OFFICIAL REPORT
AITHISG OIFIGEIL

Criminal Justice Committee

Wednesday 10 May 2023

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 10 May 2023

CONTENTS

	Col.
BAIL AND RELEASE FROM CUSTODY (SCOTLAND) BILL: STAGE 2	1

CRIMINAL JUSTICE COMMITTEE
14th Meeting 2023, Session 6

CONVENER

*Audrey Nicoll (Aberdeen South and North Kincardine) (SNP)

DEPUTY CONVENER

*Russell Findlay (West Scotland) (Con)

COMMITTEE MEMBERS

*Katy Clark (West Scotland) (Lab)
*Jamie Greene (West Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Rona Mackay (Strathkelvin and Bearsden) (SNP)
*Pauline McNeill (Glasgow) (Lab)
*Collette Stevenson (East Kilbride) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Angela Constance (Cabinet Secretary for Justice and Home Affairs)
Liam McArthur (Orkney Islands) (LD)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Criminal Justice Committee

Wednesday 10 May 2023

[The Convener opened the meeting at 09:30]

Bail and Release from Custody (Scotland) Bill: Stage 2

The Convener (Audrey Nicoll): Good morning, and welcome to the 14th meeting in 2023 of the Criminal Justice Committee. We have received no apologies.

Our business today is consideration of the Bail and Release from Custody (Scotland) Bill at stage 2. I ask members to refer to their copies of the bill, the marshalled list of amendments and the groupings document.

I welcome to the meeting Angela Constance, the Cabinet Secretary for Justice and Home Affairs, and her officials. I remind members that the officials are here to assist the cabinet secretary during the stage 2 debate and that they are not permitted to participate in the debate. For that reason, members should not direct any questions to them.

Before we start our consideration of amendments, I draw members' attention to an additional pre-emption that is not noted in the groupings document. In group 10, on the release on licence of long-term prisoners, amendment 74 pre-empts amendment 10. That means that, if amendment 74 is agreed to, I cannot call amendment 10. If we do not reach that group today, that information will be included in the groupings document ahead of next week's meeting.

Section 1—Decisions on bail: relevant information from officer of local authority

The Convener: Amendment 28, in the name of Katy Clark, is grouped with amendments 49, 50, 29, 51 to 54 and 1.

Katy Clark (West Scotland) (Lab): It might be helpful to say at the outset that I do not plan to push any of my amendments in this group to a vote. I have lodged them in a genuine attempt to get a better understanding of the Government's thinking on how the provisions as drafted would operate. It is worth saying that Pauline McNeill and I have had a number of meetings about the provisions with lawyers and practitioners—mainly criminal defence agents—so some of what I will say will be based on those discussions.

Amendment 28 relates to the requirement that the sheriff or judge must give an officer of the court the opportunity to provide information. When the committee discussed the issue initially, our understanding was that that would be a mandatory requirement. However, in the course of our deliberations, we were given advice that there would simply be an opportunity for a social worker to give information to the court and that there would not be a mandatory requirement.

The committee's major concern in that regard related to the resource implications. The backdrop is that there are probably far fewer justice social workers available to the courts now than there were in previous decades. There are genuine issues regarding the ability of a sheriff or High Court judge to have access to a social worker within the timeframes. Custody courts usually involve the sheriff court, and many dozens of cases go through a busy custody court on, for example, a Monday morning.

At our meetings, solicitors, acting sheriffs and defence agents said that their interpretation of the provision as drafted was that it would be compulsory that there be social work involvement at a very early stage. There are obviously practical implications to that.

I therefore thought that it would be helpful to bring the matter to the committee's attention in the form of an amendment, in order to tease out the issues and focus on the specific wording. It is important to put on the record that Scottish Labour wants a great deal of social work involvement in such cases. We take the view that the more information available to the court at the earliest stage, the better, because that makes it more likely that the court will be able to make the correct decision in the interests of justice.

Amendment 28 would remove the stipulation that the judge must get information from the local authority before making a determination. That is the more extreme of the amendments that I have lodged on the issue, but it reflects the consensus in the meetings that we had with defence agents. Their view was that, in the early stages of cases, where somebody might be arrested one night and appear in court the next day, it is onerous and unworkable to expect that level of information, or any information, to be available. Therefore, amendment 28 would completely remove the provision that the judge must get that information.

Amendment 49 is drafted in a slightly different way and would simply change the word "must" to "may". That would mean that there would be no mandatory requirement, but it would give the court the ability to get the information and would, I suppose, make clear Parliament's view that we would like that to happen and that we see it as advantageous. Amendment 49 would be a

weakened version of the provision in that the judge could formally give local authorities the chance to provide information—the court would have that information where it required it and asked for it.

As I say, lawyers have raised serious concerns about the practicality of the provision, given the level of social work support that is currently available to courts. Given the budgetary provision that the Scottish Government has presented to us, it seems unlikely that we will be in a substantially different position when the bill comes into force.

Amendment 1 relates to a different issue, but I presume that it would be helpful for me to speak to it at this point in the discussion. It would introduce a requirement on the Scottish Government to report to the Scottish Parliament on the operation of the provisions with regard to criminal justice social work. Clearly, that is related to the resource implications that I have referred to and whether, in reality, it will be possible for social work reports to be available at such an early stage in cases.

I hope that that is helpful and enables us to scrutinise the provisions at this stage.

I move amendment 28.

Pauline McNeill (Glasgow) (Lab): Similarly to Katy Clark, I would like to tease out the issues on the subject. On the face of it, the provision seems good, but we have heard evidence that suggests that further clarification is needed. As Katy Clark said, amendment 49 would simply remove the requirement on the court and would mean that the information "may" be provided. I have provided an alternative to that in amendment 53, which would give the sheriff the right to determine a period of time for the information to be provided.

I would like to say why I have lodged the amendments. The provision in section 1 states:

"Before determining whether to admit or refuse to admit the person accused or charged to bail, the sheriff or judge must also give an officer of a local authority an opportunity to provide (orally or in writing) information relevant to that determination."

Our committee report refers to the evidence from Dr Hannah Graham of the University of Stirling, who rightly said:

"There are acute time pressures at the point of bail and remand decision making."—[*Official Report, Criminal Justice Committee,* 11 January 2023; c 25.]

We can see that there is already a highly pressurised point in court proceedings, but there will now be this mandatory requirement. As Katy Clark said, in principle, the requirement seems good, because we would want all the information to be available to the sheriff. Of course, currently, if the sheriff wants that information, they can request it. The first issue that the committee raised concerns about was the resourcing of the provision. I realise that we have a new cabinet secretary, but the current cabinet secretary has probably seen the *Official Report* of the meeting at which the committee asked for clarification on resourcing.

More importantly, there is some confusion not as to why, but as to how. I will quote the Lord President:

"The prescriptive nature of what is proposed is likely to make submissions to the local sheriffs lengthier, increase the time taken to determine the issue of bail, result in some accused persons being detained unnecessarily while inquiries are carried out, produce more errors, increase the opportunities for appeals and add to the heavy burden on the sheriffs and the staff who are tasked with the management of what can be extremely busy custody courts."

I am sure that the cabinet secretary can understand that that gives cause for concern on a number of fronts. The provision could potentially undermine the principle of the bill, if it was to result in unnecessarily long detentions in order to gain the information as described in the bill.

I put on the record that I had a meeting with the previous cabinet secretary's officials, who said that those concerns were a misunderstanding of the provision. The follow-up that I received indicated that there was no suggestion that it should be cause for additional time to be taken to determine bail. However, I am sure that the cabinet secretary will share my concerns. Why did the Lord President, on behalf of the judiciary, think that? What went on between Scottish Government officials and the judiciary? I presume that they discussed how the provision was going to operate. That needs to be clarified.

At stage 3, when I come to vote on the bill, I want to make sure that we have achieved the objective of providing relevant information to the courts but that that does not result in lengthy delays and, if it is a mandatory provision, that we are able to resource it.

Liam McArthur (Orkney Islands) (LD): It feels as though I am rolling back the years. It is nice to be back in the Criminal Justice Committee, having served for five years on the predecessor committee. An issue that exercised that committee was the size, scale and extent of the remand population in Scotland's prisons and the effect that that was having. If memory serves correctly, it was the subject of our first inquiry at the start of the previous parliamentary session. It is accepted that that is still an issue, so I welcome the broad thrust of the bill and what it seeks to achieve. However, as ever, there are ways in which it could be improved.

Similarly, I welcome the move to involve criminal justice social work in informing the decisions that

courts take on sentencing and bail. I echo Katy Clark's and Pauline McNeill's concerns about resourcing for that. The criminal justice social work service is already under real pressure and, at the moment, the added responsibilities that are being placed upon it and the timescales in which we would hope it would be able to respond give rise to legitimate concerns.

The Law Society of Scotland expressed those concerns in its briefing for the recent stage 1 debate. Nevertheless, the input of criminal justice social work is exceptionally important and will improve the quality of the decisions that sheriffs and judges are able to make. That said, it could go further, which is the purpose of my amendments 50 and 51. I am grateful to Victim Support Scotland for its support in lodging those amendments.

My amendments aim to augment what is already in the bill, ensuring that the decisions that are taken are as informed as possible. Undoubtedly, criminal justice social work will bear the heaviest responsibility in that respect. However, amendment 51 would allow for information that is relevant to public safety to be provided to the courts by the complainer or by victim support organisations on their behalf. That would allow the courts to make decisions that are in the best interests of both public safety and victim safety while respecting the rights of the accused.

09:45

I am interested in hearing the Government's views on that additional provision. It would not, in any way, dilute what is there but would broaden out the information that is available to the courts in making the decisions that fall to them to make. Therefore, it can only enhance what the bill seeks to achieve overall. I look forward to the debate on that issue.

The Convener: I call Collette Stevenson to speak to amendment 52 and other amendments in the group.

Collette Stevenson (East Kilbride) (SNP): I have had time to reflect on my amendment and to seek further advice, and I have decided that I will not move amendment 52. However, I will keep an eye on how the issue develops at stage 3.

The Convener: I call the cabinet secretary. My apologies; I call Jamie Greene.

Jamie Greene (West Scotland) (Con): I should have indicated earlier that I wanted to speak on this group.

I know that members have to make decisions, so it may be helpful for them to know that Conservatives would support all the amendments in the group that have been discussed so far, if they are moved, with the exception of amendments 28 and 29, which Katy Clark has indicated that she may not move. We were keen to understand the cause and the possible effects of those amendments, but that has been made clear through Ms Clark's comments.

I would also have supported Colette Stevenson's amendment 52. I tried to submit a similarly worded amendment, but the legislation team explained that a similar amendment had already been lodged, which meant that I was unable to do so. For that reason, as members can see in their papers, I added my support to amendment 52.

Ms Stevenson has reflected on amendment 52 and indicated that she will not move it. I wanted to submit a similar amendment, because the issue is relevant and pertinent. I am sure that the cabinet secretary will have some comments to make about the issue, which is about considering the safety of victims in decisions about bail. The amendment would provide for information that is

"submitted by or obtained from"

victims to be included during the consideration of bail, with specific regard to any vulnerabilities particular to that victim.

Decisions on the bill will, of course, affect not only the offender—the accused, I should say—but the complainer, as Collette Stevenson's amendment 52 recognises. That is why I welcomed the amendment. For that reason, I will move the amendment when the time comes.

The Cabinet Secretary for Justice and Home Affairs (Angela Constance): I will speak to amendments 28 and 29 and then to other amendments in the group.

Although concerns have been expressed about resourcing the role of justice social work, the bill requires only that the courts give justice social work the opportunity to provide information relevant to the question of bail; it does not place a duty on justice social work to do so. We deliberately framed the provisions in that way to ensure that local authorities will always have the opportunity to provide information but that it will be for them to decide whether to do so in any individual case.

Liam McArthur: Will the cabinet secretary take an intervention on that point?

Angela Constance: Yes.

Liam McArthur: There is no obligation on criminal justice social work or on local authorities to provide input about any individual case, but the concern is that, where there are funding restrictions, any decision on whether to make an

intervention or a contribution may be informed as much by those restrictions as by whether there is a valid contribution to make.

Angela Constance: I will make more specific comments about resourcing issues in a wee while, but the heart of the matter here is whether justice social work has a relevant contribution to make or relevant information to pass on. The amendments that we are discussing now are about the practical impact of those contributions rather than about resourcing. Of course, when justice social work has a valuable contribution to make, it should be enabled and empowered to do so.

