of previous victims. I therefore welcome the provisions, because it is helpful for people to change the course of their life, to get a job and to be rehabilitated. I do not see that, by somehow giving an advantage to the offender, you are diminishing the rights of and benefits to the victim. When it works and someone gets a job and makes

a constructive future for themselves, that is of benefit to them, to potential victims, to previous victims and to society as a whole.

Liam Kerr: As no one else has a comment on that, I will bring Mr Strang back in. Last week, the committee heard about the diminishing predictive value of convictions over time. Are you comfortable that the proposed disclosure periods take sufficient account of the predictive value of convictions?

David Strang: The proposals will only affect short sentences; longer sentences will not be affected. You are right that a previous conviction is not a good predictor of future behaviour, particularly after time has gone on. A submission to the committee talks about how someone who has not been convicted of an offence for seven to 10 years is no more likely to offend than someone who has no previous convictions. Those are broad statistics rather than individual cases; it is an inexact science, and the problem with your question is that you are extrapolating from individual cases to the broad population. We can talk about the percentage chance of reconviction in relation to the population, but that does not mean that an individual is 50 per cent more likely to offend than not. You have to look at each individual case on its merits.

To answer your question, I think that the proposed changes are satisfactory.

Liam Kerr: Does that not highlight one of the problems with saying that a blanket disclosure period is appropriate when, as you have rightly pointed out, individuals behave in individual ways? Is a blanket disclosure period the right method? Could there be something else?

David Strang: You need to have consistent rules. The principle of people being able to put their past behind them and make a fresh start is helpful. You have to draw an arbitrary line somewhere. For less serious offences, which are reflected in less serious sentences, it makes sense for the disclosure period to be less than it would be for a long sentence for a serious crime. I would not criticise the principle of having a disclosure period.

11:00

Liam Kerr: Let us say that we base the starting point for the disclosure period on the sentence alone—I accept your point that the offence creates the sentence, which creates the disclosure period. Should the disclosure period be based explicitly on more than just the sentence? Should it be based on the severity of the offence, for example?

David Strang: That is a different issue from that of disclosure of a conviction. There are other ways in which people who have committed particular offences are banned from working with vulnerable children, for example. You are asking a question about a different issue from what is proposed in the bill. I think that what is in the bill is a step in the right direction.

Maurice Corry: Will the bill do enough to change attitudes towards the employment of people with convictions? Could something more be done, separate from the bill, to change companies' and employers' recruitment practices?

David Strang: That is a huge question. Yes, I would like you to legislate to remove the stigma against people who have been in prison. You are absolutely right: people's attitudes are, of course, much more important. It is interesting that people who have been successful in getting jobs having left prison are often employed by a previous employer who knows them, who knows that they were a decent worker, who knows that they have offended and gone to prison, and who has welcomed them back, or they are employed by their brother, uncle or cousin. If someone has a criminal conviction and a prison sentence behind them, irrespective of disclosure issues, that is an unintended but real barrier to rehabilitation, and that is perfectly understandable. If an employer has two suitable people, it is a natural instinct to say, "I'll take the one who has not been in prison, because they are likely to be a better worker and more honest."

You are absolutely right to ask that question. There are lots of judgmental attitudes and there is stigma. That is why it is so difficult for people to get out of a life of crime, particularly if they have had short sentences and have gone round the system. It is really hard for such people to get a job unless someone can give them a leg up into employment. That is the experience of a lot of people in prison.

Maurice Corry: We can quote the examples of people such as Sir John Timpson and companies such as Greggs and Virgin Trains. They have managed to cross that barrier and very successfully take people on.

David Strang: Yes, they have. I think that that has happened more down south than in Scotland, but they are good examples. They have set almost a moral lead and said that they will give people who have served a prison sentence a second chance.

Chief Superintendent McEwan: I do not have any views on that. From my perspective, the crux of the matter is that the rules of disclosure need to be clear. The incidents that I have been involved in over the years in which people have failed to disclose convictions when they should have done have often been the result of a misunderstanding

of the rules of disclosure. The rules need to be crystal clear for everybody to abide by them.

