OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 5 June 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 5 June 2018

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JUSTICE COMMITTEE
17th 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:

Michelle Ballantyne (South Scotland) (Con) (Committee Substitute)
Michael Matheson (Cabinet Secretary for Justice)
Rt Hon Lord Turnbull (Scottish Sentencing Council)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 5 June 2018

[The Deputy Convener opened the meeting at 10:00]

Interests

The Deputy Convener (Rona Mackay): Good morning, and welcome to the 17th meeting in 2018 of the Justice Committee. Apologies have been received from Maurice Corry, Mairi Gougeon and Margaret Mitchell. I am pleased to welcome Michelle Ballantyne, who is attending as a substitute for the Conservative Party. As it is Michelle's first appearance at the committee, I invite her to declare any relevant interests.

Michelle Ballantyne (South Scotland) (Con): I have no relevant interests.

Decision on Taking Business in Private

10:00

The Deputy Convener: Agenda item 2 is a decision on whether to take item 5, which is consideration of our draft annual report, in private. Are we agreed?

Members *indicated agreement.*

Management of Offenders (Scotland) Bill: Stage 1

10:00

The Deputy Convener: Agenda item 3 is our fifth and final 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.

For our first panel today, I welcome the Rt Hon Lord Turnbull and Ondine Tennant of the Scottish Sentencing Council. I thank the council for providing written evidence on part 1 of the bill, which is very useful. We will move straight to questions.

Daniel Johnson (Edinburgh Southern) (Lab): Good morning. In terms of the options that are open to sentencers, the new provisions for electronic monitoring provide a great deal of scope. Can you begin with some general reflections on the possibilities for sentencers and any considerations about the implementation of the bill, if it is passed into statute?

The Deputy Convener: Who would like to start?

Rt Hon Lord Turnbull (Scottish Sentencing Council): Good morning, convener, and Mr Johnson. Thank you for giving the Sentencing Council the opportunity to speak to you today. I will come to Mr Johnson's question in a second, but I thought that it might be helpful to set the context for any contribution that the Sentencing Council can make by explaining a little about the council and its functions.

As you know, the Sentencing Council was formed in late 2015. It has three statutory objectives, which are to promote consistency in sentencing across Scotland, to assist in the development of sentencing policy and to promote greater awareness and understanding of sentencing. The council's functions include the development of guidelines, conducting research and providing general information on sentencing.

At present, the council's focus is on the development of sentencing guidelines. So far, general guidelines are under development. The first guideline, which has been consulted on and is about to be presented to the High Court for consideration, is on the principles and purposes of sentencing. Separately, there is a sentencing process guideline, which is shortly to be issued for judicial and then public consultation. We are also in the process of developing a sentencing young people guideline.

We have also begun work on two offence-specific guidelines—on death by driving offences and environmental and wildlife crimes—and research into the sentencing of sexual offences has begun. That will inform our decision on whether to develop a guideline in that area.

In addition to guidelines, several projects aimed at improving awareness and understanding of sentencing have been delivered, principally through the creation of the council's website. The website provides comprehensive information about all the different kinds of sentencing, interactive case studies, explanatory videos, a myth buster and a jargon buster. Those are all open resources that can be accessed and used by agencies, practitioners, non-governmental organisations and any other interested party, for training purposes or public information.

We have not carried out extensive work on the implications of the present bill. However, we hope that we will be able to provide a little assistance, and perhaps I can assist Mr Johnson with his question. As we understand it, the bill is designed to make available to a sentencer who is considering a community payback order the opportunity to impose, as part of that order, electronic monitoring for a period of up to three years. That is an extension of what is currently available to sentencers, in relation to which the maximum is one year.

Community payback orders are, generally speaking, sentences that are designed to provide an appropriate level of punishment and to promote rehabilitation through support in the community. We noted that the policy memorandum that was published with the bill explained, among other things, that the opportunity to impose a greater degree of control over offenders in the community might make the use of electronic monitoring more appealing to sentencers.

The court principle—that is, that sentences must be fair and proportionate—incorporates the principle of parsimony, which is that sentences should be no more severe than is necessary to achieve the appropriate purpose of sentence in each given case. Therefore, the council hopes that a sentencing option that gives the sentencer more flexibility in applying that principle of parsimony will contribute to the individual sentencing purpose being achieved.

In the case of a community payback order, that purpose is likely to be rehabilitation, as well as the provision of a suitable level of public protection and punishment by restriction of liberty. In other cases, of course, the sentencing purposes of public protection or punishment might determine that only a custodial sentence can appropriately achieve the purpose. In such cases, the opportunity to impose a longer period of monitoring might not be sufficient.

It is obviously important that each case is assessed according to its own facts and that a fair and proportionate sentence is identified. However, in the council's view, flexibility in the range of non-custodial sentences that are available is likely to be of benefit and likely to achieve the bill's objective of making electronic monitoring more appealing to sentencers as an alternative to the imposition of custodial sentences.

We therefore expect that the opportunity to take advantage of a sentencing tool that has not been available until now will permit sentencers to conclude that some cases that might otherwise have been dealt with by the imposition of a custodial sentence can in future be dealt with by a new form of community payback order, which includes restriction of liberty for a period of up to three years. The individual circumstances that will determine whether a sentencer selects a sentence of that sort in any given case will of course vary from case to case, and all circumstances will be different.

Daniel Johnson: Thank you for that detailed answer. If there is one lesson to be drawn from the use of existing technology, it is that there is huge variability in how radio tags are used, with some sheriffs using them frequently and some sheriffs hardly using them at all. That is a consistent message that we have heard.

Consistent sentencing is one of your stated aims. What guidelines or training can be offered to ensure that we achieve consistency? Some people have expressed concern that, rather than increasing the use of non-custodial sentences, the new approach will be used to up-tariff people who would have been given a non-custodial sentence anyway, with such people being given a tag in addition to the sentence. How can your guidance and training prevent that from happening?

Lord Turnbull: The council is not aware of detailed research that demonstrates the sort of inconsistency in the use of the current arrangements to which you alluded. There might well be a level of inconsistency. It might well be that different opportunities are available in different sheriffdoms—again, that is not something of which the council is fully informed at the moment.

I expect that the introduction of a new opportunity would include judicial training on the availability of that sentencing tool, which should contribute to consistency. I am not sure that the opportunity to impose an additional or different sentencing tool will lead to the sentencing drift that you mentioned. The Sentencing Council observed in its written evidence to the committee that there was a possibility that an increase in the maximum

period of monitoring might lead to a general increase in the periods for which electronic monitoring was imposed. That was in the light of research that showed that, when the maximum sentence for the carrying of knives was doubled from two years to four years, the average sentence length more than doubled.

That research may not necessarily have any implications for the change that is contemplated in the bill, because the bill does not propose to increase a maximum sentence for any offence; it proposes to add a sentencing tool that can be included in a package as part of a sentencing type—namely, a community payback order. We expect that judges will impose sentences that are just, fair and proportionate according to the individual circumstances that are before them, but we suggested in our written evidence that the Scottish Government might think it prudent to monitor the impact of the change, if it is implemented.

Daniel Johnson: My final question is about the fact that this is a technology-driven innovation; the possibilities for sentencing are potentially dictated by the technology and, indeed, enabled by it. The ability to create specific exclusion zones, for example, makes it different from the existing radio-based technology. To what extent will the training that you have alluded to need to go into the technical details of the changes that are enabled by the bill? Will the training be compulsory for sentencers?

Lord Turnbull: Judicial training is in the remit of the Judicial Institute for Scotland, not the Sentencing Council. The bill offers the opportunity for other forms of monitoring, such as transdermal alcohol monitoring, and the council's only concern is the absence of research and evidence about the capabilities of such new forms of monitoring. We would be interested to examine the outcome of any trial programmes and any evidence as to the suitability or effectiveness of transdermal monitoring for types of groups or individuals. As with any new sentencing option, we consider it important to see a robust evidence base on the option's capability and effectiveness. Having said that, the council is in favour in principle of the various types of monitoring that the bill encompasses.

Liam Kerr (North East Scotland) (Con): I will move on to the process for imposing electronic monitoring. Lord Turnbull, you have talked about imposing sentences that are just, fair and proportionate. When making a decision on what sentence to impose, do you believe that those who decide to release a prisoner with electronic monitoring will be making judgments based on sufficient information?

Lord Turnbull: Did you say, "those who decide to release a prisoner", Mr Kerr?

Liam Kerr: Those who decide to release a prisoner on electronic monitoring. When the decision is made to use electronic monitoring, what information do people have? In your view, do they have sufficient information?

10:15

Lord Turnbull: In ensuring that public confidence is maintained in the administration of justice, it is important to make a distinction between issues that relate to the selection of the appropriate sentence and those that relate to the management of offenders who are serving a sentence. The issues that arise in relation to the former can fall within the remit of the Sentencing Council, but those that relate to the latter plainly do not.

The Sentencing Council is concerned with the selection of the appropriate sentence in any given case. Non-custodial sentences are, of course, imposed on a regular basis. We understand that the Scottish Government is considering the extension of the presumption against short sentences to a period of 12 months. It seems to the council that, if that were to happen, it would have a significant impact on the practice of sentencing. The range of options that were available to a sentencer would require to be appropriate for the circumstances, and it seems to the council that the extension of electronic monitoring would assist the sentencer in that process.