Consequently, amendments 28 and 29 are, in my view, unnecessary, although I can understand why they have been lodged. If a way can be found, ahead of stage 3, to reframe the ability of justice social work to provide the court with information, I will be happy to consider that. However, I think that the bill currently delivers what we want in this area.

Pauline McNeill's amendment 49 seeks to remove the requirement for the court to provide an opportunity for justice social work to provide information that is relevant to the question of bail. It has been suggested that decisions on whether to admit an accused to bail could be delayed by section 1, but the approach in the bill will not result in unnecessary or longer periods of remand, because, under existing bail law that will continue to operate, the court has only until the end of the day after the accused person's first appearance to make a formal bail decision.

Pauline McNeill: That is what was said to me after the stage 1 report was published, but I am left wondering why the Lord President seems to think otherwise. Why do you think that the judiciary's interpretation is that the approach in the bill could add on some time? I make a plea to the cabinet secretary. I support the notion that it should be mandatory for an opportunity to provide information to be provided, but the operation of that needs to be sorted out, given that the judiciary think that it could result in a lengthier process. Perhaps it is the phrasing of the bill that is the problem, which is why I suggested an alternative whereby sheriffs could determine how long the period would be.

How would what is proposed operate? Let us say that the court in question was a smaller court where there was no criminal justice social work available. In Glasgow, criminal justice social work would be available, but it would be busy. How is the system meant to operate? If you cannot tell us that now, could you discuss the issue with us before stage 3? I am not inclined to support the current wording unless we can clarify the situation. I would not be putting my argument so strongly were it not for the fact that the Lord President's interpretation seems to be different from that of the Government.

Angela Constance: I want to continue with my previous train of thought, after which I will—I promise—explicitly address your points in relation to the Lord President, because they are important.

The court is required to decide on bail on the basis of the information that is put before it in the timeframe that I referenced earlier, regardless of whether justice social work has provided information. Equally, there is no risk that bail will be refused because the court is waiting for information from justice social work, because, under existing law and under the bill, the fact that the court is waiting for information from any party is not a reason to refuse bail.

Amendment 49 would leave it to the discretion of the court whether to offer an opportunity to justice social work to provide information. There is a risk that that could mean that valuable information would not be provided in individual cases.

I turn to the remarks of the Lord President. The committee will be aware that, as Pauline McNeill mentioned, the Lord President offered views. I think that it will be helpful for me to take each of those views in turn.

With regard to prescriptiveness, we acknowledge that the new bail test is more prescriptive. That is because it adds two new specific public interest considerations, one or the other of which must apply in order for bail to be refused and remand to be deemed necessary in the future. For the record, those considerations are

"the interests of public safety, including the safety of the complainer from harm,"

and

"to prevent a significant risk of prejudice to the interests of justice."

That is a deliberate policy approach, which is designed to focus the use of remand. Therefore, the new test is more prescriptive, but it is prescriptive with a purpose. It is part of the policy goal of achieving a more focused use of remand, which we hope will, over time, reduce the use of remand.

In terms of time taken, which the member referenced, we acknowledge that some time may need to be added to some bail hearings. That is to ensure that the courts have better information on which to make their decisions.

I will move on to amendments 50 and 51, in the name of Liam McArthur, which would require the courts to seek views directly from the complainer or from victim support organisations on behalf of

the complainer to inform the bail decision. We have concerns about the practicality of those well-intentioned amendments, due to the timescales within which bail decisions must be made, particularly in custody cases. In my view, they are not necessary and they may have unintended consequences.

When the court is deciding whether to grant bail, the prosecutor and the defence are also able to make submissions to the court on the question of bail. In doing so, the prosecutor can and should make the court aware of any safety concerns that they think arise based on the particular facts and circumstances of the case. That is particularly so under the new bail test, which centres the consideration of public safety in bail decision making, including the safety of the complainer from harm.

We all agree that it is important that the complainer's voice is heard in the court process, and I am happy to discuss the matter further with Liam McArthur ahead of stage 3. However, it is also important to be mindful of the sensitivities around communicating complainers' safety concerns to the court, particularly in domestic abuse cases.

Domestic abuse involves complex dynamics in which it can be important that information about concerns that may lead to a partner or an ex-partner being placed on remand is not attributed to information that is provided by the complainer, so as not to compromise safety or make complainers fearful to engage.

Jamie Greene: I am keen to explore that further. Is it being suggested that the technical problem with Liam McArthur's amendments means that information from the complainer that relates to decision making would be made public or spoken out loud in the remand court? Is there no technical solution to that? Clearly, the judge could have all the relevant information, but they would not need to share that with the gallery or, indeed, anyone else who was in the room.

That information is surely quite important to the decision-making process. The ability to understand whether there is a public safety issue is very much dependent on direct information from a victim or someone representing them, which, in this case, would be a relevant person.

Angela Constance: That is why I said that I was happy to discuss the matter further with Liam MacArthur ahead of stage 3. However, we must be very mindful of unintended consequence in that area, for the reasons that I have laid out.

It is also important to stress that the prosecutor, who acts independently in the public interest, is best placed to provide complainer safety information to the court, which would be presented as part of their submission on bail.

I will address some of the resource issues before I move on to the amendments in the group that were lodged by Collette Stevenson.

As I have already said to committee, I understand the concerns about the potential financial impacts of the bill. Those are laid out in the financial memorandum, but, to offer further reassurance to committee, I note that we have worked with Social Work Scotland, which is supportive of our approach in and around justice social work and bail. That also applies to the Convention of Scottish Local Authorities, the Scottish Courts and Tribunals Service and others. We engaged with those organisations as part of our work to establish the estimates in the financial memorandum. I stress that we will continue to work with those organisations on the implementation plans for the bill. As we all know, Parliament agrees to the Scottish budget annually.

10:00

Collette Stevenson's amendments 52 and 54 would prescribe certain information relating to the complainer that justice social work must put before the court when taking up the opportunity to provide information that is relevant to the question of bail. I understand the intention behind the amendments. However, they would have very considerable resource implications, as justice social work is not usually involved in providing information to the court about complainers. There has been no consultation on creating such an expanded role for justice social work, and we have already heard concerns about resourcing.

That aside, it is unrealistic for justice social work to provide information of that kind in the timescales prescribed by the bail process, particularly in custody cases, because justice social work may not have any pre-existing relationship with the complainer. We also know from the experience of specialist domestic abuse advocacy services such as the advocacy, support, safety, information and services together—ASSIST—project that, in the wake of the trauma and confusion of an incident, complainers are not always physically or emotionally safe enough at that stage of the process to engage.

An amendment of the bill is not necessary to broaden the role of justice social work, because section 1 does not prescribe the type of information that justice social work must provide on the question of bail. Given those concerns, it is something that could be for consideration in the medium term, and I would be happy to discuss further what, if anything, could be planned for outwith the bill process.

Pauline McNeill's amendment 53 seeks to provide that, where justice social work intends to provide information to the court on the question of bail, it must do so within timescales determined by the sheriff or judge. As I explained in relation to amendment 49, any delay in justice social work providing information would not change the timing of the bail decision.

Pauline McNeill: I am trying to understand and process everything that you are saying to the committee. You accept that some time may be needed, but what does that mean? Is the mandatory requirement to give that opportunity to be taken up or not? A social worker might want to give a report, which I realise could be oral or in writing. Does consideration need to be given to the formulation of that? There is already some misunderstanding about the provision. You do not want a situation where the accused is detained further while awaiting a decision on bail.

Angela Constance: For further clarity, convener, earlier in my remarks I acknowledged that, depending on the nature of the information that is provided, some further time may be required at a bail hearing, but that is separate from the timescales for when a bail hearing must be heard. I hope that that is helpful.

Pauline McNeill: That is helpful. You are saying that the hearing is on the day.

Angela Constance: My only other remark on Ms McNeill's amendment 53 is that I do not think that there would be any practical benefit from it, and I say that with respect.

Katy Clark's amendment 1 seeks to put in place a requirement for the Scottish ministers to report to Parliament on the operation of section 1. I recognise that the enhanced role of justice social work carries resource implications as set out in the financial memorandum. We have been clear during stage 1 that the Scottish Government will continue to work with partners during implementation planning to review the resourcing requirements and timescales for commencement.

Members will be well aware that there are real challenges in relation to budgets, which is likely to continue. That means that difficult decisions will possibly need to be made. Phased implementation of legislation can be a way of flexibly managing the resource implication of any bill. It is also worth highlighting that Parliament—and, indeed, this committee—already has the power to carry out post-legislative scrutiny of any acts of Parliament.

I ask members to reject the amendments in the group.

The Convener: Thank you, cabinet secretary. I ask Katy Clark to wind up and press or withdraw amendment 28.

Katy Clark: I am grateful to the cabinet secretary for what she has said. I think that her intention is clear. I do not plan to press amendment 28 to a vote or to move any of my other amendments in the group. However, I am grateful to the cabinet secretary for saying that she will look at whether there is a need to reframe the wording of the bill, given that we seem to have different legal views on how the section would be interpreted. I would be concerned about the possibility of appeals if there are different legal interpretations of the wording. I am very much raising technical issues and not addressing the principle, which the cabinet secretary has made clear.

I lodged amendment 1 because I am concerned about the resourcing implications. Although we are politically very supportive of more social work involvement and more information being available, we are also very aware of the cuts to justice social work over recent decades and that, in reality, it will not be possible for justice social work to get involved in every case. It is not possible to lodge an amendment that would enable the bill to create the funding to ensure that there is adequate resourcing. The amendment was framed as it was to bring a focus to the resource implications.

Jamie Greene: I find amendment 1 very helpful. It is not a huge surprise that the Government has pushed back on it. In my experience, from working on many bills, any reporting requirements that members propose to add are generally rejected by the Government, although such requirements sometimes appear. I hope that the member will move amendment 1 or at least bring it back at stage 3. It would not place an onerous task on the Government. The timescale of one year after the legislation is introduced is on the tight side, but that could easily be amended at stage 3 to two or three years.

I do not buy the rebuttal that post-legislative scrutiny is the answer to the issue, because that generally takes a number of years and it is not always done well, as committees are extremely busy.

Amendment 1 would require the Government to come back to Parliament with a report for the reason that Katy Clark rightly mentioned, which is the very substantial worry that the financial memorandum has massively understated the costs to social work. As a committee, we have heard numerous pieces of evidence about social work being under pressure. The amendment would be a welcome addition to the bill, and I hope that the member will press it.

Katy Clark: I am grateful for what Jamie Greene has said and I will reflect on it for the next stage. It is not my intention to move amendment 1,

but I suspect that I will want to come back to the issue at a later stage.

The Convener: Can you confirm that you are seeking to withdraw amendment 28?

Katy Clark: Yes.

Amendment 28, by agreement, withdrawn.

The Convener: Amendment 49, in the name of Pauline McNeill, has already been debated with amendment 28.

Pauline McNeill: I will come back to the issue at stage 3, when I have processed it. On that basis, I will not move amendment 49.

Amendment 49 not moved.

The Convener: Amendment 50, in the name of Liam McArthur, has already been debated with amendment 28.

Liam McArthur: I very much share Jamie Greene's view on the ability to convey the information to the court in a way that does not compromise the victim's safety or public safety but does inform the court's decision. I note the cabinet secretary's comments about engaging in further discussion and I am happy to do that. On that basis, I will not move amendment 50.

Amendment 50 not moved.

Amendment 29 not moved.

Amendment 51 not moved.

The Convener: Does Collette Stevenson want to move amendment 52?

Collette Stevenson: I will not move it, convener.

The Convener: I think that Jamie Greene indicated that he was considering moving the amendment.

Jamie Greene: I support it, so I will move it.

Amendment 52 moved—[Jamie Greene.]

The Convener: The question is, that amendment 52 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Clark, Katy (West Scotland) (Lab)
Findlay, Russell (West Scotland) (Con)
Greene, Jamie (West Scotland) (Con)
McNeill, Pauline (Glasgow) (Lab)

Against

MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Nicoll, Audrey (Aberdeen South and North Kincardine) (SNP)
Stevenson, Collette (East Kilbride) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0. As there are equal votes for and against the amendment, I use my casting vote as convener to vote against it.

Amendment 52 disagreed to.

The Convener: Does Pauline McNeill want to move amendment 53?