I agree with the principle that, if a person has been convicted of a more serious offence, there should be a longer time before the conviction becomes spent. If there has been a less serious offence, the timeframe should be shorter.

Maurice Corry: Does Ms Inglis have any comments to make?

Ruth Inglis: No. The SCTS's written evidence covered only part 1 of the bill. We do not have any comments to make on part 2.

Maurice Corry: Okay. That is fair enough.

Stewart Stevenson: I want to go back to what Chief Superintendent Garry McEwan said and to look at section 5 of the bill in particular, but not only at section 5, as the same phrase is used in two different places. The heading for section 5 is "Requirement with licence conditions". Section 5(5) says:

"The Scottish Ministers must ... explain to the offender the purpose mentioned in subsection (4)"—

in other words, what the conditions are—

"and ... warn the offender of the consequences of failing to fulfil the obligations".

This is my 265th Justice Committee meeting, and I wonder whether part of the problem is whether people in a confusing, novel situation absorb and understand what they are being told. Should there be an obligation to check that what is being said is understood? It strikes me that a lot of people will find it fairly challenging to understand what the conditions mean for them. Is that a fair observation on my part, based on your experience of dealing with offenders who are in breach? Is that imagined confusion genuine? Is there scope to do a little bit more to tackle that at the point when conditions are put in place?

Chief Superintendent McEwan: I think so. My experience is from many years ago, in relation to Disclosure Scotland. I found that, at times, people failed to disclose the right information through a lack of understanding. Some may have done so intentionally, but it was mostly because of confusion and a lack of understanding. Some individuals struggle to understand some of the requirements that are placed on them, and any help that we can provide them with would be advantageous.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): My question is on an issue that has not been fully covered in the responses so far. Mr McEwan, I note that the Police Scotland submission says that

"Many people who committed crimes in their youth never reoffend".

The bill seeks to address that important point. Do you consider that it does so? Would it allow people who have committed crimes in their youth to be able to move on? Could any changes be made to enhance that aim?

Chief Superintendent McEwan: People can offend at any point during their lives, and they might do so only once. The bill's aim is to look at ways, other than remand, of managing individuals, so that, for example, they do not lose their job or house and still get to see the kids. It is about trying to balance the needs of and risks to the victim with giving some offenders who have committed isolated or lower-level offences a second chance before remanding them.

Stewart Stevenson: This Friday, the general data protection regulation comes into force. My question relates to the status quo, as well as to any changes that might be made. A disclosure check might not reveal a spent conviction, but the perusal of newspaper archives would do so—in many cases, quite readily. Do you have any views on whether the GDPR creates a general right to be forgotten in relation to published information? Is that beyond the scope of the panellists' understanding?

Chief Superintendent McEwan: It is certainly beyond the scope of my understanding; I would not attempt to answer that one.

David Strang: I do not have views on that topic.

Stewart Stevenson: I suspected that that might be the case, convener.

The Deputy Convener: The bill does not propose any changes to higher-level disclosure checks. What are your thoughts on that issue? Do you agree with that approach?

David Strang: Yes, I think so. Those people are likely to be higher risk, so that approach is appropriate.

The Deputy Convener: As there are no other views, that brings us to the end of this useful session. I thank the witnesses very much.

We will have a brief break to allow a changeover of witnesses and those on our second panel to take their places.

11:09

Meeting suspended.

11:14

On resuming—

The Deputy Convener: I welcome our second panel, from the Parole Board for Scotland: John Watt, chair, and Colin Spivey, chief executive. I

thank you for your written evidence, which is very useful. We move straight to questions, starting with a question from Mairi Gougeon.

Mairi Gougeon (Angus North and Mearns) (SNP): I am glad that we have you both in front of us today, because we have had some questions about the Parole Board, so it will be good to hear some answers from its representatives. To start, could you tell us a bit about how the Parole Board currently operates and what the proposed changes in the bill will mean for it?

John Watt (Parole Board for Scotland): How the Parole Board currently operates? Well—[*Laughter*.]

Mairi Gougeon: I know—it is an easy question to start with. You can just tell us how it operates in the context of the proposed changes.