Speaking on behalf of the Sentencing Council, it is impossible for me to identify what circumstances in any given case would result in a sentencer selecting a community payback order as opposed to a custodial sentence, or for me to identify what form of community payback order would be appropriate. It is for the individual sentencer who deals with the facts of the case before him or her to make that decision, guided—we hope—by the principles and purposes guideline, which we are in the process of developing, and the process of sentencing guideline.

Liam Kerr: Of course that is the case, but do you have a view on whether, at this stage and going forward, the sentencer has sufficient information to guide them on whether it would be appropriate to use electronic monitoring?

Lord Turnbull: That is for the individual sentencer.

Liam Kerr: But I am asking whether that is the case on a general level. At present, does the sentencer have sufficient information available to them as part of that process?

Lord Turnbull: The sentencer can have sufficient information. The sentencer will have available to him or her information from the Crown on the circumstances of the offence and, to a degree, on the background of the offender. The sentencer will also have information from the offender's representative, from the social work department, in the form of the criminal justice social work report, and from various other agencies. That package of information can provide adequate information to enable the sentencer to make a decision about release on electronic tagging. If it does not provide adequate information to enable the sentencer to make such a decision, they can request further information.

Liam Kerr: You mentioned the move away from short-term sentences that might be coming down the line. If there is an increase in the use of electronic monitoring, is there a danger that there will almost be a presumption that it will be used—for example, instead of custody or a short-term sentence?

Lord Turnbull: The council has not had the opportunity to conduct research into the way in which electronic monitoring is used at the moment, nor has it had the opportunity to conduct research into the change in sentencing practice that one might expect as a consequence of the bill, but I cannot see any reason to assume that there would be a presumption in favour of electronic monitoring simply because of its availability.

One would expect that the sentencers will assess the correct sentence according to the various pieces of information that are before them rather than just proceed with any given assumption on the appropriate sentence.

Liam Kerr: I will rest there for the time being.

John Finnie (Highlands and Islands) (Green): Good morning, panel. Lord Turnbull, I would like to ask about compliance and enforcement. The Scottish Government has indicated that, in response to non-compliance, monitoring requirements should be appropriate to the circumstances, and it has referred to the development of a response framework to support consistency of approach. Does the council have any views on what such a framework should cover and who should be involved in agreeing it?

Lord Turnbull: The council does not have any sophisticated view on that at this stage. However, it would recognise that it would be reasonable to assume that an increase in the use of limitations might increase the level of breaches of such orders. Given that the offender would be required to consent to the order and that the sentencer would be required to explain the purpose and effects of it, one would assume that those steps would assist with compliance. However, I expect that such sentences would be introduced as part of a sentencing purpose that is aimed at rehabilitation, and rehabilitation tends to be an on-going process rather than something that has an immediate outcome. Of course, the courts are familiar with that. The sentencer would have to take into account the nature and extent of any breaches in deciding what steps to take by way of response and, in particular, in deciding whether the sentencing aim of rehabilitation is no longer attainable.

We understand that the Scottish Government is in the process of considering how breaches of such compliance orders should be managed and is preparing the sort of breach response framework that you mentioned. We have not had sight of that framework or its draft. We would be interested in seeing it in due course and in discussing the matter with the Government, if it is interested in the council's views on it. However, at the moment, we do not really know the nature of the framework or the extent to which it might apply.

John Finnie: I am sure that the council's views would be welcome.

You touched on the potential expansion of transdermal monitoring. Is it the council's view that an appropriate response to compliance and enforcement would recognise that, with addictions, lapsing is part of a longer-term process and that the response to any lapse should be proportionate?

Lord Turnbull: That was very much the implication that lay behind my observation that rehabilitation is an on-going process. The courts are familiar with the need to accommodate relapse in trying to promote rehabilitation, and they are accustomed to dealing with that. The Sentencing Council has still to do research in that area, but it is interested in promoting rehabilitation where appropriate, and I am sure that it would easily recognise, as the courts do, the need for an on-going process in rehabilitation.

John Finnie: Thank you—that is very reassuring.

Michelle Ballantyne: I want to go back to Liam Kerr's point about whether there is adequate knowledge for sentencing. Lord Turnbull, you talked about the reports that are received currently, such as social work reports. Will an additional risk assessment need to be added to what is currently available? Obviously, there is a significant differential between allowing somebody to stay in the community, even tagged, and placing someone on remand. Will there have to be a revamped risk assessment or another look at what kind of risk assessments are needed in that case?

Lord Turnbull: Risk assessment is not something that the Sentencing Council has come to look at in that context. As a sentencer, I know that risk assessment is something that regularly features in reports of the sort that you have outlined. There are many risk assessment tools that are used. Sentencers take account of risk assessment and the nature of the risk assessment tool that is used, and they are familiar with the need to make additional requests for risk assessment, if appropriate.

I think that the question that you raise is one that arises out of the particular policy change to increase periods of restricted liberty. That is something that might well require a focused risk assessment question, but it is not something that the Sentencing Council has had a chance to look at at this stage.

Liam McArthur (Orkney Islands) (LD): It has been suggested by some witnesses that there are concerns about certain types of offence. In particular, it was suggested that, in the case of offences such as domestic violence and sexual violence, it might be difficult to square releasing someone, even with an electronic tag, with the need to provide assistance to victims. Does the Sentencing Council believe that there is a type of offence for which electronic monitoring would be never or rarely appropriate, or would that be wholly at the discretion of the sentencer as they weigh up the facts of the case?

Lord Turnbull: At this stage, the Sentencing Council does not have in mind the production of a guideline on the use of electronic monitoring, largely because it is approaching the question of sentencing guidelines from a slightly different perspective. We have started by trying to identify the importance of principles, and we intend to move on to offence-specific guidelines.

It might be that, in the context of a given offence-specific guideline, the council would recommend the imposition of a non-custodial sentence, in certain circumstances. It might be that the council would even recommend a particular type of non-custodial sentence. However, at this stage, we have not developed an offence-specific guideline. In particular, we have not developed an offence-specific guideline in relation to sexual offending. Therefore, we are simply not in a position to say whether we would ever be able to recommend a non-custodial sentence for any particular type of sexual offending, or whether electronic monitoring would be appropriate as part of that non-custodial sentence.

What I can say is that we have commenced the process of conducting research into sexual offending and sentencing practice. As part of that process, we are holding a stakeholder event on Friday 22 June, at which we will seek to gather the views of various interested bodies and expert groups on sexual offending and sentencing in relation to sexual offending. Those exercises will inform our decision about whether it is appropriate for us to develop a guideline on sexual offending, which could perhaps be done in our next business plan.

Liam McArthur: From that, I sense that there is an acceptance that, within those broad spheres of different types of offences, there are common characteristics that allow you to establish guidance in relation to each of them, and that that is not an unusual practice for the Sentencing Council. Is that correct?

Lord Turnbull: I am not sure that I am in a position to say anything about that at this stage.

Liam McArthur: What I am driving at is that it seems that the Sentencing Council's experience of providing guidance would lead you to assume that it is not inconceivable that, for particular types of offences, there are characteristics that are sufficiently similar that you could provide guidance in relation to whether and in what circumstances electronic monitoring might be appropriate.

10:30

Lord Turnbull: We do not have that experience at this stage, because we have not developed an offence-specific guideline. We have developed guidelines only in relation to principles and purposes, and we are in the process of developing a sentencing guideline in relation to sentencing young offenders. We have not got to the stage of considering whether there are characteristics that determine or point towards any particular outcome in any given offending situation, or whether such characteristics can be read across different forms of offending. We have not got to that state of research.

Liam Kerr: Michelle Ballantyne asked about the risk assessment and the factors that a sentencer will take into account. Can you enlighten me as to whether there is a hierarchy of considerations? I think that the public would hope that public protection might rank in the mind as greater than rehabilitation prospects, but does it in practice?

Lord Turnbull: That is where we would see the value of our principles and purposes guideline, which sets out to identify the core principles of sentencing as a matter of theory and practice, and attempts to set out the purposes of sentencing. Of course, they include public protection, punishment, the rehabilitation of the offender, the opportunity to give the offender a chance to make amends, and expressing disapproval of offending behaviour. We hope and expect that those principles and purposes, taken along with the process of

sentencing guideline, would be of assistance to sentencers and of benefit not only to the public at large but to those people who become involved in the criminal justice process, by providing clarity as to what is taking place in the sentencing process.

We hope that the individual sentencer will benefit from the structure that we have identified in the principles and purposes guideline and in the process guideline, but we do not set out a particular hierarchy that applies in every set of circumstances.

Liam Kerr: Until that is brought in, is there a hierarchy of public protection over rehabilitation in the sentencer's mind at the moment, or is there not?

Lord Turnbull: That would depend on the individual sentencer and the individual circumstances.

Liam Kerr: Thank you.

The Deputy Convener: That brings us to the end of this session. I thank the witnesses for attending and for their useful contributions.

10:33

Meeting suspended.

10:36

On resuming—

The Deputy Convener: We welcome our second panel: Michael Matheson, the Cabinet Secretary for Justice, and his officials. As we move between parts 1 to 3 of the bill for questions, the officials at the table will change. I thank the Scottish Government for its written evidence. We will move straight to questions. George Adam has a constituency-related question for the cabinet secretary.