Pauline McNeill: I am not going to move it, convener. I hope that there is now some understanding between the Government and the judiciary, given the cabinet secretary's comment that it is expected that the whole process will be conducted in one hearing.

Amendment 53 not moved.

Amendment 54 not moved.

Section 1 agreed to.

After section 1

Amendment 1 not moved.

Section 2—Determination of good reason for refusing bail

The Convener: Group 2 is on entitlement to bail. Amendment 55, in the name of Katy Clark, is grouped with amendments 56, 57, 31, 58, 59, 30, 60 to 62, 32, 63, 64, 2, 33 and 34.

I draw members' attention to the procedural information relating to this group as set out in the groupings. If amendment 55 is agreed to, I will be unable to call amendments 56, 57, 31, 58, 59, 30, 60 to 62, 32, 63 and 64, because of pre-emption. Similarly, if amendment 2 is agreed to, I will be unable to call amendments 33 and 34, again due to pre-emption.

Katy Clark: My amendments in the group, which is on entitlement to bail, relate to three areas: the public safety test; the fear of flight; and, in amendments 35 and 36, alternative approaches to address issues that Victim Support Scotland raised on these provisions.

Amendment 55, which is a probing amendment, seeks to remove the new public safety test for bail so that the law reverts to the current public interest test. As I have indicated, Pauline McNeill and I have been involved in a number of meetings with defence agents and other practitioners—including, on occasion, sheriffs—in relation to the drafting of the bill, and the view of many whom we have met is that what I have proposed is the preferred approach due to uncertainty around how the new provisions will be interpreted by the court.

On a number of occasions, fear has been expressed that the lack of certainty in relation to the definition of the public safety test is likely to lead to appeals. Even if, at the end of the day, the

outcomes are the same as they are under current bail law, such uncertainty is not in the interests of justice or of victims, and, indeed, the arguments that will have to be presented in the courts over interpretation of the legislation will come at a cost to the public purse.

10:15

My lead amendment would remove the public safety test. I am looking for the cabinet secretary to outline why the Government is proposing the change so that we can get an understanding of how it believes that it will impact on bail decisions in the courts, particularly given that Lord Carloway's submission to the Scottish Government was that, although the measure would add bureaucracy and place more onerous requirements on the courts, outcomes would not be changed. I am looking for the cabinet secretary to give an explanation of the kinds of cases in which she expects that, if the bill were to be enforced, bail would be allowed where it would not be allowed at the moment and, similarly, situations in which individuals would be remanded under the measure when they are currently not.

Amendment 31 would enable the court to have discretion to take into account electronic monitoring or other specific conditions or requirements to which the accused was subject. That issue was discussed in the committee. The approach that the Scottish Government proposes is that, where an individual has been subjected to electronic monitoring, it will be compulsory for the court to take that into account, and every two days of electronic monitoring will be counted as one day in custody.

The approach that I outline in amendment 31 would enable the court to have discretion to take into account any period of electronic monitoring or, indeed, any other specific conditions and whether the accused has complied with the conditions to which they have been subject. That would mean that the court would have the discretion on occasion to reduce a sentence—for example, if there was evidence to suggest that the person had complied with the conditions of curfew or electronic monitoring—but it would not be obliged to do that. Similarly, it would enable the court to increase the sentence if an individual had not co-operated with the special conditions that were placed on them. It could be that they had not co-operated with electronic monitoring, a curfew or another condition that the court had presented—for example, if they had made attempts to contact or approach the complainer. The reason why I have lodged the amendment is to enable the court to have a far broader range of responses and to take account of specific facts that are presented.

Amendment 30, which is also in the group, is a probing amendment that came about as a result of discussions about the public safety test. As the committee has discussed and as lawyers have stated in their various representations, there is a view that it would be helpful to have a definition of the test. One of my concerns is that I have attempted to ask others to draft a public safety test or to give an indication of the factors that they believe should be on the face of the bill but they have been reluctant to do so. Amendment 30 therefore provides an indicative list of the types of factors that might be taken into account. As I said, it is a probing amendment and I do not plan to push it to a vote today, but I am looking for the Government to give an indication as to whether those are the kinds of factors that it expects the courts will take into account when considering what public safety will involve.

Amendment 63 would require consultation with victims groups about the drafting of the public safety test. It would require the Scottish Government to come back in writing with detailed proposals for how the courts will interpret the public safety test and to consult victims organisations and others on how the courts will be expected to deal with such matters.

I lodged amendment 32 to get a better understanding of the Government's thinking. The current bail provisions are clear that the court is able to refuse bail if it believes that that will be in the interests of justice and that granting bail would be prejudicial to the interests of justice. One reason why granting someone bail could be prejudicial to the court process is that they would be given the opportunity to intimidate witnesses or complainers. If the bill were to be passed, it is unclear whether the Government would expect the courts to have a lower threshold when considering such issues. Amendment 32 would reintroduce the current law in relation to the intimidation of witnesses and complainers. It would make it clear in black-letter law that the court is entitled to remand someone if there is a legitimate fear that there could be intimidation.

One of my other amendments relates to the fear of flight. We have focused on that issue, but, when the committee discussed the bill, we did not consider to any great extent that the bill's provisions change the current bail law in that the public safety test will very much focus on the risks to the public. Issues around the fear of flight and absconding relate primarily to the ability for the interests of justice to be served, with the court process being able to proceed to its conclusion because the accused is available to attend court.

It would be useful for the Government to indicate how many individuals are currently remanded because of issues relating to the fear of

flight and individuals absconding. It would be useful to understand whether the Government believes that the bill as drafted will result in fewer individuals who fall into that category being remanded. What would the implications be for the justice system and the ability to obtain convictions if that were to happen?

Amendment 33 contains a similar provision. My understanding and the understanding of those from whom I have taken advice is that, under the bill's drafting, the court would be obliged to consider the failure to appear in a particular case when considering whether to grant bail. Amendment 33 would enable the court to take into account a wider course of action. If an individual had a history of failing to appear or of absconding—there might be evidence from previous convictions, or other evidence could be provided to the court—such information could be taken into account.

Jamie Greene: We have been trying to decipher the effect that amendment 33 might have. Is its purpose that the court must take into account not only the diet that is relevant to the specific remand hearing but any and all outstanding hearings? For example, if an accused was in front of a remand court but was also the subject of a number of other live cases that were going through the system, and, if the accused had a history of absconding in relation to those cases, would that be taken into account in relation to the other case? It sounds as though quite a lot of work would be involved. Who would present or deliver that information to the judge or the Crown?

I am sympathetic to the idea, because one of the problems with the bill—I will come on to this in talking about my amendments in the group—is that it might remove the safeguard of being able to use remand for repeat absconders. However, will Katy Clark clarify the effect that amendment 33 would have?

Katy Clark: Amendment 2 would revert to the original wording on absconding that is set out in the Criminal Procedure (Scotland) Act 1995. Amendment 33, which Jamie Greene refers to, would, as he says, set out that the court, when considering whether to refuse bail, may take into account any on-going or previous proceedings, and not just the accused's failure to appear. Indeed, the current legal position is that the court may take those matters into account, and it regularly does so. The court takes a view as to whether it believes that the accused will come back if they are given bail, and will appear for the next court diet.

My understanding of the bill as introduced is that, if an individual had failed to appear in previous diets of the case that is currently before the court, that matter could be taken into account, but that, on a strict interpretation, if the accused had failed to appear in other outstanding cases that had not yet reached their conclusion, that could not be taken into account. It will often be clear from someone's schedule of previous convictions that there has been a failure to appear on previous occasions relating to other matters, perhaps where the accused has already been convicted.

The effect of amendment 33 would be to make it clear, for the avoidance of doubt, that the court could take into account not just what had happened in the particular case and in relation to that particular complaint but other information, which is how Scots law has worked until now.

The amendment is an attempt to get a better understanding from the Scottish Government of how the bill will change the law and whether it will make a significant difference. I put the issue to the previous cabinet secretary when he appeared before the committee, and he said that, if people do not appear, they could, of course, be remanded. However, we cannot just rely on what the previous cabinet secretary said to us; it is about the strict interpretation of the legislation, which is what the courts will have to grapple with. We have to ensure that the courts are able to take into account the circumstances that are presented to them.

Amendment 34 is consequential to amendment 33.

Amendments 35 and 36 relate to issues that have been raised by Victim Support Scotland. They contain alternative approaches and raise issues that we will probably want to come back to at stage 3.

Amendment 35 would ensure that the safety of the complainer has to be taken into account. It would ensure that the court must, when granting bail, state the reasons why it considers that the granting of bail does not pose a risk to public safety. The current wording of the bill would require an explanation when an individual is remanded. The presumption is that people will get bail, so there does not need to be an explanation as to why they are granted it, but, when a person is remanded, the court will be required to set out the reasons for that.

As I said, amendment 35 was lodged as a result of discussions with Victim Support Scotland, which is concerned that victims often do not understand why bail has been granted. The amendment would enable equality in that reasons would have to be given not just when somebody is remanded but when somebody receives bail.

Amendment 36, which is an alternative, would delete section 2 completely so that there would no longer be a requirement for reasons to be given.

As I said, I have also worked with Victim Support Scotland on that proposal.

I move amendment 55.

10:30

The Convener: I think that we have jumped ahead slightly, which is fine. However, we will now come back to focus on group 2. I call Jamie Greene to speak to amendment 56 and other amendments in the group.

Jamie Greene: I have four amendments in the group and will try to keep my comments to those, as there are many amendments in the group and we have heard a lot of explanation about others.

Amendments 56, 58, 61 and 62, and many of my amendments to the bill, relate to a particular group of people—victims of crime. My amendments in the group have an overarching goal. Although I understand the cabinet secretary's approach, I want to ensure that the bill reflects on and considers both victims and offenders as much as is possible. That fits very nicely with the excellent debate that we had yesterday: the Parliament is rightly seeking to constructively refocus our justice system on the needs and rights of victims, and there is broad consensus on that.

The amendments get to the very heart of what part 1 of the bill is about, which is the issue of changing the test for bail. The proposed legislation alters the bail test that is set out in the Criminal Procedure (Scotland) Act 1995. Under that existing legislation, bail can be refused for a number of very valid reasons, including, for example if there is a

"substantial risk that the person might if granted bail ... abscond; or ... fail to appear at a diet of the court".

We have heard a little about some circumstances in which judges and sheriffs have used that provision.

Someone can also be remanded if there is a substantial risk that a further crime might be committed while that person is on bail—we all know the statistics about crimes committed while people are on bail—or if there might be a substantial risk that the person might interfere with witnesses or obstruct the course of justice. Those reasons are all routinely used to refuse bail, and I think that those are sensible measures that the judiciary has made good use of since the provisions came into force, in 1996.

The Government has challenged us to think about the assumption that we have a large remand population, which is an issue that the committee has looked at in great detail. Is there a conclusion that remand is currently being overused by sheriffs and judges or that it is being wrongly applied when the existing tests are applied? It is not clear from any of the notes accompanying the bill what the Government believes.

Our stage 1 proceedings went into a great deal of detail with a large number of witnesses, and we took much oral and written evidence. There is no concrete evidence of the overuse of remand. The committee went to watch hearings taking place and there was no evidence of that. I understand that remand is generally perceived to be a last resort in summary cases, and I very much got that impression from our private discussions with judges. As those discussions were private, I cannot refer to them, but it was clear that remand was very much a last resort. It was used only once in the 30 or so cases that we watched. Those were summary cases, so that is what we would have expected.

The use of remand will naturally be more common in solemn cases, as it will be in the High Court. That is because of the nature of the cases that go through those proceedings, which tend to involve crimes such as serious violent assault, murder or attempted murder, serious organised crime or serious sexual assault. Naturally, remand figures in those cases are much higher. However, the Government has not made the case that judges are overremanding people.

If the intent through the bill is to reduce the remand population, a very clear way in which the Government could do that would be to get through the backlog of cases. This Parliament voted on legislation to increase the time limits for which someone can be held on remand. We were all uncomfortable in doing so, but we understood the reasons for that. The measure was used during the Covid pandemic, and it was extended. Indeed, some of us felt nervous that it would become a permanent feature of our justice system.