John Watt: At present, the Parole Board operates under the Prisoners and Criminal Proceedings (Scotland) Act 1993, which lacks detail about what the board ought to do, how it should do it and what some of the tests should be. In addition, the act says nothing about governance, so we have had to pretty much invent a governance system, which is not ideal. We rely on a lot of case law, mostly English, in relation to the tests that are to be applied for some releases and what those tests mean. Clarity is absent from much of the current legislation.

We hope that the new legislation will reinforce our independence. The Worboys case went into this in some detail, as previous cases have done. The board is a court, and it needs that independence, which—in my view—needs to be reinforced. The public and prisoners need to understand what tests are to be applied in relation to each type of release so that they understand what is happening. The public ought to understand that more widely, and the media certainly should; it is apparent from some media coverage that there are big misunderstandings.

The current membership prescriptions are unhelpful because they create all sorts of difficulties for us. From reading *Official Reports* of the committee's previous meetings, I dare say that there will be some questions about that issue, so I will leave it to one side for a moment. The new provisions will give us more certainty and promote a better understanding of what we do, because many of the changes reflect what we actually do. A key element is that the legislation will reinforce our position as a court, which is widely misunderstood. The authorities see it clearly enough, but the public do not read case reports. We are a court and need to be treated as such, and the changes will bring us a long way towards that.

Mairi Gougeon: I agree with what you have said about public understanding, which can benefit from committee sessions such as this one. When we undertake scrutiny, we get to hear a bit more about the general workings of the Parole Board and what the proposed changes will mean.

You talked about governance and how you have had to arrange it yourselves. I had highlighted that part of your written evidence, in which you suggested that

"the Bill should ... set out arrangements for governance through a Management Board"

that would be distinct from the Parole Board. Is it the case that the governance currently operates in that way and you would simply like it to be outlined in the legislation?

John Watt: Yes. The name "Parole Board" has caused all sorts of problems in the past. The board has been treated like a management board—not deliberately, but through inattention or lack of understanding. The word "Board" in the title creates problems. We have what we call a management group—I did not want to call it a board because it would then be the board of a board, and matters would become unduly complicated.

We do not yet have non-executive members. In the past, there were 30 members of the management board, which is clearly unworkable. We consulted our legal advisers and came up with a model that set up a Parole Board management group, which is essentially a management board. We made it clear in a new memorandum of understanding with the Scottish ministers that that is what we would do, and that members at large would have purely judicial functions and no management functions. That is essentially how we did it. We took what we thought was best practice and set up the best arrangement that we could. I anticipate that, in future, the group would simply be formalised as a management group with a requirement for some non-executive members from outside the board.

Mairi Gougeon: But you would like to see that laid out in the legislation.

John Watt: I would like to see it set out in statute, along with appropriate wording about the board's independence, which would cover both its independent status and a way of governing that independent status. I do not think that we could have one without the other.

Mairi Gougeon: The submission that we received from the Sheriffs Association noted its concern that

"the Bill does not propose to re-constitute the Parole Board for Scotland as a statutory Tribunal within the ambit of the Scottish Courts and Tribunal Service".

What are your views on that? Would you prefer to see that?

John Watt: I would not necessarily prefer to see it. I think that it was the senators of the College of Justice rather than the sheriffs who said that. Was it not in their response?

Mairi Gougeon: Well, the submission that I have in front of me is from the Sheriffs Association.

John Watt: Whoever it was, the issue was discussed in about 2013 or 2014, when the tribunals were being restructured. At that time, I rather thought that we would be absorbed into the SCTS. However, very early on, it was made very clear that that would not happen, primarily because the SCTS did not have the capacity to take on any more tribunals and the Parole Board was so far down the list that nothing would happen in the foreseeable future. My understanding then was that there were also concerns about compatibility, in that some in the SCTS were concerned that the judicial body that decided on releasing people from prison would be in the same organisation as those who put them in there in the first place. I was not quite sure what the reason was but, on the basis that it was so far into the distance that it was unlikely to be my problem, I put it to one side.