George Adam (Paisley) (SNP): Good morning, cabinet secretary. You will be aware of the case of Craig McLelland, from Foxbar in Paisley, who was brutally murdered last year. In that regard, it has come to light that James Wright breached a home detention curfew 11 days after being released from prison. The death of anyone at a young age is tragic enough, without the circumstances in this case. It is a massive thing for Craig McLelland's family to have to deal with. In fact, it is so much so, that Craig's partner, Stacey, wrote something that the judge read out during the sentencing:

"I have to watch our three sons in pain, sobbing, crying, asking questions that I cannot answer."

Cabinet secretary, is there anything that you can say to try to provide some kind of comfort for that family in Paisley? Can you provide any answers or assurances over whether the Scottish Prison Service and Police Scotland followed appropriate procedure in this matter?

The Cabinet Secretary for Justice (Michael Matheson): I am grateful to George Adam for raising the matter. It is clearly an appalling case that raises a number of questions that I can understand the family will want to have answers to, as I do.

There are two aspects in particular to this case. The first relates to, from what I can see at this stage, the assessment process when determining the decision to allow the individual concerned to receive a home detention curfew. The second aspect is the period of time after there had been a breach of that detention curfew for the investigation and the individual's apprehension. It is important to ensure that answers are provided on both those aspects of how the case was handled. First, there is the Scottish Prison Service's assessment when making that determination in the first place; and, secondly, there is the police handling of the matter.

In order to look at the issue thoroughly, I have asked Her Majesty's prisons inspectorate for Scotland and Her Majesty's inspectorate of constabulary in Scotland to look at the case in order to determine, first, whether there are aspects that can be improved in how assessments are made when determining whether someone should be provided with a home detention curfew; and, secondly, whether there are ways in which the police process for investigating such breaches and apprehending individuals who have breached an HDC can be improved so that they are brought to account and apprehended. They will report directly to me and, once we have those reports, we will be able to determine whether any further actions need to be taken.

Liam Kerr: Good morning, cabinet secretary. I will follow up on George Adam's question. The case that he mentioned is appalling, so people will be pleased to hear how thoroughly you will look into its circumstances.

On electronic monitoring, people will be concerned to see that we are considering a bill that could increase the prevalence of convicted criminals in the community. Can you reassure the public that, in implementing the legislation, we will not be in that situation? Did you, when drafting the bill, consider that there would be more criminals in the community? How will we ensure that dreadful circumstances such as George Adam referred do not happen again?

Michael Matheson: Home detention curfew is provided for in legislation that has been in place since 2006. The provisions in the bill will allow us to use an extended form of electronic monitoring that we do not have at the moment. For example,

for someone who is on a home detention curfew, we will be able to use global positioning systems monitoring instead of the system that we use at present.

The bill will extend electronic monitoring for three kinds of order. The first is community payback orders: the court will have the power to monitor electronically a person who is on a community payback order. Secondly, the bill will extend electronic monitoring to people who are on sexual offences prevention orders, which we cannot electronically monitor at the moment. Thirdly, it will extend the provision to allow us to monitor electronically people who are on sexual harm prevention orders, whom we cannot electronically monitor at the moment.

The purpose behind the bill is the creation of a clearer framework on use of electronic monitoring. That will ensure that we have a much clearer structure for monitoring people who are on orders that place them within the community, and for use of electronic monitoring as part of that. It is important that the bill will allow us to extend monitoring to individuals on such orders who, at present, cannot be electronically monitored. If the Parliament agrees to the legislative proposals, that will allow us to monitor them more effectively. Alongside that, the bill will allow us to introduce GPS monitoring, to which the committee has given some consideration. It provides monitoring at a significantly greater level of detail than the existing radio-based system.

The bill will give us a clearer structure for the use of electronic monitoring, extend it to areas where it is not available at present, and ensure that we have appropriate measures to monitor individuals when they are in the community.

To go back to the point that I made to George Adam on the case that he mentioned, I want reassurance about how the Scottish Prison Service assessed the individual concerned, and about how Police Scotland investigated the breach once it was reported to the police. It is right that the family have their questions answered. I hope that the assurance review that will be carried out by HMPI and HMICS will give us those answers and the assurance that we are looking for about both aspects of the process that relate to the case.

John Finnie: It is welcome news that you are having the prisons inspectorate and inspectorate of constabulary examine the case. Will you assure the committee that the reports will be made public?

Michael Matheson: Of course. Both inspectorates will report to me, and I am more than happy for the reports to be made public.

The Deputy Convener: I will ask about the general purpose of reform for electronic monitoring. Will you clarify the extent to which the expansion of electronic monitoring should be focused on reducing the use of custody? Will it be successful in doing that?

10:45

Michael Matheson: A key part of what we seek to achieve with part 1 of the bill is the creation of clearer framework for use of electronic monitoring. From the findings of the electronic monitoring working group, it is clear that electronic monitoring on its own is not an effective mechanism for helping someone to address their offending behaviour. It needs to be seen as part of a package of measures and used alongside those other measures to address people's offending behaviour and promote desistance.

The bill will allow us to achieve that much more effectively by ensuring that electronic monitoring is seen as part of a package. We are extending the legislation to orders that people might receive that we do not currently have the scope to monitor electronically, so that people can see that there is a package of measures that are intended to address their offending behaviour, while monitoring them appropriately.

An example of where electronic monitoring could provide greater protection is through the use of GPS and exclusion zones that individuals are not allowed to enter. I believe that some committee members were able to visit G4S to look at the system and at how geofenced areas can be set down to trigger the system in order to protect victims and other vulnerable individuals as and when that is considered to be appropriate. It can be used as a method of addressing victims' issues while sitting alongside the range of measures to address the offending behaviour of the individual, rather than just providing electronic monitoring on its own.

Our aim is to provide a much more comprehensive system, and that is the purpose of the bill.

The Deputy Convener: What training and guidance will the relevant professionals receive to help to ensure that the aims of the reform are carried out properly?

Michael Matheson: Do you mean when someone is on an order?

The Deputy Convener: Yes.

Michael Matheson: It is important to recognise the way in which the bill is framed. For example, if someone breaches their electronic monitoring, the breach is tied in to the order that allows that person to be in the community in the first place. If they are on a community payback order and are also subject to electronic monitoring, and they

breach some part of the electronic monitoring requirement, they are breaching the underlying order. It would therefore be for the criminal justice social worker to determine the nature of the breach and what sanctions should be applied or what action should be taken. That could include referring the matter back to the court for it to make a determination. The underlying order is the anchor for any decision on a breach. Criminal justice social workers have an important role to play in determining what action should be taken should there be such a breach in a community-based order.

We are in the process of revising the guidance that is issued to criminal justice social work services. It is due to be shared with the Social Work Scotland justice working group that will consider the matter in August. Once we have finalised that, the new guidance will be issued to criminal justice social workers.

The electronic monitoring element is almost an addition to the underlying order. Criminal justice social workers are well used to dealing with people who are on CPOs or other community-based orders. There might be an additional element of electronic monitoring on top of that for some individuals, but when breaches are signalled up to the system and reported back to the criminal justice social worker, they will be dealt with in the same way that any breaches are dealt with. The guidance on compliance that we will issue will update criminal justice social workers on how to handle these matters.

Daniel Johnson: I will follow on from those points about what electronic monitoring makes possible, and the point that has just been made about training. When we were at G4S, we heard that use of the existing technology boils down to the individual sheriff and their familiarity with, and confidence in, the existing technology.

What concerns do you have about how consistently electronic monitoring will be used, and what steps do you think can be taken to ensure that there is full awareness of what is possible? For example, G4S has said that it holds open information sessions for sheriffs to attend, but they are very much a voluntary thing. I recognise that the independence of the judiciary is important, but what are your concerns in that regard, and what steps can be taken to ensure consistency?

Michael Matheson: I know that extensive work has been undertaken to try to improve the knowledge of our sentencers around the potential benefits that can be gained from electronic monitoring. The last time I was at G4S looking at use of GPS monitoring, I was told that something like 11 sheriffs had attended an open evening the night before to study the system and to understand how they could make greater use of electronic monitoring.

The Judicial Institute also has a role to play in educating our sentencers on the scope and nature of different sentencing options and the use of electronic monitoring. If the legislation is passed and we move into the space where we can use GPS monitoring, given the different way in which it can be used and the other measures that can be built into electronic monitoring using GPS, I would expect the Judicial Institute to consider providing training to sentencers to enable them to understand the issues.

There will also be an opportunity for the contract provider to think about how it can provide to sentencers a range of information on how the system operates, and provide various options to them. The main route by which we will seek to educate our sentencers about the options that are available through the use of electronic monitoring will involve working with the Judicial Institute and the electronic monitoring service provider.

Daniel Johnson raised the issue of consistency. The reality is that our courts and sentencers will make different decisions in different cases. It would be wrong for me to say that there should be a consistent approach across the country. What is important is that we need to have a consistent approach to making the information available to our sentencers so that there is a consistency of understanding of what is available. Ultimately, however, it will be for individual sentencers to make a decision with regard to when the use of electronic monitoring is right and when it is not appropriate. That is what we are focused on.