Many people are held on remand who perhaps should not be, but is that a result of their wrongly being held on remand in the first place or the fact that they have been languishing in prison on remand while they wait for their case to come to court? I think that it is the latter. Indeed, we have seen evidence of that, including when we visited HMP Edinburgh—or Saughton prison—early in our inquiry, where we met a number of men, most of whom were young, who had been held on remand for far too long. We all want to address that issue, and I am sure that we will all come together to do that. However, the issue is that the bill will change the bail test.

My amendment 56 might be the shortest of my amendments, but it is probably the most important one that I will speak to today. It would change the word "and" to the word "or", which seems minor. However, the effect of that would be to ensure that

the two-step test, which is the Government's most controversial proposal in the bill, is removed. In effect, the amendment would remove any conditions that having a two-step test would impose. Some scenarios have already been mentioned, such as further offences that might be committed while someone is on bail or where there is a genuine risk that an offender will abscond or miss future diets—those are primary considerations. Currently, sheriffs and judges—rightly—routinely use those crucial factors.

I want to pay credit to Victim Support Scotland, which has been mentioned a couple of times already. Some of the other amendments that I have lodged in this group have been as a result of my working with it, and they should not be taken lightly.

Victim Support Scotland told us:

"It will be a concern to the public in general and victims of crime specifically that the provisions relating to bail narrows the court's discretion to refuse bail. That is, no doubt, with the intention of reducing the prison population."

The Scottish Police Federation said in its written evidence that the proposals would be

"as unwelcomed by communities plagued by repeat offenders as they will be to Police Officers who work tirelessly to keep these communities safe."

Amendment 56 would broaden the scenarios in which an individual can be refused bail. I do not think that we should be forcing our courts into a situation in which they believe that an offender could be a risk but, due to a technical interpretation of the legislation, would have to release them anyway.

Lord Carloway is absolutely right: the judiciary knows best in that regard. That is my view, too. Indeed, over a number of months, if not years, I have heard from the Government that it relies heavily on the independence of the judiciary and that ministers should not meddle or interfere with it. That is generally the response that I have received to most questions that I have put to justice secretaries historically. If the Government truly believes that the judiciary is independent, let it remain so.

Amendment 58 would give the courts further discretion on the ability to remand someone into custody if they think that there is a substantial factor in justifying that—and they would have to justify that. The amendment replicates the wording of an existing provision in the Criminal Procedure (Scotland) Act 1995, which judges and sheriffs have already used to good effect. It adds extra flexibility. The amendment says:

"insert—

<( ) due to any other substantial factor which appears to the court to justify keeping the person in custody.>"

That is reasonable and proportionate, and it certainly makes sense. In that regard, I also support amendments 2 and 33 on the basis of Katy Clark's explanation.

The bill must also give—this is where there is room for improvement, which I hope that the cabinet secretary is open to—judges and sheriffs the discretion to use, if the new test is applied, the absolute power to take into account all relevant factors.

I was slightly nervous about the language that the cabinet secretary used when speaking to group 1. She was more explicit than her predecessors in saying that the bail test is "more focused" and therefore might

"reduce the use of remand."

I am not entirely sure what "more focused" means in that context—does it mean more restrictive, perhaps? The answer to that is yes. What does the cabinet secretary mean by "more focused," and does she believe that that will tie the hands of judges? If not, why not?

I will discuss amendments 61 and 62 separately. They were drafted in conjunction with Victim Support Scotland. I am pleased and proud to work with it, because it represents the voice of victims—not in all cases, but in many cases. Amendment 61 aims to ensure that, when a court is considering a matter of public safety, it

"must request the prosecutor or officer of the local authority to provide the information"

that is pertinent to the consideration of public safety. The amendment does not use the word "and"; it uses the word "or".

In my experience—and the cabinet secretary rightly acknowledged this during an earlier group of amendments—the Crown agent who is there on the day is often the best source of information. However, I also appreciate that they are extremely busy. There is often only one advocate in the court, who has a large number of cases to get through, and, when they are asked to provide information in real time, they struggle due to the sheer volume of information that is made available. That is the case on a Monday morning, in particular, if someone has been remanded into custody over the weekend. There is a lot of pressure to get a huge amount of information together for a Monday morning court hearing, and it is possible that not all the information will be there on the day.

The Crown has to make a judgment about whether to oppose bail, and it is on that point that further intervention could better take place. There could be improvements at that level on whether the Crown simply does not oppose bail. Normally, in those circumstances, it would be very bizarre for

the judge to remand someone if the Crown has not opposed bail.

Pauline McNeill: Will the member give way?

Jamie Greene: Yes, in one second.

Giving the Crown more information in advance of that point in the proceedings would mean that it would be up to the judge or the sheriff, as is rightly the case. The way to do that is to better inform the Crown agent; the way to do it is not to restrict the parameters by which judges make such decisions.

Pauline McNeill: Jamie Greene referred to a very important point that the committee examined. In fact, members of the committee specifically put that matter to the Crown Office.

We heard evidence previously that, if a case is marked to oppose bail, the procurator fiscal who is in court cannot depart from that because of the centralised marking system. I need to put on record that the Crown Office said that that is not the case. However, that is what we had heard, and, when we did, we wondered why there does not seem to be flexibility. I wanted to amplify what Jamie Greene said, because it is important to consider that.

Jamie Greene: The Crown agent should be given flexibility to change their mind on the day—notwithstanding what it says in the centrally marked papers—if further information that is relevant to the complainer or the victim comes to light during proceedings, and many of us have tried to insert that into the bill through amendments. The Crown might choose to oppose bail on the day, and it should have that power and flexibility. Whether or not the agent has the confidence and experience to do so is an entirely different matter; as we know, that is a whole other kettle of fish. Equally, the Crown might choose not to oppose bail, given further information that comes to light up until the point of the hearing. We know that they rattle through cases speedily on the day—there are many cases to get through—so I am not entirely convinced that everyone is in receipt of all the information that is needed.

Amendment 62 takes it a little bit further, because it says that the prosecutor

"must give the court opinion as to any risk of something occurring"

so that the court can make a consideration on what the impact of granting an offender bail would be.

In essence, all my amendments seek to strengthen the process so that victims' rights are at the heart of decision making. As drafted, the bill does not do that. I hope that the Government will be open to that, because I am not the only one asking for it. It is not only the judiciary that has voiced concerns; victims organisations have as well. They are on the record as saying that—it is all in the stage 1 report and in the evidence that the committee received.

I am happy to look at amendments 61 and 62 if they are problematic on a technical level. That is absolutely fine, and I am willing to talk to the cabinet secretary about that. However, my other amendments in the group would give judges the flexibility that they need; it cannot be an "and" situation. The new two-step test will tie the hands of judges. It is up to the Government to explain why it does not.

I will let other members speak to their amendments in the group.

10:45

Russell Findlay (West Scotland) (Con): I have two amendments in the group—amendments 57 and 59. I would probably have had more, but Katy Clark was quicker off the mark than I was. I thank Victim Support Scotland for its assistance in helping with the amendments.

I would like to take the discussion back to what section 2 is about. It has the heading, "Determination of good reason for refusing bail". In essence, the bill narrows the grounds on which a sheriff can remand someone in custody. Bail should be granted unless it is

"in the interests of public safety"

not to do so. We have already heard evidence about the lack of a legal definition of "public safety". Some people have told us that that is problematic and that it will lead to all sorts of appeals, while others have said that it will not be much of a problem. We do not really know.

The other criterion for refusing bail is the existence of

"a significant risk of prejudice to the interests of justice."

That is a more well-known and well-defined legal term. However, Katy Clark's amendments, Jamie Greene's amendments and my amendments try to be a bit more explicit.

I will take them in turn. My amendment 57 would give a sheriff the option of refusing bail if the individual in front of them was considered to present a risk of absconding. There is an obvious benefit to the interests of justice in people not disappearing and causing chaos with cases, disruption for witnesses, extra costs and all the rest of it. It is important that amendment 57 sets that out in black and white.

We heard evidence from the Scottish Police Federation, which warned that people who faced certain charges in relation to which a secondary conviction could result in a much higher tariff might

be more inclined to disappear. Ergo, there is a need for amendment 57 to set out that risk in black and white.

The Crown Office and Procurator Fiscal Service supplied us with evidence that suggested that limiting the use of remand in the way that the bill proposes would not be good for the efficient running of the court and could cause disruption to victims and witnesses. It is also worth putting on record that the previous cabinet secretary admitted that there were legitimate concerns in that area.

Amendment 59 is similar to amendment 57 in that it proposes that the sheriff be able to take into account past bail breaches. If someone who is in front of a sheriff has a long track record of breaching bail, including not turning up in court, as they were supposed to do, it stands to reason that the sheriff should be allowed to consider that. The cabinet secretary might tell me that that is covered by "the interests of justice" provision; I do not know. Amendment 59 is partly a probing amendment. However, if section 2 does not cover that, or if there is any doubt, I think that what is proposed in amendment 59 should be included in the bill. The same issues exist with bail breaches as exist with absconding.

Jamie Greene: One of the problems with the provisions in section 2 relating to "public safety" and

"prejudice to the interests of justice"

is that the lack of definition means that they can be interpreted differently. In speaking to my amendments, I suggested that the bill will lead to a narrowing of the rule on when remand can be used, which will mean that fewer people will be held on remand.

However, is it possible that the obverse could be the case—that, because "public safety" is not defined, the interpretation of

"the interests of public safety"

could be so wide that more people could be remanded, which is entirely counter to the Government's ambitions?

Russell Findlay: I think that we heard evidence to that effect, but I cannot recall from whom. The lack of clarity could cause a sheriff to err on the side of caution and be more cautious than they otherwise would be. That is why our amendments, which lay out some of the serious issues that sheriffs should take into consideration, are needed.

Something else that Jamie Greene said, which is worth repeating, is that we have had no evidence whatsoever that sheriffs are overremanding, which is the phrase that he used. It is worth remembering that the default position is that bail will be granted unless there are reasons—whatever those might be—not to grant it. That is important.

There is also the more fundamental issue of judicial independence. I understand that, with regard to anything that relates to judicial decision making, although it is entirely right and proper that the Parliament legislates, we must be mindful that we do not overly restrict sheriffs in their ability to make good decisions.

I return to amendments 57 and 59, specifically. Such considerations are routinely used—similarly to what is set out in Jamie Greene's amendments. Part of the emphasis of the Scottish Government's bill is on a court's ability to consider good information, which can be achieved through the involvement of criminal justice social work. No one disagrees with the importance of the court being as fully informed as possible, but, by the same rationale, sheriffs should not be restricted with regard to how they make decisions and on what grounds. Therefore, the more explicit options they have the better.

Pauline McNeill: I begin by saying that Jamie Greene's opening remarks on his amendments in this group put the matter really well. When we first started to look at the question of remand generally and questioned the then cabinet secretary about our concerns, the response that we got was that we could deal with some of those concerns in the Bail and Release from Custody (Scotland) Bill. We will deal with the issue of section 23D of the 1995 act later, so I will not address that now.

The committee has taken time to try to understand why the remand population is as high as it is, because that is of concern to everyone. However, I agree with Jamie Greene that further examination tends to suggest that that might not be anything to do with the provisions in the current legislation but is for other reasons. I am sure that we will continue to examine that.

Jamie Greene: Will the member take an intervention?

Pauline McNeill: Yes.

Jamie Greene: Thank you. I forgot to mention the lack of data that is available to us throughout the process, and you have just prompted my memory. That is a real issue. We should be making legislation that is driven by good data, by which I mean relevant qualitative and quantitative data. The biggest problem that we had was understanding what the prison population looks like. Are people there for too long? What types of crime profiles are people in prison for?

If a pattern emerged—for example, that people who had committed quite low-level crimes had

been remanded—there would be valid questions to ask of the judiciary about their decision making using the current bail test. However, we did not have such evidence presented to us, and there certainly were no patterns emerging, other than that we know that there are delays to eventual trials. There is a lack of positive information to show that the current rules do not work and are leading to a high remand population, which is why we are so nervous about the change to the bail test. We are not opposing it for the sake of opposing it.

Pauline McNeill: Jamie Greene puts that really well. That is where we started out, and it is where we are now. We are having to drill down into the details of the new test so that we are satisfied, which is one of the points that I now want to address.

On the new bail test, one view—to take another point that Jamie Greene made—is that we need to trust the judiciary to an extent within the parameters of the law to make the right decisions, and we set the parameters in the law. However, with regard to the new bail test, the bill clearly states that bail can be refused if the court determines that that is necessary

"in the interests of public safety, including the safety of the complainer from harm".