Since then, the position has changed. Towards the end of 2017, we thought that that door might be opening slightly, so the Scottish Government had some discussions with the SCTS and the Lord President's office. However, it was made clear that it was not going to happen. I do not know what the position is just now. As far as the Parole Board is concerned, it is not on the horizon and is not a realistic prospect and so, to that extent, I have put it to one side. In principle, I cannot see a problem. However, in practice, we would have to understand a lot more about the circumstances in which we might be absorbed, how the absorption would take place and what it would mean for the board. I have not applied my mind to that.

Therefore my answer is that, although in principle I see some merit in that proposal, it does not seem to be a realistic prospect at the moment.

Mairi Gougeon: I have a final question, which is on evidence that we heard in previous sessions. What is your view on imposing a six-month time limit on a prisoner making representations about recall from release on home detention curfew? In previous evidence, we heard concerns about such a time limit being put in place. Do you foresee that as being an issue? Do prisoners on recall tend to do that quite a lot anyway, or does it take a long time for them to get around to doing so?

John Watt: No, it is not really an issue. If I may say, from my reading of the *Official Reports* of previous sessions, there has been a misunderstanding about home detention curfew. It can happen only after the Parole Board has made a decision that a determinate prisoner can be released on parole licence. Such a decision may take place, say, eight or 10 weeks before the parole qualifying date. In the period between the decision and that date, the SPS can release a prisoner on home detention curfew. That will end on the parole qualifying date because, by that time, he or she will be out on parole. Therefore HDC operates only in that window. We could almost close the window at the parole qualifying date because it is not relevant any more. The six-month limit was a bit of a compromise. I might have argued for a shorter period, but the question is academic by the time that six months have passed.

As I understand it, the original reason for that was that SPS rules prevented anybody who had been recalled from an HDC from getting it at any time in the future. For example, an HDC recalled in one sentence would count against a prisoner in another that might be imposed three, four, five or six years down the line. The only way in which they could deal with being refused HDC then would be to seek to appeal the original decision to recall them on HDC. We have some figures that show that such appeals were taken up to nine years after the event. That was only because the prisoner had not appealed at the time because they had not understood the consequences. As I understand it, that rule has gone now so it is no longer significant. A six-month limit creates no problem given the current position. It might even be too generous.

Mairi Gougeon: Thank you very much for clarifying that.

The Deputy Convener: We have also heard in evidence that there should be a single test for decisions on the release of prisoners. What is your view on that?

John Watt: Our view has varied over time. We found it difficult to formulate a single test.

To depart slightly from the question, every release ought to have a statutory test that is applied to it, but not every release does. We have thought about that and taken some legal advice. We consider that there is a single test that may be applied, which is the one that presently applies for life cases:

"The Parole Board shall not give a direction"

for release

"unless ... the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined."

That sets out in a single test what we have to consider: the protection of the public against the interest of the prisoner not to be confined. A single test would be best and most useful. That is the single test that we propose. Failing that, there should be a test for each release.

Daniel Johnson: The point about the board's independence is interesting. Is it important as a matter of principle, as a matter of status, as a safeguard against some future Administration or for some combination of those reasons? Will you explain a little bit more why you think that it is so important?

John Watt: It is a matter of principle. If we accept that the board is a court, it must be able to demonstrate its independence. The issue is not so much that it is independent—I do not think that anybody thinks that it is not—as the appearance of its independence. From what they see and know, the public must have confidence that the board is independent and, if they do not see, read or know what provisions are in place for that independence, there is at least a risk that the board will not have the appearance of independence.

If I remember correctly, some consultation responses mentioned the need for the appearance of independence. It is certainly reinforced in the Worboys case. It is really only about stating for posterity the position at the minute. It ought to be recorded for the future. It is a matter of principle and protection.

Does that answer your question?

Daniel Johnson: It does. Thank you—that is useful.

I will also ask you in a little bit more detail about the test. In your written submission and in your response to my question, you raised the Worboys case. The reason why that was so controversial and why there was an outcry is that, fundamentally, the public did not understand why or how the decision was made. A test would help. You laid out one parameter for the test. Is that sufficient? There are other parameters that the public would probably expect to be used. Public safety is one, but the risk of reoffending and, I suggest, whether the individual has reformed and feels remorse for the crime are others. Could those elements be added to such a test?