Daniel Johnson: Given the way in which you have couched the policy, it seems that, fundamentally, it should enable more people to receive non-custodial sentences. Would you say, therefore, that the ultimate test of whether the legislation is successful will be whether we see an increased proportion of non-custodial sentences? Conversely, would you say that it would be a failure of the legislation if we were to see the same proportion, but with the people who receive non-custodial sentences having an electronic tag?

Michael Matheson: I do not expect to see a dramatic rise in the use of electronic monitoring as a result of the bill. I expect there to be some increase, and we have set out in the policy memorandum our expectations of what that could be.

The use of GPS provides sentencers with greater assurance. If they are considering giving someone a CPO, they can decide that the person should also be electronically monitored. That allows the people who are managing that individual to think about how they tailor their CPO

arrangements alongside the use of electronic monitoring. G4S may have shared with members how it is possible to use electronic monitoring to set a timetable for someone over the course of a day or a week so that it is possible to manage that individual and ensure that they are complying with their CPO. It might be that it is sensible to use it in that format; it might be that, if someone breaches a CPO and is returned to court, the court will seek to apply electronic monitoring to them in order to deliver greater assurance around the arrangement; or it might be that a sentencer is considering the possibility of a short prison sentence but decides that, with the additional assurance that is provided by electronic monitoring, a CPO is a more appropriate disposal.

Electronic monitoring can be used in a variety of ways. It can be used to provide greater assurance in cases in which people receive a CPO; it can be used to increase the monitoring of someone who might have breached a community-based order; or it can be used in combination with the CPO instead of giving someone a short-term prison sentence.

As I said, I do not expect to see a dramatic increase in use of electronic monitoring. There will be some level of increase, but it might be across a number of different fronts; rather than just involving individuals who would otherwise have gone to prison, it could involve individuals on community-based programmes, in relation to whom it would provide an additional assurance with regard to managing them in the community.

Jenny Gilruth (Mid Fife and Glenrothes) (SNP): As you have previously mentioned, the bill contains a provision relating to use of GPS technology. Scottish Women's Aid raised concerns about that in its written submission. It cited an example from America that involved anxiety being caused to the victim because they could see the perpetrator moving around. The case specifically concerned a victim of domestic abuse. In what circumstances might you envisage GPS technology being used? Do you think that certain crimes might lend themselves to use of that technology more than to others?

Michael Matheson: That is potentially the case, but I do not think that we should go down the route of excluding the use of GPS technology because of that. There will be specific circumstances in each individual case, and it is important that sentencers have the flexibility to decide whether they think that the use of electronic monitoring is appropriate in individual cases.

Jenny Gilruth raised the issue of domestic abuse cases. One of the actions that we are taking forward concerns the establishment of a pilot around the electronic monitoring of individuals who have been convicted of offences that have involved domestic violence. We are working with Scottish Women's Aid to shape that pilot. I recognise that there are individuals who might find it concerning to know where the convicted individual might be, but there is also the aspect of use of exclusion zones and so on, which can provide greater assurance to victims.

Before we rush into use of the technology in relation to individuals who have committed domestic abuse offences, I want to test how it could be used and how we can ensure that the scheme can operate in a way that meets the needs of those who have experienced domestic abuse, and which addresses the concerns that have been expressed by organisations including Scottish Women's Aid.

We have already had some initial discussions with Scottish Women's Aid around the matter. The process is still at an early stage, but I am more than happy to keep the committee informed of progress on the pilot. There are a couple of things that we need to consider, such as how use of the technology would differ in urban areas and rural areas: for example, are there benefits that could be greater in rural areas than they would be in urban areas? I want to test those aspects before we consider use of the technology in this area, in order to address some of the concerns that Jenny Gilruth has highlighted, and which Scottish Women's Aid has expressed. Hopefully, through working with Scottish Women's Aid on the matter, we can understand the issues more fully and develop a system that is reflective of the concerns and anxieties that we have heard.

Jenny Gilruth: On the point about rurality, does the Government have any concerns about the fact that poor GPS reception in rural areas might limit the effectiveness of GPS technology?

11:00

Michael Matheson: In my experience, GPS signals in rural areas can be better than they are in urban areas. However, there can be a challenge around access to telephone connections. The technology uses two systems: it uses GPS to position the individual, and it sends the data that it collects through mobile phone technology to the monitoring centre. It is the loss of that mobile phone connection that can have a negative impact, rather than the GPS element. Do not ask me to go into the technical aspects of the system in any greater detail than that, but that is broadly how the technology operates—that is how it has been explained to me.

A new electronic monitoring service contract is due to come into play in April 2020, and a key part of that will involve the ability to deliver the service right across Scotland. As part of that process, the

technology will have to be tested across the country, including in rural and remote areas such as our island communities, to ensure that we have an understanding of how it will be used in those areas and how confident we can be about the service that can be provided there. The contract has been framed in such a way that makes it clear that we expect the service to be provided across the country.

When the system loses connection, the data that is gathered by the tag is stored in the tag. As soon as the tag has a connection with the mobile phone network, the data is relayed directly to the service provider. My understanding is that the connection can go down to 2G—general packet radio service signal level—which is much weaker than 3G or 4G.

Part of the assurance work that will be carried out through the contract process will involve making sure that the system can operate across the country, including in the remote and rural areas, and that there are sufficient measures in place to ensure that the system is resilient and operates effectively everywhere that it needs to.

Jenny Gilruth: On the point about the storage of data, section 9 of the bill relates to the retention of information through monitoring. Do you foresee any concerns in terms of data protection, particularly with the advent of the general data protection regulation? With regard to how individuals' information will be shared and stored, can you talk the committee through how you will maintain individuals' rights to own their own data?

Michael Matheson: In effect, the service contractor who is providing the electronic monitoring is doing so on behalf of the Scottish Government. In electronic monitoring cases, Scottish ministers will be the data controller, which means that responsibility lies with the Scottish Government.

I am always conscious that the introduction of any new technology means that there is a need to ensure that the public in general have confidence with regard to the data protection measures that are associated with it. The intention in section 9 is to ensure that the data protection rights of individuals who are subject to monitoring will be respected and that appropriate regulations will be introduced to ensure that Scottish ministers have a system in place that complies with all the data protection regulations and legislation that we have to comply with, including the recent changes around GDPR.

The data will be collected and stored in accordance with data protection measures, and it will be discarded at the appropriate times. All of that will be set out in regulations, and the ultimate parties who are responsible for that are Scottish ministers, because we are the data controllers in relation to these matters, even though the contract is being delivered through a third party.

I hope that that gives you an assurance that we have no intention of skirting around these matters. It is important that we have appropriate measures in place to ensure that data is being used and handled appropriately.

Liam McArthur: I assure the minister that we have benefited from Stewart Stevenson's seminar on what GPS can and cannot do.

The issue in remote and rural areas is as much to do with the logistical challenges of responding to a breach as anything else. However, presumably the expectation is that the extent of any exclusion area would be wider in a rural or island area, and that, for example, specific islands would be excluded, with access to the relevant ferries and planes being monitored. Is that correct?

Michael Matheson: I should say that I bow to Stewart Stevenson's greater knowledge with regard to the technical aspects of the system.

Liam McArthur: We all do.

Michael Matheson: I have offered you as much as I can this morning.

I go back to the point that I made earlier. Any breach by someone who is being monitored electronically is a breach of the underlying order that they are on. For example, if someone in an island community breaches their CPO, criminal justice social workers in Orkney will be responsible for deciding what action should be taken and whether the case should be referred back to the sheriff court. If the person breaches their electronic monitoring, the same process should be utilised.

The use of things like exclusion zones could be much more challenging in our smaller and more remote areas, given the geographical space and size of those communities. Before the court can determine whether someone should be electronically monitored, a criminal justice social work report has to be done, so that the sheriff understands the implications of electronic monitoring. In some circumstances, the use of exclusion zones might not be practical, and that is something that can be flagged up in the report.

In the existing system of CPOs, criminal justice social work reports and electronic monitoring, the fact that the court has to take into account the criminal justice social worker's report should help to address some of the problems that we might have with very small communities and whether exclusion zones could be used there effectively without being breached constantly. In circumstances where they could not, the court

might determine that an exclusion zone is not an appropriate measure and it will make another determination.

Liam McArthur: Can I have some clarification in relation to the domestic abuse pilot that you talked about in response to Jenny Gilruth's question? At one stage, you referred to a pilot for domestic violence cases, and you went on to talk about domestic abuse. I assume that the pilot would be on domestic abuse in its wider sense, especially as we have just passed legislation to incorporate coercive and controlling behaviour.

Michael Matheson: Absolutely. I am, however, conscious that how we manage that in rural areas and urban areas might be different, as might the way in which electronic monitoring could be used. We need to give careful consideration to how we test that out in different places and spaces to see whether any pilot that we undertake would work effectively.

The Deputy Convener: I want to ask about resources. Some evidence that we have received has questioned whether sufficient allowance has been made for the additional resources that will be needed to achieve this change. Some have suggested that the financial memorandum might be a bit cautious. When we were at the Wise Group and G4S last week, we heard that it costs £42,000 a year to incarcerate a person, and the financial memorandum estimates the cost of monitoring a person for a year to be just over £2,000.

Is there an opportunity to transfer resources from the prison system to community justice to offset the cost?

Michael Matheson: The figure of £42,000 for a year in prison is slightly on the high side—it is probably closer to £35,000 to £36,000 a year. However, that is still a significant amount of money compared to the costs associated with electronic monitoring and community-based programmes.