I feel that that speaks to some of the concerns of victims organisations.

The other part of the test is that bail can be refused

"to prevent a significant risk of prejudice to the interests of justice."

My reading of that provision would partly address the amendments in Russell Findlay's name, which probe how prescriptive we need to be in that regard, and rightly so. It seems to me that that provision could cover the concerns of victims organisations, depending on how it is interpreted.

I will finish on a point that is similar to one that I made in the debate on the previous group. We have the judiciary asking for a definition of "public safety", which leads me to be a bit concerned that there is no common understanding of what that provision is expected to do. The Government needs to be clear with us about that; otherwise, I feel that we need to be more prescriptive to ensure that the provisions are commonly understood by the people who will make the decisions.

Angela Constance: I will speak to amendment 55 and the other amendments in the group. There is a wide range of amendments that seek to do different things, so it will take a little time to explain why the Government opposes the amendments, and I hope that you will bear with me.

There are amendments that seek to expand the circumstances in which remand can be used by the court, some of which would potentially significantly widen the basis on which remand might be used even in the current system, let alone under the proposed framework that is envisaged by the new bail test in section 2. It is, of course, in respect of the current system that the committee called for a reduction in the use of remand. The relevant amendments run counter to the Government's policy to narrow the focus of the bail test so that remand is kept as a last resort, either when there is a risk to public safety, including victim safety, or there is

"a significant risk of prejudice to the interests of justice."

Amendment 55, in the name of Katy Clark, would remove the new bail test that is proposed in the bill. If we are committed to ensuring that remand is a last resort reserved for cases in which it is really needed to protect the public and victim, or to safeguard the interests of justice, it is important that members reject amendment 55.

Jamie Greene's amendment 56 would expand significantly the court's ability to remand an accused person under the current bail test. It would have that effect as a result of separating the two requirements of the new bail test to make them alternative rather than cumulative. The effect would seem to be that the court would remand an accused person where one or more of the grounds listed in section 23C(1) of the 1995 act was established, or where there was a risk to public safety or

"a significant risk of prejudice to the interests of justice",

as is set out in proposed new section 23B(1A) of the 1995 act. An accused person who posed no risk to public safety or to the delivery of justice could therefore be remanded solely on the basis that

"at least one of the grounds ... in section 23C(1) applies".

Jamie Greene: That is only on the assumption that the provision states that the court "must" remand. Section 2 of the bill says that

"The court may determine that there is good reason for refusing bail only if it considers that"

one of the grounds in section 23C(1) applies and that the new bail test that the Government has introduced via the bill is met. The interpretation is interesting—my understanding of the changing of "and" to "or" is that we would either revert to the status quo under the 1995 act or we would simply afford the court the flexibility to make an and/or decision. If replacing "and" with "or" is the wrong way to go about that, the Government could suggest a better way. The provision states:

"The court may determine ... if it considers",

so there is no "must" about it. There is no absolute that weakens the current remand test or expands it in any way.

11:00

Angela Constance: I have spelled out my real concern—and, indeed, the Government's concern—that a direct impact of separating the two requirements of the new bail test and making them alternative rather than cumulative—it would help if I could say the word—would be a significant expansion of the court's ability to remand under the current bail test. That is where our nervousness arises—that this is not a step forward but a step back.

Amendment 58, in the name of Jamie Greene, also seeks to expand the use of remand by inserting a catch-all provision into the new bail test to enable the court to refuse bail where it considers that necessary

"due to any other substantial factor which appears to the court to justify keeping the person in custody."

The amendment would give the court a broad discretion to refuse bail, as long as one of the grounds in section 23C(1) of the 1995 act applied.

Another amendment that seeks to expand the use of remand is amendment 59, in the name of Russell Findlay. It would expand the reasons for which the court may consider it necessary to refuse bail—

Russell Findlay: Will the cabinet secretary give way on that?

Angela Constance: If you let me finish this paragraph, I certainly will.

Mr Findlay's amendment would expand the reasons for which the court may consider it necessary to refuse bail to include the phrase

"because the court considers it likely the accused person will breach their bail conditions".

It is the Government's view that the amendment is not necessary, because the new bail test already ensures that the court can consider the impact of such breaches of bail.

Russell Findlay: I just wanted to make the point that the intention behind the amendment is not, as I think was said, to increase the use of remand. It is to give sheriffs as much information as they can get and to give them the flexibility to make the best possible decisions in order to protect the public.

Angela Constance: I appreciate that, Mr Findlay, but the point that I am earnestly trying to make is that it is not necessary.

Furthermore, the amendment would also have the effect of broadening the court's discretion to refuse bail. It would allow the court to refuse bail where one of the grounds in section 23C of the 1995 act applied and the court considered that there was a risk that any bail condition would be breached, whether or not there was a risk to public safety or the delivery of justice.

Jamie Greene: Will the cabinet secretary give way?

Angela Constance: Of course.

Jamie Greene: I appreciate your taking all these interventions—it is a good debate.

What is the Government's fundamental problem with the court having additional options? Under its wording, amendment 58 proposes that the court may consider refusing bail

"due to any other substantial factor which appears to the court to justify keeping the person in custody."

It is the "justify" bit that is important, because, when a judge or sheriff decides to remand someone, they must give a valid and justified reason for doing so. Equally, the person in question has the right to appeal the decision. Why does the Government believe that courts should not have that power? The case has not been entirely made.

Angela Constance: At the risk of stating the obvious, I say to Mr Greene that it is Parliament's job to make legislation, and legislation either gives very wide powers or places some restrictions on the decision-making powers of independent agents—in this case, for good reasons of victim and public safety. It is, of course, the job of judges to interpret law, but we have to make this law on the basis of our all agreeing that, although there is always a place for remand, remand figures are too high overall.

There are many factors contributing to that situation, some legislative, some cultural and some relating to policy and practice—indeed, we have been engaging in the debate about resources—but the bill is built on the acknowledgement that remand, which should be a very short time in custody, is largely, though not always, ineffective; does not reduce but actually increases reoffending; and, as a result, increases the risks to victims and community safety.

We all broadly agree on that and on what we are trying to achieve. At the risk of being less than diplomatic, my concern about some of the amendments, although well intentioned and about further scrutiny, is that their effect would undermine the overall approach of the Government's policy and what we are trying to achieve.

Amendment 31, in the name of Katy Clark, may seek to widen the use of remand by adjusting the

new bail test. However, we do not think that it does, as the new bail test already covers the situation that the amendment seems intended to address. The court can refuse bail to an accused person on the basis that they pose a risk to public safety. In addition, the current law requires that the court must consider the extent to which the public interest could be safeguarded by the imposition of bail conditions in the event that bail were to be granted. The bill does not change that. That includes the use of electronic monitoring.

Katy Clark's amendment 32, which relates to the intimidation of complainers, witnesses or others and the definition of the phrase

"prejudice to the interests of justice",

would not have any practical effect, other than add to possible confusion on the bail test. The risk that an accused may interfere with witnesses is already one of the listed grounds for refusing bail. The definition of

"prejudice to the interests of justice"

under proposed new section 23B(9) of the 1995 act includes

"the course of justice ... being impeded or prejudiced as a result of ... the giving of false or misleading evidence, or the quality of evidence, or its sufficiency in law, being diminished."

Of course, that would be the intended effect of witness or complainer intimidation.

Amendment 57, in the name of Russell Findlay, which seeks to amend the new bail test in relation to an accused person absconding, is unnecessary. Under the new bail test, in determining whether there is a good reason for refusing bail, the court must consider that at least one of the grounds in section 23C(1) of the 1995 act applies. Section 23C(1) already includes the grounds of there being any substantial risk that the person might abscond if granted bail. The risk of an accused person absconding is also covered within the meaning of

"significant risk of prejudice to the interests of justice",

for the purposes of the courts' determination as to whether that ground has been established in order to justify remand. The bill provides that the definition of

"prejudice to the interests of justice"

includes

"the accused person evading justice as the result of the proceedings being delayed or discontinued",

which, of course, would be the effect of a person absconding.

Katy Clark's amendment 2 would remove the limitation on the use of remand where the accused poses a risk of failing to appear in court. Under the bill, in summary proceedings, the court can consider the failure-to-appear ground in only two scenarios. The first is if the accused has failed to appear at a previous hearing of the case, having been granted bail or ordained to appear. The second scenario is that the charge in respect of which the accused is appearing before the court is a failure-to-appear offence. If neither of those situations arises, the ground cannot be used to justify a refusal of bail.

Those restrictions do not apply in solemn cases. The restriction for summary cases in the bill, which amendment 2 would remove, is a proportionate step in minimising the use of short periods on remand pre-conviction, while ensuring that summary courts retain the power to remand those who are considered to pose a risk to the delivery of justice.

Amendments 33 and the consequential amendment 34 would make changes to section 2(3), should amendment 2 not be agreed to. The amendments, which would replace the reference to "relevant diet" in the bill, are not necessary. Although their effect is somewhat unclear, the amendments seem to be based on a view that the definition of "relevant diet" does not cover all court hearings at which an accused may potentially fail to appear. However, the definition covers all court hearings, so the amendments are not needed.

Amendment 30 seeks to define the concept of public safety for the purposes of the new bail test. I do not think that a definition is needed and I am of the view that providing one would carry significant risk, as was acknowledged in the committee's report and discussed at stage 1.

The words "public safety" have been part of bail law since 2007, and I am not aware of any cases in which the lack of a statutory definition has caused an issue. The bill does not include a statutory definition of public safety, and it is the policy intention of the bill that it is for the courts to continue to interpret and apply the term in the same way as they have been doing until now, by giving the words their ordinary meaning. It is common practice not to include statutory definitions in legislation when the ordinary meaning is intended to apply.

I have highlighted the risk of providing a definition; I have concerns about the definition that is offered, too. Paragraphs (a) to (c) in amendment 30 specify examples of behaviour by the accused that might indicate a risk to public safety. Although those examples might be said to be broadly in line with our understanding of the term, by listing things to be included in the meaning of public safety, the term itself could end up being construed too narrowly by the reference to that list. The reverse could also be true, with a broader definition being applied than is otherwise intended.

A definition could create uncertainty. For example, in relation to the proposed definition, it is unclear what amounts to being

"known to demonstrate aggressive, abusive or antisocial behaviour",

as set out in paragraph (a). There is uncertainty, too, about the terms that are used in paragraphs (b) and (c). Amendment 30 also widens the concept of public safety beyond its ordinary meaning to include mere "likelihood to re-offend", with no link to public safety being needed.

Amendments 60 and 64 would insert a regulation-making power that would require ministers to

"set out ... the meaning of ... 'public safety'".

A statutory definition of public safety is not necessary and is not without risk, whether it is provided in the bill or done through regulations.

Amendment 63 would require the Scottish ministers to

"consult ... about the impact of the public safety test"—

which forms part of the new bail test—and to publish a report relating to that consultation.

I have lodged amendment 8, to which we will come later, which will require the Scottish ministers to publish a report on data relating to bail and remand. That is, in my view, the appropriate approach to follow instead of focusing a report on the impact of an individual element of the bail test. Bail decisions are based on the individual facts and circumstances of each case and are made independently by the court; as such, a precise measure of the impact of the public safety test would be impossible to deliver.

Lastly—with thanks to the committee for its forbearance—I come to Jamie Greene's amendments 61 and 62. Amendment 61 would require the court to ask

"the prosecutor or officer of the local authority to provide the information"

relating to public safety that was proposed in amendment 52. In our consideration of the previous group, I set out concerns about statutory provisions in the area that amendment 52 covers; the same concerns apply here, which relate to the deliverability of, and appropriateness for, such a significant expansion of the role of justice social work.

Similarly, I set out in response to Liam McArthur's amendments 50 and 51 that the prosecutor can, and routinely does, make submissions to the court on the question of bail. As part of that, the prosecutor can, and should, reflect any victim safety concerns that the prosecutor considers are present, for the court to be aware of. As I said on the previous group, I am open to further discussion with Mr McArthur and others.

Amendment 62, in the name of Jamie Greene, seeks to require the prosecutor, the defence or justice social work to provide an opinion on risk in order that the court may consider public safety matters in accordance with the new bail test.

11:15

The 1995 act, if it is amended as the bill proposes, will ensure that it is for the relevant party—the prosecutor, the defence or justice social work—to decide whether to give the court an opinion as to any risk of something occurring, or any likelihood of something not occurring.