John Watt: No. You would not add those to a test because it would become completely unmanageable. The board takes those factors into account when making a decision, of course. The test that I read out has been examined by courts over the years and has been expanded and explained. Therefore, the things that the board takes into account include previous offending, conduct in prison, recommendations from social workers and the extent to which the offender has addressed his offending behaviour through programmes.

I see no reason why that ought not to be published somewhere as part of the board's bread-and-butter work, but it should not necessarily be in the test. Those factors relate to how the test would be applied. For example, the board must be satisfied that continued imprisonment

"is no longer necessary for the protection of the public".

You may ask, "Protection from what?" It is the protection of the public from the risk of harm. You may then ask, "How do you define 'risk', and how do you define 'harm'?" The courts have done that over the years. "Risk" is loosely defined as contingent possibility, and "protection" is protection from harm. The courts have been notoriously slow to define what that means, but it is generally accepted that it has to be risk of physical harm and sexual offending. We think that, if the case merited it, that could move into such areas as psychological harm. It is a philosophical discussion that we could pretty much have all day, but those are factors to be taken into account in applying the test.

11:30

If the board does not take sufficient factors into account—as in the Warboys case, for example, where the dossier omitted certain key documents and the board failed to take account of the importance of outstanding charges—the court can intervene and ask for the decision to be taken again, because the board was wrong when it declined to take account of outstanding charges.

The board in Scotland does that. That is part of our guidance that nothing is unavailable as evidence, and everything with a bearing on risk can be considered. The only question is what weight is applied to it.

The answer to your question is that such information should appear somewhere, and the public should know about it. It could go on the board's website, for instance. We are in the course of revising all our guidance, which will be published on the website in due course. That kind of thing will be included.

Daniel Johnson: That is a very interesting suggestion. Would you like the bill to contain a requirement for the board to publish the factors and how it applies to them, even in an illustrative way, rather than in a prescriptive manner?

John Watt: We are going to do that, so I do not really mind one way or the other. It would perhaps be better if that was in the rules, rather than in the primary legislation.

Daniel Johnson: You are saying that the factors might be subject to secondary legislation.

John Watt: The factors would not be, because you cannot legislate for what factors the board will take into account. Every case is different, and there will be a range of factors. All I can say is that no factor would be omitted in advance. We cannot say in advance what we will or will not consider. It would be difficult to express it. My preference would be to leave it to the board to publish that information. Then, if the Scottish Government or the Parliament thought that there was a pressing need for more detail to be in the public domain, you could legislate at that point, possibly.

There is a whole dose of issues around transparency and allowing people in to see proceedings in process. That is probably a better way of allowing the public to understand what we do and how we do it.

Daniel Johnson: Indeed. In a previous evidence session, Douglas Thomson, who I believe is a previous member of the board, made the suggestion that minutes—albeit in a redacted form—could be, and perhaps should be, published as a means of achieving that transparency.

John Watt: Yes. Prior to the Warboys case, we were thinking about that and about how we could involve victims more. We had reached the point of revising our decision minutes so that they could be redacted more easily, with a view to publishing them on the website. Douglas Thomson said two things in quick succession, about public hearings and redacted minutes—but obviously we cannot have both. I have no problem at all with redacted minutes. That would be a good thing, and we are part of the way down that line already.

Daniel Johnson: You were making the suggestion that there should be some sort of test set out in the bill, albeit that the detail might be provided in secondary legislation. Is there sufficient evidence from the Scottish Government's consultation for such a test to be formulated? It would obviously have to be demonstrated that there is public support for the test.

John Watt: There has to be a formulation of a test. The courts have hesitated to define the test too closely, and I would counsel against defining it too closely—in either primary or secondary legislation. I was suggesting that it should be left to the board to publish its guidance. Then, somewhere down the line, the court might say that, in a particular case, the guidance was wrong if it was not applied properly, or if the board had omitted some consideration for the test.

The courts have been slow to define the test more closely—it needs to be open in order to deal with the wide range of circumstances that the board deals with—and I would hesitate to define it more closely. I would leave it to the courts to evolve the test, which they have already done. The test has evolved—mostly in England and Wales, though it applies in Scotland also. It should be a simple test and should be left to the courts to interpret.