With a piece of legislation like this, it is challenging to predict the actions of sentencers and the use of electronic monitoring. We have tried to expect some level of increase. As you can see in the financial memorandum, we expect an increase of approximately 10 per cent across all types of monitoring. We have framed the financial memorandum based on those expectations.

Our view is that the financial memorandum is broadly in the right place. It is worth keeping in mind that criminal justice social work budgets are at record levels, at £100 million a year, alongside the additional £4 million that we provide for community-based sentencing.

Once there is greater use of electronic monitoring, I will be keen to keep a close eye on how it plays out in terms of placing increasing demands on criminal justice social work. We will monitor that closely, but I believe that the financial memorandum is an accurate reflection of how things are likely to develop, and that the funding is adequate.

The convener mentioned the transfer of resources from the prison side to the community-based side. We have had that discussion at committee on previous occasions for a couple of years now. One of the real challenges regarding shifting resource to the community-based side is that there is still demand on the prison side. At the moment, if we take resources away from the prison side and move them into the community, we will potentially leave a gap in funding for the prison service. If we did that, it would not be the first time that members of this committee would ask me about ensuring that we had proper prison-based services, including courses to deal with offenders' behaviour.

It is not straightforward to move money from the prison side into the community. We cannot simply say that because more people are being electronically monitored we can move resource across. That can only be achieved if demand reduces on the prison side. In the past couple of years, we have moved some resource from the prison side into community-based sentencing where there has been financial capacity to do that. However, I am not in a position to say that if it costs, say, £40,000 a head each year to keep someone in prison and we reduce the prison population by 10 we can transfer all that resource into the community.

There will still be demand on the prison service side, no matter what. The prison service has to take whoever is referred to it by the courts. I recognise that there is a need to rebalance the resourcing, but in the present financial climate we would create unintended problems on the prison side if we were to cut its budget and push that money into the community-based setting.

The Deputy Convener: Thank you—that is helpful.

Michelle Ballantyne: You have talked a wee bit about the impact of the bill in terms of assessment and reducing risk. Can you tell us how the bill will strengthen the way in which decisions about putting people on electronic tagging are based on professional assessment? At the moment, there is the criminal justice social worker report, but will the people who make the assessment need to do more when thinking about electronic tagging as an option? What onus will that place on them? What provision does the bill make with regard to that sort of thought?

Michael Matheson: It goes back to the principle that electronic monitoring is added on top of the order that someone would receive from the court anyway—the underlying order. If the court is considering someone for a community payback order at the moment, criminal justice social work services will provide a report on that individual prior to the court making a determination on whether a CPO is appropriate. If the sentencer is thinking about the use of electronic monitoring, they would flag that up at that point. That would allow the criminal justice social workers to think about what impact electronic monitoring, alongside the CPO, would have on the individual's domestic situation and family, and how receptive they would be to its use.

There is already a mechanism for the report to be produced, as an assessment would be carried out anyway for the underlying order. If the court asks the criminal justice social workers to give specific consideration to electronic monitoring, there may be an additional element of the report that looks at the impact that it may have on the family, but the mechanism is already there for assessing the domestic situation and individual circumstances. That is not unusual for criminal justice social workers; they do it for individuals who are being considered for electronic monitoring at the moment. It may be an additional element of the report, but the report would be completed anyway, in order for the court to make a determination on the underlying order.

Michelle Ballantyne: The way that you phrased that made it sound as though the extended use of electronic monitoring is about up-tariffing the sentencing from a CPO as we know it now, adding electronic tagging over and above what would currently be imposed on an offender.

Did you really mean that, or were you talking about people for whom a CPO would be considered but found not to be appropriate because of risk, and for whom therefore a custodial sentence would perhaps be veered towards? I am slightly confused about the implication. Is another thing simply being added to the existing pot without sentencing changing?

11:15

Michael Matheson: Earlier on, I made three points. First, electronic monitoring could be used for someone who would currently receive a CPO that the sheriff feels that he requires further assurance on. Therefore, it would potentially be used as an up-tariff for those individuals.

Secondly, electronic monitoring could be used for individuals who are in breach of a community-based order. If the matter is returned to the court, rather than deciding to issue a custodial sentence, the sentencer may decide to continue with the community-based order and add in electronic monitoring to give further assurance on that.

Thirdly, electronic monitoring could be used for individuals who are being considered for a short-term prison sentence. The combination of a community-based order and electronic monitoring alongside an appropriate community-based programme that is thought to be robust enough for the individual might provide the required assurance. That option could be chosen rather than a short-term prison sentence.

Therefore, there are various ways in which sentencers could use electronic monitoring. They could use it as a straight up-tariff element, which you mentioned, or it could be for a breach in respect of which the individual may otherwise get a custodial sentence. Closer monitoring of the individual might be seen as another option that could give further assurance. Electronic monitoring could also be used for individuals who are being considered for custodial sentences. The combination of a community-based order and electronic monitoring might give the assurance that is needed on what would be an appropriate sentence for the individual.

Therefore, there are a number of different ways in which electronic monitoring could be used. It is not purely a matter of up-tariffing.

Michelle Ballantyne: On the work that CJSWs currently do in respect of monitoring, including monitoring breaches, in my experience they already have workload issues with seeing people who have breached, for example. If people who are currently on CPOs and are not tagged are suddenly tagged and that needs to be monitored as well, will that workload be significant for criminal justice social workers?

Michael Matheson: The electronic monitoring element will be carried out by the service provider. Obviously, the community justice social worker will deal with the person's underlying order, and they might manage the order in such a way that they tie that into any electronic monitoring. For example, the person may have to be in a certain place at a certain time, and the CJSW can timetable their day in a more structured fashion. That possibility is not currently available to them with the use of GPS tagging. However, as I said, the monitoring will be carried out by the service provider. Obviously, the criminal justice social worker is responsible for managing and dealing with any breaches of the community-based sentence order. That will not change, but a breach could come about through a person's breach of their timetabling or through their going into an exclusion zone, for example. That would then be flagged up to the criminal justice social worker.

The approach may increase some aspects of the work of some CJSWs; for others, it may not make much of a difference or mean a significant change. However, it provides CJSWs with another tool in the box for how they manage individuals in the community and ensure that individuals comply with any community-based order that they have been placed on. It allows them to look at using electronic monitoring to ensure that the person is complying at the appropriate times.

John Finnie: My question follows on from Michelle Ballantyne's question and is about the response framework for compliance and enforcement. If I understood correctly, you said that the matter has been raised with Social Work Scotland. Can you outline what that response framework will cover, who has been involved in its preparation and when it will be available?

Michael Matheson: It is about compliance. The guidance that will be issued to criminal justice social workers has come about as a result of engagement with the Social Work Scotland justice working group. In August, we will refer the guidance to that group for consideration and it will feed back to us any further changes that are needed. Once that exercise has been completed, we will issue the guidance to local authorities for their criminal justice social workers.

John Finnie: Could it be shared with the committee?

Michael Matheson: We can certainly share it with you, although I am inclined to do so after Social Work Scotland has had an opportunity to feed back on it and we have completed that process.

John Finnie: Is there a suggestion that there are shortcomings with the existing arrangements? Are they sufficiently resourced? Another aspect is whether there is a deficiency because the police do not have a power of arrest with respect to some issues.

Michael Matheson: It is more a case of trying to update the issues that relate to compliance. It is important for the public to have confidence in how community-based programmes are operating, and a key part of that is assurance around compliance. I am keen to make sure that we provide criminal justice social work teams with the most up-to-date information possible to ensure that they are doing everything that they can to ensure effective compliance.

It is worth adding that compliance figures for community-based programmes have gone up in recent years. I want to make sure that we are doing everything that we can to improve compliance further, and the intention behind the new guidance is principally to make sure that the approach across the country is effective and more consistent. There are still inconsistencies in how different local authority criminal justice teams deal with matters, and the work of Community Justice Scotland and the work on the compliance guidance are important elements in getting a more consistent approach to dealing with non-compliance.

John Finnie: In relation to transdermal monitoring of alcohol and drugs, will the framework give due regard to the nature of addiction, in which there are built-in lapses?

Michael Matheson: Although the electronic monitoring working group recommended that we should make provision for the use of transdermal monitoring, we intend to test it out before we look at rolling it out on a wider scale. There are people who think that it will be effective only if it is used on a voluntary basis. However, even on that basis, it will require a legislative framework, and the bill allows for that.

Transdermal monitoring is an element that could help to promote and support desistance among those who are trying address their alcohol consumption. It is another tool in the box that could be appropriate for some individuals. However, before we use it on a wider scale, I am keen for it to be tested out to see how it fits in as part of a desistance programme, rather than its being something that we add on to monitor people's alcohol consumption just for the sake of it. It needs to be part of a programme that is about changing people's alcohol consumption and improving how they manage that, and the bill will provide a framework that will allow us to do that.

John Finnie: That may happen in future, but is there a recognition in the existing and proposed arrangements that addiction issues can be challenging and that there are lapses? I hope that an individual will not be harshly treated over a lapse.

Michael Matheson: It is about giving a proportionate response when individuals lapse and allowing the criminal justice social workers to make a determination as to whether more robust action is needed and, if so, what that action should be.