Jamie Greene: I am trying to get my head around something. The bill clearly wants to offer the court as much information as possible, and it proposes to do that by allowing criminal justice social work to be given a bigger role in providing information about the offender.

All the amendments in this group are also trying to give the court as much information as possible, but about the complainer or the victim, and yet the Government has rejected every amendment that seeks to find a way to do that.

My question is simple. If there is a mechanism in the bill to allow more information, from whatever source, to be given about the offender's situation, how on earth do we get more information about the victim or the complainer to the court, given that there is no mechanism for doing so?

Angela Constance: I indicated earlier—in relation to the amendments in and around justice social work, for example—my willingness to have further discussions, whether that is on legislation or non-legislative approaches.

I know that we have not yet got to these matters but, with regard to reporting, I am willing to ensure that we have the right reporting mechanisms that can give us some facts, in particular through the use of data to help our understanding. I hope to do that in a way that is comprehensive, and through a more collective approach, because—this is not meant disrespectfully—if it is done sporadically across various amendments from different parties, the result could be less than cohesive.

There is another factor to bear in mind, which gets to the core of Mr Greene's concern. It is about risk, and how all the players—the prosecution, the defence and justice social work—take information and evaluate the risks, and come to a judgment about those risks, whether to victims or to the public more generally.

The bottom line is that risk is appropriately a matter for the court, because it will adjudicate on that when it makes its bail decision. Of course, it is also a matter for the individual players, whether those are justice social workers or the prosecution, who will provide information that is based on an understanding of risks or potential risks.

Those are matters of professional judgment, and they are quite difficult, if not near-impossible, to legislate for in the bill, but there are other ways in which we can tackle the issue—for example, through other aspects relating to the bill such as standard operating procedures, risk assessments or throughcare standards. It is not due to a lack of willingness on my part.

In conclusion, for the avoidance of doubt, I ask members not to press or move their amendments in this group. If they do so, I ask members to vote against them.

The Convener: I call Katy Clark to wind up and say whether she wishes to press or withdraw amendment 55.

Katy Clark: I do not intend to press amendment 55 to a vote or to move any of the other amendments in my name in this group. The amendments have been lodged in an attempt to clarify the Scottish Government's thinking, given that, during the discussions on the bill, it has been unclear which groups of accused who are currently remanded would get bail after the bill's passage. The cabinet secretary has been clear that her intention is to reduce the remand population.

Throughout the bill process, we have been told that it is an attempt to refocus bail law. What has been less clear is what the law will be refocused to. Some of what the cabinet secretary has said has helped to clarify what the Government is trying to achieve. However, it is still not clear which currently remanded groups would get bail if the bill passes. From what has been said, they seem likely to fall into the category of risk of prejudice to the interests of justice rather than public safety. The amendments have attempted to explore that.

I am not satisfied that we are absolutely clear that how the bill has been drafted means that the law as changed would satisfy the range of responses that the courts need to ensure that we can get convictions safely. In cases where somebody is charged with a serious offence but the nature of the offence means that they are not a risk to anybody else—for example, the only risk would be that they would never appear in court again—the bill as drafted would put us in a better position than we are in now.

I am interested in hearing more from the cabinet secretary over the coming period about the fear of flight area, and I would like an indication of the kinds of accused who are currently remanded and to whom bail will be granted under the bill, so that we can scrutinise whether that is genuinely in the interests of justice.

I am grateful for what the cabinet secretary has said. She has made it very clear that her intention is to reduce the remand population. The question that the committee has is: what categories of those who are currently remanded would it be safe to allow the opportunity of bail? I look forward to further consideration of that issue. I do not intend to press any of my amendments to the vote today.

Amendment 55, by agreement, withdrawn.

Amendment 56 moved—[Jamie Greene.]

The Convener: The question is, that amendment 56 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Clark, Katy (West Scotland) (Lab)
Findlay, Russell (West Scotland) (Con)
Greene, Jamie (West Scotland) (Con)
McNeill, Pauline (Glasgow) (Lab)

Against

MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Nicoll, Audrey (Aberdeen South and North Kincardine) (SNP)
Stevenson, Collette (East Kilbride) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

As there is an equality of votes, as convener, I use my casting vote to vote against the amendment.

Amendment 56 disagreed to.

Amendments 57 and 31 not moved.

Amendment 58 moved—[Jamie Greene.]

The Convener: The question is, that amendment 58 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Clark, Katy (West Scotland) (Lab)
Findlay, Russell (West Scotland) (Con)
Greene, Jamie (West Scotland) (Con)
McNeill, Pauline (Glasgow) (Lab)

Against

MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Nicoll, Audrey (Aberdeen South and North Kincardine) (SNP)
Stevenson, Collette (East Kilbride) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

As there is an equality of votes, as convener, I use my casting vote to vote against the amendment.

Amendment 58 disagreed to.

Amendments 59, 30, 60 to 62, 32, 63, 64, 2, 33 and 34 not moved.

Section 2 agreed to.

The Convener: We will take a short break. I ask members and others to be back in the room by 11:40.

11:27

Meeting suspended.

11:40

On resuming—

Section 3—Removal of restriction on bail in certain solemn cases

The Convener: We move to section 3, on the removal of the restriction on bail in certain solemn cases.

Amendment 65, in the name of Pauline McNeill, is in a group on its own.

Pauline McNeill: Amendment 65, which would leave out section 3, is a probing amendment, because I would like some clarity about what that section does and what its purpose is.

Section 3 seeks to repeal section 23D of the Criminal Procedure (Scotland) Act 1995, which restricts the granting of bail in certain solemn cases. The section currently provides that bail is granted only in "exceptional circumstances"—if the accused is being prosecuted in solemn proceedings for a violent, sexual, or domestic abuse offence or a drug trafficking offence, or if they have a previous conviction under solemn procedure for any such offence. Those provisions are quite clear.

There is quite a bit of support for the removal of section 3, particularly among some members of the legal profession. In our stage 1 report, we quoted what the Law Society of Scotland told the committee:

"At a practical level, if, say, a 45-year-old man is accused of a domestic violence offence and he had a conviction on indictment for domestic violence 20 years ago, the court would not be allowed, in principle, to grant bail, unless the exceptionality test was met. If, on the other hand, that 45-year-old man had half a dozen convictions in the past three years but all on summary complaint, section 23D would not kick in."

The Law Society went on to say that section 23D

"is a pretty arbitrary, one-size-fits-all kind of solution".

Fred Mackintosh KC, speaking on behalf of the Faculty of Advocates, expressed a similar view that section 23D should be repealed because it is unnecessarily restrictive on the courts, and Sheriff David Mackie of the Howard League supported the removal of section 23D as he felt that

"The provisions in the bill provide sheriffs and judges with all the discretion that they need to address the concerns of victims."—[*Official Report, Criminal Justice Committee,* 18 January 2023; c 18-19; 19; 42.]

When I read section 23D, I felt satisfied that, with the new bail test, the provisions were sufficient to allow the court to protect the safety of the complainer, and I think that that is the view of the committee's adviser. However, the cabinet secretary will be aware that a number of victims organisations have urged the retention of section 23D because they are not satisfied of that.

One thing completely threw me, which is the reason why I am seeking further clarity on why the Government wants to repeal section 23D. When the committee carried out post-legislative scrutiny of the Domestic Abuse (Scotland) Act 2018—which happened after we had closed our stage 1 report for this bill—we became aware that the subsection in section 23D referring to domestic abuse had been inserted into the 1995 act only in 2018. Had I been aware of that during stage 1, I would have asked the Government why it is seeking to repeal something that went into the legislation only in 2018. I was not on the committee at that time, so I do not know the background, but I believe, from checking with the Scottish Parliament information centre, that that happened through a Government amendment.

I think that we require at least some explanation before we consider taking something out of legislation only five years after it was put in. I am interested in finding out, before stage 3, what happened in the intervening four-year period. I do not expect the cabinet secretary to be able to tell the committee that today, but I would like to know whether there is some concern about the operation of that provision or whether it is just being swept up because the other aspects of section 23D are too restrictive for the courts.

I am open-minded about it and not taking one view or the other, but I want to speak for the victims organisations that do not think that that provision is covered. That is what gave me cause for concern, and I would be grateful for some clarity around it.

I move amendment 65.

11:45

Jamie Greene: I thank Pauline McNeill for lodging amendment 65. As she said, the amendment was one of a number of proposals from victims organisations, and I think that the rationale has been quite well explained. Those organisations have some nervousness about the matter.

When we took evidence on the proposal, there were two schools of thought, which were expressed publicly and in private. It seems that the legal profession is keen to see the removal of section 23D of the 1995 act, which it feels is problematic. I wonder whether the Government had discussions with the Crown, solicitors and the judiciary on the issue, as such discussions might underlie the rationale for removing section 23D. Equally, the perception of a number of organisations was that its potential removal is worrying—they feel that section 23D is a valid safety net, particularly for those who are at risk of domestic abuse and sexual crime.

Victim Support Scotland got in touch with a number of members, seeking to remove section 3, which will abolish section 23D. It is important that I put that organisation's claims on the record because I would like the cabinet secretary to address them. Victim Support Scotland's perception might be an error, but I want to give the cabinet secretary at least the opportunity to alleviate its concerns. Its interpretation is that the proposal to remove section 23D would

"allow bail to be granted to convicted repeat and serial perpetrators of domestic abuse and sexual offending against women and who present a particular danger to women's safety."

It went on:

"Given women's experiences of abusers being given bail, including the lived experience of survivors given in evidence to the Criminal Justice Committee, women need as much protection as the law can afford them. The safety of victims should be at the heart of any decision to release a person on bail, so the removal of this restriction and reliance on the new all-encompassing bail test does little to show victims of these types of crime that their safety is being protected under the law".

Those are Victim Support Scotland's words, not mine. I do not want to put words into anyone's mouth or even take a personal view on the issue, but there is a case to be answered around the removal of section 23D, and amendment 65 gives us the opportunity to have that debate.

Angela Constance: Before I go through my speaking note and make the remarks that I need to put on the public record, I will respond to Pauline McNeill's point about the committee's post-legislative scrutiny of the Domestic Abuse (Scotland) Act 2018. I put on the record that I have obviously received the work that the committee has done in that regard, and I very much welcome it. I will seek to respond once I have had the opportunity to discuss the detail with our justice partners. However, my intention is to respond to the committee as much as I can prior to stage 3, because I think that that would be helpful. Pauline McNeill also asked why we are removing section 23D now. This is taking place in the broader context of our work with partners on remand issues.

I will now speak directly about Pauline McNeill's amendment 65, which seeks to remove completely section 3 of the bill. As we know, section 3 repeals section 23D of the Criminal Procedure (Scotland) Act 1995. The amendment would mean that the current restriction on bail in section 23D would continue to apply alongside the newly proposed bail test that is set out in section 2 of the bill. I understand that the amendment has been lodged because of concerns that have been expressed that the repeal of section 23D could put victims of violent crime, domestic abuse and sexual offences at greater risk of harm. It is entirely right to ask questions about the impact of the repeal, and I want to address them directly.

First and foremost, I want to reassure all victims of crime and those who tirelessly represent their interests that I am clear that remand will continue to play an essential role in protecting victims and the wider public. The bill does not change that. Public safety and victim safety are at the heart of the new bail test. As I have said, there are, of course, occasions when remand is absolutely necessary in order to protect victims from harm, particularly in cases of sexual or domestic abuse. The new bail test will ensure that that can happen.

The bill proposes to repeal section 23D for one simple reason, which is to ensure that the same core bail test applies in all cases. In its place, the new bail test explicitly highlights for the first time the importance of ensuring the safety of victims from harm. The bill not only does that but defines safety from "harm" as safety from both "physical or psychological harm" in recognition of the harm that is caused by threatening or coercive behaviour, which is an insidious feature of domestic abuse. That means that, when the court considers that an accused person poses a risk to public safety, including the safety of the victim—the type of person to whom section 23 currently applies—remand can be used. In fact, the proposed changes to the new bail test emphasise that.

I note that, as Pauline McNeill mentioned, there is strong support for the simplification measure among those who use bail law. It has been said that repealing section 23D gives the court improved, rather than reduced, discretion to fully consider the facts and circumstances of each

case, including the risk of harm that is posed to victims.