Colin Spivey (Parole Board for Scotland): Although the consultation that took place on parole reform last year did not go into the detail of what the test might be, there was an overwhelming response in favour of there being a clear test and, possibly, a single test. There is an appetite out there for this to be done.

John Watt: We have tests, which we apply at the moment, that derive from cases north and south of the border. For a determinate prisoner, our working test is whether that person's risk can be safely managed in the community. If there were separate tests, that could be adapted quite simply, as we have been doing that for decades. We developed it over the decades and the courts have been happy with that up until now. Nobody has quibbled about it. It is not good to have a court-derived test such as that. It is possible to set it out clearly even though it is based on that kind of development of the law in a piece of legislation.

Stewart Stevenson: Daniel Johnson brought up the subject of independence and I want to develop that a little.

In paragraph 14 of the written evidence that you provided to the committee, you drew our attention to section 3 of the Tribunals (Scotland) Act 2014. I am grateful to you for bringing my attention to that, because it places a duty on me and the rest of us MSPs. It states:

"The following persons must uphold the independence of the members of the Scottish Tribunals",

and section 3(1)(d) is

"members of the Scottish Parliament".

In other words, we have a legal duty. I am not certain whether I have to uphold members' independence by some positive action every single day or whether it means that I must avoid doing something that would be in conflict with upholding their independence.

In the discussion that we have just had, we talked about the courts evolving the test. If, as you have recommended to us, we were to adopt for the Parole Board section 3 of the 2014 act, one of the listed people would be the Lord Advocate, who is responsible for the courts system. If the courts were to evolve the test that you apply, would there not be, in turn, a conflict? Am I being too devious?

John Watt: You are being too devious, and, if I may, the Lord Advocate is not responsible for the courts system.

Stewart Stevenson: That is true, of course. It is the Lord President.

John Watt: The Lord Advocate is responsible for the public prosecution service. I suppose that the Lord President has to be free to interfere, does he not?

Stewart Stevenson: Yes, ipso facto.

John Watt: That question was perhaps too devious of you. What section 3 really means is that nobody should take any steps to undermine the independence or appearance of independence of the members.

Stewart Stevenson: Is it not quite unusual to legislate for that? When we create a list, the immediate implication is that anybody who is not on the list can interfere with the members' independence to their heart's content, including, for example, the police service, which is not on the list.

John Watt: The police cannot interfere because they have no authority to interfere. It is designed to deal with those who might be in a position to take steps in their official capacity to undermine the appearance of independence of the Parole Board. For example, you could see how politicians, especially in Parliament, could be in that position.

Stewart Stevenson: Yes, although section 3(2) goes on to say:

"the First Minister, the Lord Advocate and the Scottish Ministers ... must not seek to influence particular decisions",

whereas I, as a humble backbencher, can do so to my heart's content. I am not sure why the distinction has been made.

John Watt: You could do that. However, as the chair of the board, I could have regard to what you say, but perhaps place little weight on it. If you have something to say and it bears on risk, we would be happy to take it into account in a judicial capacity. As a backbencher, you are entitled to argue that the board is not working, needs wholesale restructuring and does not have the appearance of independence. This is a democracy—of course you are free to say that.

Stewart Stevenson: Convener, I think that I have exhausted that one.

Liam McArthur: To follow that up a bit, you said in your written submission that the bill does not go far enough in underscoring the perception of independence, rather than the practice of independence. Where could the bill go further to deliver that outcome?

John Watt: That is more about draftsmanship and principle, is it not? I would leave that to the parliamentary draftsmen.

Liam McArthur: I am sure that we have very clever people who help with the draftsmanship but—

John Watt: We might have to come back to you on that, as I have not thought about it. On independence and governance, section 44 is called "Continued independence of action". I am not entirely sure what the "of action" part means—"Continued independence" would have been fine. Section 44(1) states:

"The Parole Board is to continue to act as an independent tribunal when exercising decision-making functions".

The issue would not be dealt with in there. I do not know—I would have to come back to you with some mature thought on that.

Liam McArthur: That would be helpful.