We have to recognise that, for anyone who has an addiction and is trying to rehabilitate themselves, the risk of relapse is high. Relapse does not mean that the individual should not continue to try to address their addiction problem, but they must be assessed to see whether they are prepared to continue to do so. Transdermal monitoring is an electronic means of supporting programmes in that regard, but it cannot be done on its own. It needs to be part of a programme that promotes desistance and helps people to change their addictive behaviour.

Liam McArthur: Will the further work that is being done shed light on an issue that puzzled the Delegated Powers and Law Reform Committee? That committee noted the reference in the bill to

"an offender's consumption, taking or ingesting of alcohol, drugs or other substances",

and questioned what "other substances" might mean.

Michael Matheson: It covers things such as new psychoactive substances, which it might be appropriate to pick up on. Even if the purpose of the monitoring was to address a person's alcohol consumption, if it picked up that a person had taken other substances, from a legal perspective we would be covered. The provision ensures that we have legal coverage in picking up such information.

The Deputy Convener: Why does the bill not provide for electronic monitoring as a condition of bail?

Michael Matheson: Committee members might be aware that an electronic monitoring scheme for bail ran for two and a half years, between 2005 and December 2007. The purpose of that scheme was to try to reduce the number of people who were being remanded in custody by monitoring people on bail, while providing greater public protection.

There was a report into that approach, which was found not to have achieved its aims. The service proved to be high in cost and quite burdensome, and it was not effective in addressing the issues that it was intended to address. The enabling powers in that regard were therefore repealed, so there is currently no legal provision for electronic monitoring as a condition of bail.

The evaluation also found that electronic monitoring of people pending trial helped people to maintain contact with their families, which might have been lost if they had been remanded in custody.

The bill will give us a mechanism whereby we can pilot different approaches. If, once they have been tested, they prove effective, we can revisit the question of further legislative provision to allow electronic monitoring to be used for bail.

It is extremely important that we test the approach properly, to see whether we can get a system that works effectively, rather than just deciding to roll it out. The provisions in the bill give us the power to run pilots and test the approach more effectively than has been done previously. Once we have done that, we can determine whether further legislative provision is required to allow us to use the approach more routinely.

Liam McArthur: Over recent weeks, the evidence that we have taken has shown pretty much universal support for the inclusion of the option of electronic monitoring as a condition of bail. I hear what you are saying about laying the groundwork for the approach to be introduced in due course. I presume that you have heard the same views in support of the approach but have come to the decision that it is not appropriate to provide for it now.

Given that the bill's title includes the words "Management of Offenders", you have, in effect, ruled out the possibility of including such provision in the bill, because people on bail do not fall within those terms.

11:30

Michael Matheson: I hear what people are saying about the potential of electronic monitoring as an alternative to remand, to support someone who is on bail. However, the experience over two and a half years was that the approach did not work well and was not effective.

My view is that, if we are to look at the use of electronic monitoring as an alternative to remand—that someone could be bailed and electronically monitored—we need to test that out over an extended period of time, to ensure that it operates effectively. That period could be two or three years. After completing that evaluation, it would be a case of looking at whether we wanted to roll it out nationally and, if so, what that would look like and how we would resource it.

Even with the bill, the potential use of electronic monitoring in bail cases is still some considerable distance away. It is not something that will happen quickly. The advantage of GPS is that it gives us much greater control of the information we get on someone, compared with where we were in 2005, but even with a pilot, we will still be several years away from the greater use of electronic monitoring in bail cases, because of the need to have a pilot that runs for a couple of years, to test it out effectively and ensure that it is working properly.

The need for public assurance is a big part of the reason why it is important to run the pilot for a relatively extended period of time. I do not want the greater use of electronic monitoring in bail cases to compromise public safety. The system needs to be effective, and that will take some time to determine. That is why I have made the decision that, under the bill as it stands, we will take the power to run pilots. Once we have completed that work, it is right that Parliament should then consider the matter, and if we then wanted to roll it out we should bring something to Parliament to allow that to happen.

Liam McArthur: Are you satisfied that, in a bill that is about the management of offenders, taking that power is legitimate in relation to those who would otherwise be remanded?

Michael Matheson: For the purposes of running the pilots to test out the approach, I think that it is appropriate that we have the power to do that. At present we do not have that legal power, because the previous legislation was repealed.

Liam McArthur: Is that competent within a bill that is about the management of offenders?

Michael Matheson: Yes. Is your point about the pre-conviction use of electronic monitoring?

Liam McArthur: Yes.

Michael Matheson: There are provisions in the bill in relation to pre-conviction use of monitoring. Different disposals can be issued at different times while someone's case is being considered. Bail is an interim disposal that the court issues at a particular point, and our view is that that is perfectly within the scope of the bill as it stands.

Liam McArthur: Pre conviction, you cannot be an offender, presumably.

Michael Matheson: The bill is so titled because of the range of areas that it covers. It covers three different areas: electronic monitoring, reform of the Rehabilitation of Offenders Act 1974, and the Parole Board reforms. All those areas relate to offenders, but the bill does not specify that monitoring will be used post conviction. The bill allows us to use it for bail purposes as well, if that is appropriate.

Liam McArthur: Could you share with the committee the findings of the 2005 report on the previous scheme?

Michael Matheson: Absolutely. I am conscious of some of the concerns that have been raised about whether monitoring can be applied to bail cases, because they are pre conviction. We will introduce an amendment at stage 2 to put that beyond doubt, but we are clear about the scope of the bill including the ability to have the pilots, and the term "offenders" is used because the bill covers three different areas that relate to different parts of the process of dealing with offenders.

The Deputy Convener: That concludes our questions on part 1 of the bill.

11:34

Meeting suspended.

11:34

On resuming—

The Deputy Convener: We move to part 2 of the bill, which is on the disclosure of convictions.

Liam Kerr: The bill will reduce the time before most convictions are spent. How did you set the disclosure periods? What data did you use to determine the appropriate level to set disclosure?

Michael Matheson: The principal purpose of this part of the bill is to reform the Rehabilitation of Offenders Act 1974 and reduce the disclosure timescales. That was informed by a report back in 2002, which considered timescales in the 1974 act and whether the existing arrangements and timeframes for the disclosure of convictions were adequate. The report made a range of recommendations for changes.

The changes have already been introduced by the United Kingdom Government. The approach that we have taken is broadly similar, although we have sought to be more transparent in the calculations that have been made in those areas in which we are consistent with the rest of the UK—broadly within one or two years. There are a couple of areas in which we propose reducing the timescale to a greater degree than in the rest of the UK, based on our principles in respect of short-term sentences and how they should be taken into account.

The underlying principle goes back to the study that was done in 2002, which informed the approach taken by the UK Government. We have used the same basis, but we have tried to give greater transparency in some areas and we have sought to further shorten the timescales in respect of short-term sentences in order to make them more consistent with the idea that individuals should be able to move on and into employment or other areas of work after their conviction is spent, where that is appropriate.

Liam Kerr: The committee has heard about the predictive value of previous convictions. There is some correlation between the length of time since previous offending behaviour and the likelihood of reoffending. What part did that play in setting the disclosure periods?

Michael Matheson: We have sought to take an approach that is based on the sentence that a person receives, rather than the offence that they committed. I understand Mr Kerr's point. We have taken a sentence-based approach because, when a court considers the sentence, it considers all the factors that relate to that offence: the nature of the offence and the impact on the victims and the local community. For example, if someone is done for breach of the peace, that could cover a range of things, which would not be apparent on the face of

it, but which the court at the time of sentencing would have known about and which would be reflected in the sentence that the court imposed.

We think that taking a sentence-based approach is better in reflecting on the disclosure timeframe than an offence-based approach, because that might not reflect the full extent or true circumstances of the case. It could put employers in a difficult position if they are trying to determine the nature of what went on in relation to an offence, rather than considering the sentence that was imposed.

We have tied our timeframe to the sentence because the court has considered all the matters relating to the case and has imposed a sentence. In our view, that is a much more transparent process and the timescale is linked to the court making a determination on all the facts, rather than our trying to second-guess what the court was considering.

Liam Kerr: Last week the committee visited the Wise Group and we heard from some ex-offenders, one of whom seemed concerned because he had a significant history of offending from a considerable time ago. His view was that he was completely reformed, he had moved on with his life and was not going to offend again but that his past would not let him move on. Part of that was about the disclosure periods. He said that they needed much more fundamental review. Do you have any thoughts on that? How do you respond to the point that he put to the committee?

Michael Matheson: He might be referring to the drag effect that disclosure periods can have. Part of the reason behind the bill is to recognise that society has moved on. The original purpose for which the disclosure periods were set has changed, as have the purpose behind the legislation and how we operate.

Liam Kerr: Forgive me, cabinet secretary. That is an interesting point, which I would like you to develop. What was the original purpose? I do not think that the committee has heard that.

Michael Matheson: In the Rehabilitation of Offenders Act 1974, the idea was that disclosure had to continue and only after the point at which the act decided that a person no longer had to disclose the conviction were they viewed as having been rehabilitated. That is a very old-fashioned way of considering rehabilitation and I am sure that you know from your experience that it does not necessarily fit with our approach today.

The original idea was that rehabilitation continued for that period of time. That is now often referred to as the drag effect that disclosure creates. It is more effective for someone to have a period in which they have to disclose the conviction but to move them into employment and move them on in life, which is a key part of their rehabilitation. The challenge is that, in some ways, the Rehabilitation of Offenders Act 1974 compromised that because of the extended disclosure periods that it created.