For all those reasons, I ask Pauline McNeill not to press amendment 65. If she does, I respectfully request that committee members vote against it.

Pauline McNeill: In relation to my earlier exchange with Jamie Greene, I note that, when we first examined the remand figures, the then cabinet secretary—I think—specifically referred to section 23D as one of the restrictive provisions and implied that that might have been one of the reasons why the remand figures were high. On close examination, although we do not have the figures, it does not appear that section 23D is used in many cases, so I am not concerned that it is increasing the remand population per se.

I do not want to pre-empt the cabinet secretary's response to our post-legislative scrutiny, but I wonder why the point about the domestic abuse provision was not even drawn to our attention by anyone, bearing in mind that the exceptional circumstances test relates to when there has been a previous analogous conviction. I thought that the cabinet secretary might address that in her remarks, but she did not. We are talking about people with analogous convictions—that means that, if the offence relates to drugs, the previous conviction must relate to that and not to a summary offence. I assumed that the fact that someone had a previous conviction made it more likely that they would cause harm or abscond and that that was why an exceptional circumstances test was built into the 1995 act. I am probing the issue, and the Government needs to set out what the equivalent of the exceptional circumstances test is.

As I said in my opening remarks, I am sympathetic to the Law Society's view in that the fact that someone has an analogous conviction from 20 years ago does not necessarily indicate that there is cause for concern. However, if the previous conviction was, say, five years ago, there might be more concern in that it might be more likely that the person will offend while on bail.

Jamie Greene: The point is echoed by the commentary from victims organisations. With serial or repeat offenders, there is a history. It might not necessarily be relevant to the case that is in front of the court when a decision has to be made about remand, but it might well be. I guess that the victims organisations seek some comfort and security that that will still be a factor somehow.

The question is how existing legislation or the bill provides for that and how we ensure that it does not remove the judge's ability to consider a pattern of behaviour—domestic abuse is a good example—and say that, because of that pattern, perhaps with other parties or previous partners, there might be a risk to the complainer in the case that is in front of them on the day. Is it technically possible and legal to do that? Is there a mechanism for that information to be made available to the judge when he has to make the remand decision?

The victims organisations have a valid concern. I am not sure whether the statement that has just been given will give them any comfort. We will not know until after the meeting, of course.

Pauline McNeill: Let us face it: it is a complex area of law, especially for us legislators to get our heads round when we are not practitioners. [*Interruption*.] Yes, cabinet secretary, please intervene on me.

Angela Constance: Sorry, convener, it is a long time—five years—since I have done stage 2, and I was unsure whether I was permitted to intervene, being a guest of the committee and the person under scrutiny.

I want to give some clear reassurance to Pauline McNeill and Jamie Greene. Perhaps I did not mention it earlier because, for me, it is stating the obvious, but previous convictions are, of course, a consideration. People will come to a judgment—whether it is the justice social worker, the prosecutor or the court itself, which will be the final arbiter—on the significance and relevance of previous convictions. They are a fundamental part of any assessment of any alleged offender in any circumstance. I hope that that is helpful.

Pauline McNeill: That is the point that we needed to get to, so that is helpful. The question is what the equivalent would be of "exceptional circumstances". I think that we are suggesting that the current test means that it would be that the information that was before the sheriff would include previous convictions and the sheriff would have to consider the matter under the umbrella of the provisions on public safety, including the safety of the complainer,

"to prevent a significant risk of prejudice to the interests of justice."

Angela Constance: Yes.

Pauline McNeill: Maybe that was obvious, but I do not like to take things for granted.

Members might recall that the committee sat through a case at the High Court in Glasgow in which the advocate had an uphill struggle to get over the hurdle of exceptional circumstances. There was a massive string of previous convictions and even we could see that there was no chance that bail would be granted in that case.

I politely suggest that the committee and, I imagine, victims organisations are looking for that

kind of reassurance for stage 3. I am not interested in introducing unnecessarily restrictive provisions for sheriffs making decisions, allowing them to use some discretion, but nor would I want to leave a gap if the organisations that have made representations to us still felt that the provisions left one.

Amendment 65, by agreement, withdrawn.

Section 3 agreed to.

Section 4—Refusal of bail: duty to state and record reasons

The Convener: Amendment 7, in the name of the cabinet secretary, is grouped with amendments 35, 66 and 36.

12:00

Angela Constance: I will speak to amendment 7 and the other amendments in the group. Amendment 7 seeks to address the concerns that the committee highlighted regarding the potential additional burden that might be placed on the courts by the recording requirements that are contained in section 4 while still ensuring that the core information that is required to monitor the use of remand by courts is recorded.

In particular, the committee asked the Scottish Government to revisit the recording requirements in section 4 in order that they be made less onerous. Amendment 7 responds to that request. As such, it narrows the recording duty in the newly proposed section 24(2AA)(b) of the Criminal Procedure (Scotland) Act 1995. It does so by removing the requirements for the court, when remanding an accused person in custody, to enter in the record of proceedings, first, where it relies on the failure-to-appear ground in section 23C(1)(a) of the 1995 act as the sole basis for remand and the reasons why it considers that that is necessary and, secondly, the reasons why it considers that electronic monitoring of bail is not appropriate or an adequate safeguard. However, the requirement on the court to verbally state those reasons when bail is refused remains unaltered.

The effect of the amendment is that courts would be required to formally record in the court minutes only

"the grounds on which it determines, in accordance with"

the new bail test,

"that there is good reason for refusing bail".

Turning to amendment 66, in the name of Rona Mackay, I have reflected carefully on the evidence that was given during stage 1 scrutiny. Special conditions of bail can help both with protecting the complainer from the risk of harm and by providing reassurance that any attempt by the accused to cause them harm would amount to a breach of bail and would allow the police to take action. That requirement was originally introduced in the 1995 act in respect of people accused of sexual offences, and I am persuaded that there is a good argument for extending it to cover those who are accused of domestic abuse or stalking, which are also offences in which the perpetrator singles out a specific victim.

By ensuring that the court must justify any action not to put in place additional protective conditions in those cases, the amendment will emphasise to the court the importance of appropriate special conditions of bail in cases of domestic abuse and stalking, and it will improve the transparency of court decision making. I ask members to support Ms Mackay's amendment.

Amendment 35, in the name of Katy Clark, seeks to make changes to section 4 of the bill by further amending section 24 of the 1995 act so that the court must state certain grounds and reasons for the granting of bail and have those grounds and reasons entered into the record of proceedings.

As I have mentioned, an expansion of the recording duty falling on the courts as a result of section 4 directly contradicts the committee's specific recommendations in this area. It asked the Government to revisit that section in order to reduce, not increase, the recording duty.

Amendment 35 would place an increased burden on the courts in a very large cross-section of cases that enter the system. That might require further information technology changes by the Scottish Courts and Tribunals Service and might increase the length of court hearings, with potentially very little analytical value. That is because there is an overarching legal presumption for bail, which should be refused only when there is good reason for doing so. As such, bail is, in effect, the default position.

With any requirement to provide reasons why bail has been granted, one could simply point to the legal requirement to do so—namely, that there is no good reason not to grant bail. The amendment would also require the court,

"in any proceedings in which a person is accused of an offence",

to explain certain things, including why

"the accused does not pose a risk to public"

or complainer safety. That is an extremely broad requirement that would apply to all cases that enter the system, not all of which would involve a public safety-related offence or an identifiable complainer.

More generally, it is already a requirement under existing bail law that, whenever the court grants or refuses bail, it must state its reasons for doing so. The bill does not change that. As such, the information that is listed in amendment 35 is information that the court may already verbally state in open court under that duty.

During stage 1, the calls for improved data gathering were generally focused on gaining a better understanding of remand. As such, and for all the reasons that I have outlined, I ask Katy Clark not to move amendment 35.

The final amendment in this group is amendment 36, also in the name of Katy Clark, which seeks to remove section 4 in its entirety, with the effect that the duty in that section on the court to state and record its reasons for refusing bail would not be introduced. Again, that contradicts what was said in the committee's report, so I ask Katy Clark not to move amendment 36.

The policy intent behind section 4 is to help to improve, over time, understanding of the use of remand and to emphasise the importance of its being used only as a last resort. The availability of richer and more detailed data on the use of remand was universally supported during stage 1 evidence-taking sessions, and amendment 7 would, if agreed to, address concerns that were expressed by the committee about the potential burden that the recording duty, as originally drafted, would place on the courts.

I move amendment 7.

Katy Clark: It might well be that the Government's amendment 7 deals with the issues that I have attempted to address in amendments 35 and 36. As I have said, amendment 35 was drafted after work with Victim Support Scotland, and it is also supported by Scottish Women's Aid, ASSIST, Rape Crisis Scotland and other organisations. It would be helpful to put on the record the reasoning behind that amendment and, indeed, amendment 36, which was drafted following discussions with defence agents. I would want to go back and have discussions with those organisations before the next stage of proceedings.

On amendment 35, as we know, the bill places a duty on the court, when bail is refused, to state the grounds on which it has determined that it has good reasons for doing so. Those reasons are to be entered into the record of proceedings. In that respect, I heard what the cabinet secretary said in relation to amendment 7.

However, the concern raised by Victim Support Scotland relates to issues of equality and rights to information for victims. Although it accepts that the bill as drafted will contribute to transparency of judicial decision making around bail and will, for that reason, be of benefit to victims of crime, it believes that the provisions need to go further by ensuring that written reasons for the granting of bail are provided, too. That will enable victims to have an understanding of the court's thinking.

Victim Support Scotland has said that, in consultation sessions that it held with Scottish Women's Aid, women and workers for local women's aid groups highlighted that the lack of information available to women explaining the court's reasoning was a common and repeated issue and a source of frustration and concern to them. The organisation has therefore argued that, to ensure consistency and transparency of decision making and proceedings for participants and to assist in the enforcement of bail conditions and safety planning for victims, the reasons for refusal must also be communicated in writing to the victim, particularly women experiencing domestic abuse. I think that we will look at electronic monitoring later, and Victim Support Scotland feels that similar provisions are required in that respect, too. Moreover, the organisation has pointed out the precedent in the 1995 act for the court to give reasons for making decisions on specific aspects of bail that would have an impact on a complainer, referring to section 24(2B) in particular.

I very much welcome the cabinet secretary's amendment, but I want to reflect further on the points that are being made by Victim Support Scotland and other organisations with regard to equality and the availability of similar information, whether bail is granted or refused.

The alternative position that I have put forward in amendment 36 came out of discussions with solicitor practitioners and, as I said, some practising sheriffs. They felt that the onerous nature of the provision and the added bureaucracy would involve more time but would lead to the same outcomes. Amendment 36 was lodged to remove the provision completely for the reasons that the legal profession has set out on a number of occasions and that are referred to in Lord Carloway's submission to the Scottish Government.

I will reflect on what the cabinet secretary said about the provision simply being a formal requirement. However, I want to look at issues around equality and whether the proposal meets the needs of victims. Therefore, I do not intend to push either of my amendments to a vote.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Amendment 66 relates to section 23D. For the record, I thought that we had a very useful discussion on Pauline McNeill's amendment 65, and I appreciate that the cabinet secretary took time to respond to that.

During evidence taking, I was really concerned about the removal of section 23D. We heard strong reassurances from the legal profession and others that it would not open up risk to victims of domestic abuse and stalking, but I felt that something needed to be put in the bill to strengthen those reassurances.

I was particularly struck by the evidence from Victim Support Scotland, Scottish Women's Aid and Speak Out Survivors, which highlighted to us the critical role that bail conditions play in what are uniquely pernicious crimes, both in the practical sense of protecting victim safety and in the wider sense whereby the right special conditions of bail can help a victim to feel safer and more secure.

The message that is sent out to victims is crucial, and I felt that that would be lost with the removal of section 23D, hence the reason for lodging amendment 66. It is really important that we strengthen the role of bail conditions in cases of domestic abuse and stalking.

Currently, when the court grants bail on standard conditions to a person accused of a sexual offence in either solemn or summary proceedings without imposing any further special conditions of bail, it must explain why it did not consider special conditions to be necessary. My amendment 66 would extend that existing duty on the court so that, when the court grants bail on standard conditions to a person accused of an offence involving domestic abuse or an offence of stalking, it must give reasons why no further special conditions of bail were imposed.