Liam Kerr: I am interested in understanding the Parole Board a little better, so I will just fire some questions on procedure and things like that, if you do not mind. My understanding from reading the evidence is that the Parole Board is in effect a tribunal.

John Watt: Yes—it is a tribunal non-departmental public body.

Colin Spivey: Yes—it is a tribunal NDPB.

Liam Kerr: Two to three people will make a decision, and they are selected from 30-odd people.

John Watt: There are 40-odd now.

Liam Kerr: How are those two to three people selected? How many times does the Parole Board sit and how many times does any given individual sit in a year?

John Watt: The number of days that members sit varies depending on their availability, subject to the rule that it has to be 20 days or more. Practically, there is a scheduler who works for Colin Spivey. Roughly three months in advance, she will ask members for their availability, and they will give it—we have just done that for July. Armed with that availability and the number of cases that have to be dealt with, she will then allocate cases to groups of three. That is how it works, basically. If there are not enough members, she will ask for more; if there are not enough cases, some members will not be selected to work in that month. Members give their availability, and I have to say that they are very good at that—they give a good spread of availability.

I am responsible overall for that. The groupings of members tend to be done at random. We would

never keep any member away from another member—or I have not done that until now, but maybe I should never say never. Ultimately, it is my responsibility, but I devolve that to the chief executive, who in turn devolves it to the scheduler, and it then becomes an administrative process.

There are roughly two or three tribunals a day. Some are done by live-link television and some are done in prisons. Each of them involves three members and is chaired by a legal member. On two days of the week—Tuesdays and Thursdays—groups of three members, chaired by a legal member, deal with paper cases. There are about 2,500 cases a year and perhaps 800 or so are dealt with face to face by a tribunal; the rest are dealt with on paper by groups of members who sit on Tuesdays and Thursdays, with the work split equally between them.

On Mondays, Wednesdays and Fridays, it gets kind of complicated. We have smaller groups of two who sit to consider cases of urgency. For example, where a report has been received that an offender in the community has breached a licence condition and can no longer be safely managed, the supervising officer will submit a report and that will go either to a twosome on a Monday, Wednesday or Friday or a threesome on a Tuesday or Thursday. That happens every day of the week so that we can deal with them quickly. Those cases are given priority because they carry an increased level of risk to the public. That is our set-up for dispersing members.

The cases are just allocated. On Tuesdays and Thursdays, someone might be lucky and have 12 or 15 cases, but they might have 20 or 25. The work has to be done and members just soak it up on a swings-and-roundabouts basis.

Liam Kerr: I realise that there is one significantly trained legal member, but what training is given to the lay members, if I am allowed to call them that?

John Watt: They are called general members.

Liam Kerr: What training is given to the general members?

11:45

John Watt: There are 22 general members. They get a two-week introductory training course, and we have just finished that. It covers risk assessment in detail, of course, and also legal issues, diversity and practical issues, such as how to use the information technology. It also involves in-depth discussion on tribunals and casework meetings, which is what the paper meetings are called. We have created six or eight dummy cases and we go through those in significant detail, discussing all the key issues.

As well as those two weeks of introductory training, there is on-going training. General members shadow other members while tribunals and casework meetings are live to see how they work, and we have a training group that gathers views from members—and from me—as to what training might be required in the course of the year. There are three set-piece training days during the year on key developments, and the next one is likely to be on the fallout from the Worboys case.

Liam Kerr: Do you have a view on whether the proposals will have an impact on members' ability to dispose of cases?

John Watt: It will have none at all. I have no concerns.

Liam Kerr: I have a couple of final questions. What is the reoffending rate for a paroled prisoner?

John Watt: I am not sure that we have figures for that. We used to gather figures manually, but we moved to an electronic system and, as you might guess, we lost some number-crunching ability. A few years ago, it was something in the order of 6 per cent of prisoners. I give this information with a warning proviso. Something like 6 per cent of offenders who were released on parole licence, which is by decision of the board, were ultimately recalled because they were no longer safely manageable in the community. Predictably, something like 16 per cent of those released on non-parole licence—which is by operation of law—were recalled. It is difficult, because—

Colin Spivey: One of the difficulties is that once somebody has gone past the end of their parole period, we do not necessarily have information on their reoffending. That information will be held elsewhere in the system.