I do not know what impact the bill would have on the individual to whom you were speaking. However, part of the purpose behind changing the timeframes is to ensure that we get the balance right between the need to ensure public safety, the need for employers to get access to appropriate information to make a determination when they employ someone and supporting individuals to move on in life. There are three distinct areas that need to be considered in setting the timeframes. That is how we have gone about trying to strike the balance. As is clear from the consultation, the view is that the previous timeframes did not have the balance right.

The impact on the individual to whom you referred depends on his circumstances. It might be that, under the bill, he will no longer have to disclose his conviction, depending on the nature of his offence. In the system that we have created, the disclosure period is longer for people who receive longer sentences because of the serious nature of their offences. If the offence is such that the sentence is more than four years, there is continued disclosure for a much longer period and some individuals will always have to disclose the conviction.

In the disclosure periods that we have set out in the bill, we have tried to get the right balance between the three different areas: public safety, the need for employers to have the right information and supporting individuals to move on.

The Deputy Convener: I ask members to keep their questions as brief as possible, please. We still have quite a few questions to get through, including those on part 3.

Daniel Johnson: In combination with the legislative aspects of disclosure, is there a public information aspect? We keep hearing that the disclosure system is difficult to navigate for people who have experienced imprisonment or some other form of sentencing and for employers. Is there scope for public information to improve that for both parties?

Michael Matheson: There is. The launch of release Scotland is about working with employers to help them to understand the potential benefits and the risks of employing people who previously offended. That is an employer-based initiative, so we are working with employers to change their views on, and culture in relation to, the matter. That is alongside the work that we do with Scotland works for you, which is about trying to

ensure that there is better understanding of, and information on, employing offenders.

11:45

A number of companies are very much at the forefront of some of that work; Timpson, Greggs and Virgin Trains have all been instrumental in seeking to lead the way in demonstrating the benefits of employing people who have previously committed offences. The legislation is one element of that. The other element that is important is understanding the need for culture change. The legislation will take us only so far. The work that we are doing through release Scotland and Scotland works for you is helping to facilitate that culture change.

It is not about the Government lecturing on those matters. A key part of driving that change, and the best way of properly addressing some of the misconceptions that people may have, is for one employer to hear from another employer. If companies such as Greggs, Timpson and so on can be successful—I suppose that the success of Virgin Trains is more questionable, depending on your experience with Virgin Trains—that demonstrates that people who have an offending history can go back into employment. The practical experience of those companies can reassure other companies about the opportunities. That is key. The legislation will take us only so far; culture change is absolutely critical to getting the step change that we are looking for.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): We need to balance the need for public safety with the right to move on, and culture change is important. I absolutely agree that legislation in itself will not create that culture change and neither will private and public sector initiatives on their own.

One issue that has been raised is around the language and terminology that we use. In the evidence that was provided for today's session, an explanation was given as to why, in the title of the bill, the term "offender" is used; that point was raised with us in other evidence. Can the cabinet secretary, or possibly his officials, elaborate on the rationale behind the use of the word "offender"?

Michael Matheson: There are a couple of challenges, in that we are seeking to amend the Rehabilitation of Offenders Act 1974, which has elements in it that are reserved and elements that are devolved.

Some of the language that we have used is reflective of us seeking to amend and update bits of the legislation in the 1974 act. Where we have been able to update the language, we have done so. There are a couple of areas in part 1 in which I think that we could go slightly further to amend the language and address some of the issues. However, there are other parts of the bill in which it is more difficult for us to change some of the language because of tying it into the language that was used in the 1974 act, which is the original piece of legislation.

Witnesses have highlighted a couple of areas in which we could improve the bill further and officials have already identified a few areas in which we may be able to do that. I am keen to look into that, but the combination that we have at the moment is there because we are creating some new provisions but we need to relate the bill to aspects of the existing primary legislation—the 1974 act—and that makes it difficult for us to be able to change the language across the board in the way that we might want to in a completely new piece of legislation.

Ben Macpherson: Does that apply to the title of the bill as well?

Michael Matheson: That goes back to the point that I made to Liam Kerr. We are trying to cover three different areas in the legislation and we are trying to get a term that covers all those three areas. It is very difficult, because the short title is meant to be exactly that, a short title, and we think that "offender" is the most appropriate term. I understand the concerns that some of your witnesses have raised on the matter. However, we believe that the term fits the needs of the short title, given the three areas that the bill spans.

Ben Macpherson: Thank you—it is good to hear that, and it is reassuring that an evaluation of the language that could be changed within the current drafting is already going on. I look forward to considering that at stage 2.

Daniel Johnson: I understand the technical points and the restrictions. However, does the cabinet secretary recognise that some people might feel that the term "offender" is stigmatising? Can the cabinet secretary give an undertaking that the Scottish Government will seek to avoid that language in future legislation and measures?

Michael Matheson: We did that when we introduced the Community Justice (Scotland) Act 2016 and changed the language. We were criticised by some people for doing so, but that act was much more focused on trying to deal with people with convictions rather than referring to them as offenders and it moved much more to promoting desistance. If I recall correctly, the Criminal Justice (Scotland) Act 2016 enshrines some of that in our legislation.

We are conscious of the matter and we recognise that terminology and language, not only disclosure periods, can have a drag effect against individuals being able to move on in their lives. If someone who has committed an offence is willing

and able and we provide them with the right assistance, it is in all our interests that they be able to move on to a life away from committing offences because that promotes community safety. Therefore, if there are practical measures that we can take that help to support and address that, the Government is keen to do that. Language can play its part in helping to support that.

Michelle Ballantyne: If we are going to shorten the disclosure periods, have you given any thought to what happens in the worldwide web environment? We can now search pretty much anyone and get a lovely summary of everything that has happened to them, particularly via old newspapers. If we are going to allow people to move on, how do we reconcile that with information still being publicly obtainable?

Michael Matheson: That is an issue of genuine concern. I understand it, but the reality is that I do not have an answer. There are mechanisms to address it, such as the process whereby someone can apply to Google to have information about them removed from the internet, but there will always be the possibility that somebody could google their past and the search could bring up information that they would prefer people not know about or which they do not feel is appropriate. However, an employer cannot use such information for the purpose of deciding whether to employ someone. It can be much more challenging to demonstrate, prove and enforce that but, legally speaking, they cannot and should not do that.

Other than the mechanisms that are in place for people to apply to Google to have information removed, I do not have an answer on how we resolve the issue. However, I am conscious that, over time, it will become a bigger issue because of the way in which and how readily things are reported. Even what goes on in a local sheriff court, which might only get into the immediate local papers, can now be on the web and on Twitter and can be shared much more quickly.

There is no simple answer to the question. There might be scope to consider with internet providers whether they could improve the way in which their removal system operates. However, they will always say that there is a legitimate amount of information that they should be able to have on the internet for people to access if they consider it to be appropriate.

Michelle Ballantyne: Thank you. It will be a real problem.

You said earlier that disclosure should be about not the crime committed but the sentence imposed. One thing that concerns me is potential violence against children. I am thinking about cases such as that of Madison Horn in Fife, who was killed by her mother's boyfriend. He did not have large sentences from the past for such actions but he had a history of violence. How will that get picked up in the disclosure process? Somebody might not have had a large sentence but perhaps they should have to disclose their predisposition to a certain type of behaviour.

Michael Matheson: If someone has committed a serious offence, they will have a longer period for which they have to disclose that information, because it is reflective of the sentence.

Further, in relation to protected roles, information can be made available under the enhanced disclosure provision. In certain circumstances, even when someone's conviction is spent, the information is still made available to an employer or a particular service, where that is considered to be necessary—that would, of course, include issues of child welfare. At the moment, consultation is taking place around the necessity for disclosure to take place in relation to protected roles. That enhanced disclosure element also enables the police to disclose information that they think is relevant to the role that the person is applying for and which the organisation that is being applied to should be made aware of, even if it does not necessarily relate to a conviction. There is some flexibility in the disclosure process and, even when the timescales have been passed for a basic disclosure, an enhanced disclosure will still require that information to be made available.

Michelle Ballantyne: In its current form, the bill does not seek changes to that enhanced level of disclosure.

Michael Matheson: It does not.

Michelle Ballantyne: Are you therefore suggesting that that might need further consideration, in terms of a review?

Michael Matheson: No, because this is separate legislation. The disclosure periods that are set out in the bill concern what would be classed as a basic disclosure for the purposes of employment. There are then protected roles, in relation to which an enhanced disclosure would be appropriate. Even with the changes that we are introducing, there is still information that would be made available for an enhanced disclosure, and that would apply even when the conviction has been spent. Further, information that the police have that they think is relevant in relation to the post that has been applied for can be made available, if that is thought to be appropriate.

Some changes were made earlier this year to Disclosure Scotland's processes on the back of legal challenges around all information relating to spent convictions being made available. However, there is no need for Disclosure Scotland to make any changes as a result of the bill. It will have to

change some of its systems for basic disclosure checks, but not for enhanced disclosure checks.

The Convener: That concludes our consideration of part 2.

11:57

Meeting suspended.

11:57

On resuming—

The Convener: Part 3 of the bill concerns the Parole Board for Scotland. Again, I ask for questions and answers to be as brief as possible, as we are against the clock now.