John Watt: I misunderstood the question. I thought you were talking about reoffending while on licence.

Liam Kerr: I was going to come on to that question.

John Watt: My answer was about reoffending while on licence, but reoffending generally would be a much broader issue. The Scottish Government statistical people may hold some information, but we tend not to, if only because it is unhelpful. If we take a decision based on the facts and circumstances of an individual case, that is fine—that is what we should be doing. However, so much can change between that decision and any reoffending that it is hard to link the two. The answer to Liam Kerr's question is that we do not have the statistics, and I am not sure who would have them.

Liam Kerr: I will find out.

John Watt: I am not sure that they would be helpful to the board.

Stewart Stevenson: I am seeking confirmation of something. Mr Watt said that 6 per cent of people on parole are recalled.

John Watt: That was my general recollection.

Stewart Stevenson: Whatever the number is, I want confirmation that it is perfectly possible for someone to be recalled without having committed an offence.

John Watt: Yes.

Stewart Stevenson: Thank you.

John Watt: Do you want me to expand on that?

Stewart Stevenson: I recall sitting in Saughton prison with six murderers. One of them was very aggrieved to have been recalled from life parole because they had been present while another murder was committed. I sort of understood that situation, but they did not.

John Watt: You are absolutely correct; the basis for the decision is always risk of harm to the public.

The Deputy Convener: I have a final question. We have heard some concern about the fact that the requirement for there to be a psychiatrist on the board has been removed. What are your views on that?

John Watt: We do not necessarily see a benefit in having a psychiatrist on the board, and supplementary written information underlined some reasons for that. We did a recruitment round in 2016 that included psychiatrist recruitment and had two applicants, so not many psychiatrists out there seem to be interested. We appointed one. They give us their availability, which the scheduler tries to match with cases in secure hospitals. However, the psychiatrist is not always available when a case needs to be dealt with.

My view, and I think that of the board, is that board members are perfectly capable of examining medical witnesses—with cross-examination, if need be—to extract the relevant information and request more if necessary. The presence of a psychiatrist is not always helpful to extracting evidence.

I will give you a parallel. In criminal procedure, when an accused person defends a case on the basis that he was insane at the time of the crime, there is no suggestion that the jury cannot decide the case unless it includes a psychiatrist, that the judge ought to be a psychiatrist or that a psychiatrist ought to ask the questions—the people who ask the questions are all laypeople. I would be disappointed if a tribunal of the board could not obtain the right information from a doctor; if it could not, we should be looking for somebody else. The evidence, and how to extract it, is what is important, rather than the identity of the questioner.

Sometimes it is better if laypeople or non-medical people ask the questions. It is a bit like getting an IT expert to do guidance material for a piece of electronic gubbins; it should be a complete idiot who does that. There is merit in exploring the evidence of medical witnesses through lawyers and those with decades of experience of the criminal justice system.

We have six senior mental health professionals on the board, which allows a better spread of availability for cases in secure hospitals. We also have cases that involve complex psychological reports, but it has never been suggested that it should be mandatory to have a psychologist on the board. The reason is that members are capable of exploring the evidence effectively.

The Deputy Convener: That is helpful. Unless members have any other questions, that brings us to the end of the session. Do you have any final statement about your views on the bill and the direction in which is it going?

John Watt: It is very important that the legislation passes and provides us with a more structured framework in which to operate. Without it, we will continue to swim upstream at times, trying to pick the best route without any framework in which to operate. Although the board is probably capable of doing that, without that framework we will continue to operate in isolation, and the context will not be available to the public or to the practitioners who interact with the board. The Worboys case, as you may have pointed out, is a classic example of misunderstanding fuelling very destructive media comment—much of it ill informed.

The Deputy Convener: Thank you very much.

That concludes today's meeting. Our next meeting will be on Tuesday 5 June, when we will continue to take evidence on the Management of Offenders (Scotland) Bill. We will also have an informal visit to Glasgow next week, on 29 May.

Meeting closed at 11:53.

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