Daniel Johnson: I would like to ask about the change in membership requirements. There has been some concern about the removal of the requirement for the Parole Board to include a psychiatrist, although we understand from the Parole Board that that requirement has caused issues in finding enough psychiatrists who are available. Do you have any opinions about the psychiatric input into Parole Board decisions as a result of the change?

Michael Matheson: The original requirement for having a forensic psychiatrist and a member of the judiciary on the Parole Board goes back to the establishment of the board, when it was a much smaller organisation. Now, there are around 50 members of the board who have a range of expertise, including legal and medical expertise, and the chair of the Parole Board is responsible for ensuring that that range of expertise is represented. There is no longer a requirement to specify that we have a High Court judge and a forensic psychiatrist on the board, because of the range of expertise that is now available.

It is worth saying that the High Court judge who sat on the Parole Board was present only infrequently, largely because the presence of a High Court judge was no longer really required. The change simply updates the rules to reflect the fact that the responsibility for ensuring that the right expertise is represented on the board is a matter for the chair. The Parole Board has the option of bringing in external expertise as and when it is required, so a person with a particular type of expertise relating to forensic psychiatry, for instance, could be brought in if that was deemed to be necessary by the chair of the board when considering a case.

12:00

Daniel Johnson: I have a question about the independence of the Parole Board. The board's submission is interesting, because it is the first time that I have seen a call from a body asking to be regulated a little bit more rather than a little bit less. However, it also makes some points about its independence and whether those provisions could be strengthened, about the need for clarity on governance and about appointments. Do you think that there is scope to improve the bill to provide greater clarity on those points? Do you agree with the case that the Parole Board makes?

Michael Matheson: I understand some of the questions that have been raised by the Parole Board. My view is that the bill goes far enough in restating the independence of the Parole Board in its decision making. I know that the board draws comparisons with the situation of the Scottish Courts and Tribunals Service and with the Judiciary and Courts (Scotland) Act 2008. However, the board operates somewhat differently from those bodies, so putting something about that in the bill would have no value whatsoever. The board operates as an independent body, and I think that the bill goes sufficiently far in reinforcing that. I do not think that we could add anything to the bill that would enhance or materially change any of that.

On governance, are you referring to the Parole Board sitting under the Scottish Courts and Tribunals Service? What aspect of governance do you have in mind?

Daniel Johnson: At point 16 in its submission, the board says:

"With respect to administrative independence we believe the Bill should also set out arrangements for governance through a Management Board, including the role of the Chairman, Chief Executive and the Management Board".

Michael Matheson: I understand the point that you are making.

The reason for dealing with the matter through regulations is to ensure that there is greater transparency and a clear line of accountability in how the arrangements are taken forward. The regulations will also formalise the management structure that supports the board. Having a separate management board would be, in effect, creating another public body, which I do not think is necessary for this purpose. The regulation-making functions that ensure that we have the right management structure to support the board provide the most appropriate way of approaching the issue.

Of course, the regulations will be drafted in consultation and partnership with the chair of the Parole Board to ensure that the administrative support that it is felt is needed is provided in the most appropriate way. The other benefit of using the regulation-making functions is that regulations can be adapted fairly quickly as and when necessary.

You also raise the issue of appointments. Part of the purpose of changing the appointments process relates to the independence of the Parole Board. The process will be taken forward by the chair, so it will no longer go through the public appointments process—which would come to ministers—or the Commissioner for Ethical Standards in Public Life in Scotland. The mechanism will go through the chair of the Parole Board, who will deal with the appointment of Parole Board members. That is about reinforcing the independence of the board's decision making.

Daniel Johnson: The points that the Parole Board has made around independence are, in part, a matter of principle and, in part, a reflection of the situation with regard to the Worboys case. I think that the Parole Board believes that it is important not only that it is independent but that it is seen to be independent. In that regard, it is important that it does everything that it can to ensure that its operations are as transparent as possible.

Two interesting suggestions have been made on the back of that. One concerns whether some sort of public test could be arrived at and the other concerns the publishing of minutes, albeit in a redacted form, so that the public can have greater insight into the board's decision making. The Parole Board was keen to point out that it might not be possible—or advisable—to provide for either option in the bill, in the fullest sense. However, it thought that provision might be made to require the board, first, to develop and publish tests and, secondly, potentially, to publish something on its decision making. How do you respond to those suggestions?

Michael Matheson: You raise a couple of issues. On greater transparency, there is currently provision for the chair of the Parole Board to provide information about a case in exceptional circumstances, where that is appropriate, although I understand that the board has not made much use of the provision.

The Worboys case raised issues that the Parole Board and the Scottish Government have been considering in the context of Parole Board rule 9, which provides that disclosure of information is not allowed. We are keen to ensure that the board operates in as open and transparent a manner as possible, notwithstanding some of the confidentiality issues that exist, and consideration is currently being given to addressing the issues that arose in the Worboys case to ascertain whether we can improve and enhance transparency in the decision-making process.

A significant amount of work is also being done in England and Wales as a result of the judgment. We have been in touch with the Ministry of Justice to explore its direction of travel in the work that it has been carrying out, so that we can properly understand how we might improve how we do things in Scotland. There is more work to be done in the area to ensure that the system operates in a more transparent manner, notwithstanding the issues to do with confidentiality, which are extremely important.

Sorry—I have forgotten the other points that you made. Have I addressed all the issues that you raised?

Daniel Johnson: I think so.

John Finnie: What is the justification for imposing a six-month time limit on prisoners making representations about recall from release on home detention curfew? The Parole Board sought to reassure us on the matter; does the Scottish Government have a position?

Michael Matheson: At the moment, there is no time limit. We decided to set a six-month limit, which we think is reasonable. In a recent case, a prisoner instructed a solicitor about revocation that had taken place eight years previously. Many of the individuals on the Parole Board who had dealt with the case had retired or moved on and were no longer available to consider the matter.

In appeals to the Upper Tribunal for Scotland about First-tier Tribunal decisions, the limit is 30 days. There is also provision for someone to appeal their case, and there is a three-month period in that regard. Our view is that six months is a reasonable period for someone to consider whether they want to appeal a revocation of their parole licence.

John Finnie: Do you acknowledge that information could come to light some time after the six months? Is there some flexibility or avenue of redress if that happens?

Michael Matheson: Ultimately the person could take the matter to court. The proposed six-month limit is the timeframe for an appeal to the Parole Board. If there was a decision to appeal outwith the Parole Board, the person would have to go through the normal court appeal process.

There is no timeframe at the moment, and eight years is, in my view, an extremely long period to wait before choosing to lodge an appeal. If someone thinks that their parole has been revoked inappropriately or incorrectly, they should be able to decide whether to appeal the decision within six months, to allow the Parole Board to consider the matter. Otherwise, the matter could run on for an extended period, and it would be unreasonable to expect the Parole Board to deal with that.

The Deputy Convener: That concludes this evidence session on the Management of Offenders (Scotland) Bill. I thank the cabinet secretary and his officials for a useful session.

Justice Sub-Committee on Policing (Report Back)

12:10

The Deputy Convener: Item 4 is feedback from the meeting of the Justice Sub-Committee on Policing on 31 May 2018. Following the verbal report, there will be an opportunity for brief comments or questions. I refer members to paper 3, which is a note by the clerk, and I invite John Finnie to provide feedback.

John Finnie: As you said, convener, the Justice Sub-Committee on Policing met on 31 May—just last week. We took evidence from Police Scotland about its firearms licensing process, and we heard from Superintendent Ronnie Megaughin, who is responsible for national firearms and explosives licensing and safer communities, and from Drew Livingstone, the service conditions officer at Unison's police staff Scotland branch.

In 2015, Police Scotland introduced a new model for the delivery of firearms licensing across Scotland, and, in March 2018, Her Majesty's inspectorate of constabulary in Scotland published its local policing inspection and firearms licensing report. The report found that the current practice in respect of firearms inquiries had departed significantly from what had been envisaged and approved by the Scottish Police Authority and that the process was inconsistently implemented. The sub-committee heard that a one-size-fits-all approach was not working and that Police Scotland's current review will consider how to introduce local flexibility. Other issues raised were the increase in the number of police officers carrying out that role and the use of two information technology systems that work separately from each other.

The sub-committee also considered its forward work programme and agreed to schedule an evidence session on 21 June on Police Scotland's digital data and information and communications technology strategy.

The Deputy Convener: Thank you. Are there any questions or comments from members?

Daniel Johnson: My one overriding comment on last week's evidence session was that it raised questions about the capacity for undertaking and delivering change in the police. In particular, I am mindful of some projects—particularly IT projects—that have raised questions about how existing practices are captured when change management and transformation programmes are being undertaken.

Michelle Ballantyne: I have quite a bit of case work in this area. Medical reports are a significant part of licensing. Was there any discussion about that? I have had a lot of complaints about the difficulty of obtaining medical reports and the huge fluctuation in cost, from a tenner to £150.

John Finnie: The issue was alluded to as a positive development in firearms licensing where there was an input from a general practitioner, but the specific issue of the costs incurred in obtaining a GP report was not considered.

Michelle Ballantyne: That is probably quite a big, problematic area.

The Deputy Convener: That concludes the public part of today's meeting.

12:13

Meeting continued in private until 12:26.

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