Adding domestic abuse and stalking offences to existing requirements for sexual offences cases will ensure that the court must justify any decision not to put in place additional protective conditions in cases in which a victim would feel especially threatened by the risk of further offending by the accused. That is where special conditions of bail are of particular importance. As such, I consider that the amendment is vital. It seeks to emphasise to the court the importance of the consideration of robust special conditions of bail in cases in which the complainer might have particular reason to be concerned about the risk of further offending by the accused, including domestic abuse or stalking.

Amendment 66 would also serve to increase the transparency of court decision making in this area, which, as we heard from those representing victims' interests during stage 1 evidence sessions, is of the utmost importance. As a committee, we have heard that many times. For those reasons, I ask members to support amendment 66.

Russell Findlay: Amendment 35, in the name of Katy Clark, which I have also supported, would require the court to record the reasons why it has granted bail. We are seeking parity of treatment, whereby the recording of reasons for refusal of bail are also provided.

Victims of crime are often taken aback or confused when they find out that someone has been granted bail in their case, and there are no means by which victims are told that that has happened or the reasons why. If that was recorded, it would be a much easier mechanism to provide that understanding and that equality with accused people.

12:15

Amendment 36, in Katy Clark's name, would remove section 4 entirely. We do not support that. It would reduce transparency for victims who already often struggle to get information from courts. Rather than get rid of that requirement, we need to improve it and make it more robust and more open to both sides in any case.

I understand that amendment 7, in the cabinet secretary's name, would restrict the grounds and reasons for refusing a person bail that the court was required to record. I seek confirmation of that from the cabinet secretary. We want to avoid the watering down of reasons for refusing bail, so it will be useful to hear from her exactly what will no longer be recorded under her amendment.

Jamie Greene: I thank my colleague for his comments. Amendment 35, in Katy Clark's name, is well drafted and important. There is a suggestion that it would increase the workload of the courts, and we are all a bit nervous about that. These are fast-moving hearings. However, there is a gap here, because victims are left in the dark as to why certain decisions are made. If we are going to make changes, which the bill does—whatever our views are on those changes—let us make changes that improve the information that is given to victims.

If bail is granted, it is entirely reasonable and rational for the appropriate reasons to be given. The court should set out the specifics of why it believes that the accused does not pose a risk to public safety—that is the new test, and it includes the safety of the complainer, which is important—and why it thinks, if relevant, that the accused can be appropriately managed through the imposition of bail conditions. We are looking at a scenario in which the courts say, "We have a new enhanced bail test but, on balance, we believe that the risk can be managed through, for example, enhanced bail conditions, and here are the reasons why we do not believe that this individual poses an immediate risk to the complainer and can therefore be released back into the community."

At the moment, the only recourse available would be for the complainer to make

representations to the Crown and ask for an appeal. There is no mechanism for the complainer to request that a reason be given for a decision, other than what has been said verbally in the court on the day, and to hear that, you would have to be there, which, for many complainers, would not be entirely appropriate. We all know the problems with getting records and transcripts of what has been said in court—it is a prolonged and expensive process.

Unless the Crown has been proactive in providing information to the complainer about why it thinks bail was granted, there is no real mechanism for getting that information. I do not want to add to the workload of the court clerks or to make the decision-making process more difficult for judges and sheriffs. However, if we are going to enhance the process by which reasons must be given for remanding someone, we should do the same for the contrary situation—we must give complainants more and better information when bail is granted. Accepting amendment 35 is one way of doing that, and things could be tidied up by the Government ahead of stage 3.

Equally, it would be a good outcome if the cabinet secretary said that she will take the matter away and work with members to see what can be done, but we need that commitment. Otherwise, if Katy Clark does not push this issue, someone else will.

The Convener: Would any other member like to come in?

Russell Findlay: The cabinet secretary mentioned the potential IT costs. What work has been done to quantify those costs? The issue sounds surmountable, and surmounting it might help in finding a way forward, as Jamie Greene has suggested.

The Convener: I will bring the cabinet secretary back in. She might pick up on those comments.

Angela Constance: Katy Clark and Jamie Greene mentioned the information that should go to victims. Information should, indeed, go to victims, and that should happen via the Crown Office and the victim information and advice team. If concerns exist about that not happening—members might have constituency cases, for example, or might have heard experiences from victim support organisations—I am happy to hear them.

Let me be transparent with the committee and say that there remains a question as to whether the solution can be found through legislation or through policy, organisational structures or, indeed, resources. I am happy to have a broader discussion about that point, but—without ruling anything in or out—the solution to the problem might not necessarily be legislation.

Russell Findlay: I just want to clarify something. My understanding is that, if a mechanism exists through the Crown Office or the VIA service to provide complainers with information on decisions about someone being bailed, that information would only be on whether someone had been bailed or remanded, with no detail provided beyond that.

Angela Constance: I am happy to go back and check that point, but my understanding—particularly after yesterday's debate about the trauma-informed justice skills framework that is to apply to all actors in the justice system—is that we need to give victims meaningful information. Although the information needs to address the facts of the matter on whether someone has been remanded or bailed, I do not think that it is unreasonable to expect people to be given some context about what was said in open court, bearing in mind that it might not be appropriate or desirable for the complainer to be present in court. The route to provide that information would be via the Crown Office. I am happy to have further discussions on that point.

On Mr Findlay's other point in relation to my amendment 7, I gave the reasons for refusal and will repeat them for the record—I apologise if people recall hearing them. Amendment 7 removes the requirements for the court, when remanding an accused person in custody, to enter in the record of proceedings, first, where it relies on the failure-to-appear ground in section 23C(1)(a) of the 1995 act as the sole basis for remand and the reasons why it considers that that is necessary and, secondly, the reasons why it considers that electronic monitoring of bail is not appropriate or an adequate safeguard.

Amendment 7 agreed to.

Amendment 35 not moved.

Amendment 66 moved—[Rona Mackay]—and agreed to.

Amendment 36 not moved.

Section 4, as amended, agreed to.

After section 4

The Convener: We move to the group on reports on bail and remand. Amendment 37, in the name of Katy Clark, is grouped with amendment 8.

Katy Clark: I will not be putting amendment 37 to the vote. I look forward to hearing what the cabinet secretary has to say about amendment 8, which also seeks to introduce a reporting requirement.

Amendment 37 relates to women prisoners. It arises out of the difficulties that exist in obtaining information about the nature of the women who

are held in custody in Scotland and, in particular, the difficulty of obtaining data in relation to women who are held on remand.

Amendment 37 also arises out of the concerns that exist—I know that the cabinet secretary shares them—about the overall number of women in custody and about the proportion of women in custody who are on remand. According to the most recent figure that the committee received, 36 per cent of the women who are being held in custody in Scotland are currently on remand. We know that Scotland has the largest number of people in prison, as a proportion of the population, in western Europe. We also have by far the highest remand figures.

In addition, women make up a higher proportion of our prisoner population and Scotland has the highest number of women in prison. A higher proportion of the prisoners who are in custody in Scotland are women than is the case in other countries; I think that women make up approximately 4 per cent of the prison population.

We know from research and evidence that the courts tend to give more stringent sentences to women than they give to men for the same offences. That is not a new feature. It is not the responsibility of any particular party or of the current Government. It has been a feature of our custodial system for many generations. Across the political parties that are represented in the Parliament, there is concern about why we have such a high level of women in custody and about whether we are dealing with women offenders in the best possible ways and have the necessary range of resources and mechanisms in place to deal with those challenges in the most effective way.

As I said, I will not push amendment 37 to a vote. I am interested in hearing from the cabinet secretary about the type of information that could readily be provided to the Parliament or about systems that could be developed to provide information.

As drafted, amendment 37 would require ministers to publish a report on women who have been refused bail, which must include information on

"the nature of the offences women refused bail have been charged with".

As I said, that information is not currently available to the committee, although equivalent information is available in relation to male offenders.

My amendment also asks that information be provided on women who have been refused bail in relation to whether they have a history of offending; whether they are classified as primary carers; their age; and any specific common health issues that they have, including physical health issues, mental health issues and any issues in relation to drug addiction. The amendment does not mention alcohol addiction, but that is another area of concern.

Amendment 37 also asks for information about the proportion of women who are refused bail who are subsequently sentenced to imprisonment. Obviously, there is concern about women who are held on remand for a lengthy period who are found not guilty when they come to trial, or who receive a sentence that is significantly less than the period that they have already been in custody.

As I said, the list that amendment 37 provides is not definitive—it is just a range of suggestions. It might be the case that certain types of data are more readily able to be calculated by the prison system and the rest of the justice system than others.

My intention in lodging the amendment is to create a pathway so that more information is available about the nature of the women who are being held in custody, so that policy makers and legislators are able to grapple with the challenges that we face and enable us to address the level of custody that is used for women, which I believe is not appropriate for the society that we live in.

I will listen very carefully to what the cabinet secretary says in relation to her amendment.

I move amendment 37.

12:30

Angela Constance: I will speak to amendment 37, in the name of Katy Clark, first. Amendment 37 inserts a new section after section 4 that would impose an annual duty on Scottish ministers to publish a report on women who have been refused bail. A non-exhaustive list of the information that the report must contain is set out in subsection (2), from (a) to (g), of the proposed new section.

I recognise that the amendment is well intentioned, and I agree that there is benefit in a requirement for the Scottish ministers to publish a report in relation to women on remand. However, I have some concerns about the amendment as it is drafted.

Some of the information that is covered by amendment 37 is already routinely published as part of the Scottish Government's official statistics release. In particular, the following data is already published: the nature of the offences that women who are refused bail have been charged with, the average age of women who are refused bail and the number of women who transition from the remand population to the sentenced population.

Conversely, some of the data that is listed in amendment 37 would be either difficult or, in some instances, impossible to produce. Accordingly, it may impose onerous requirements on the Scottish Courts and Tribunals Service and, potentially, the Crown Office and Procurator Fiscal Service, to compile the data that is sought.

As such, I ask Katy Clark not to press amendment 37, and I will undertake to work with her to see whether we can return at stage 3 with a workable reporting requirement that explores the characteristics of the remand population—including by gender—in a meaningful and informative way but that does not place unduly onerous burdens on the Scottish Courts and Tribunals Service and others. I am conscious of the concerns that have already been expressed throughout stage 1 about the capacity demands on operational justice agencies, but I will seek to strike the right balance.

I now turn to amendment 8, in my name. The committee's stage 1 report expressed concern about a lack of information about the circumstances in which remand decisions are made. Amendment 8 responds to that concern by imposing a statutory duty on Scottish ministers to

"publish a report on bail and remand."

The report will be required to contain certain information broken down by year and covering the first three years during which the new bail test under section 2 is in operation. The report must contain certain specified information in relation to bail and remand decision making. In relation to remand, that includes information such as

"the average daily remand population"

and

"the number of individuals who entered the remand population by reference to ...

(i) the offence (or type of offence) in respect of which the individual was remanded in custody,

(ii) the individual's gender,

(iii) the local authority area in which the individual lived immediately before being remanded in custody".

In relation to bail, that includes information such as

"the number of bail orders made by reference to the offence (or type of offence) in respect of which the individual was granted bail"

and data related to

"bail-related offences, and ... other offences ... committed while on bail".

Amendment 8 sets out the full list of information that must be included in the report, as well as, importantly,

"any other information that the Scottish Ministers consider appropriate".

I trust that that will be welcomed by the committee, and I ask members to support amendment 8, in my name.

The Convener: A couple of members wish to come in. I will bring in Rona Mackay first.

Rona Mackay: I put on record my thanks to Katy Clark for lodging amendment 37 on data for women on remand. It is a crucial issue and the data is very much needed. I am so glad that she has opened up the matter for discussion, and I am very pleased that the cabinet secretary is willing to look into the issue and bring back something at stage 3. Gathering the data is very worthwhile, and I agree with everything that Katy has said.

Jamie Greene: I, too, thank Katy Clark for lodging amendment 37. My understanding is that she will not be moving it, but I will let her explain that when the time comes. The committee has certainly grappled with the issue of data.

I want to speak to amendment 8, which was a very welcome surprise when it appeared on the daily list of amendments. It is not often that the Government comes forward with comprehensive reporting requirements in that fashion. [*Interruption*.] Well, you are doing so now, which is a welcome change of tack.

My understanding is that some of the data is already collected, although it is quite hard to get. Indeed, we have been trying to get information for quite some time. It is very tough to tease out the data, which often comes out through various reports or through the publication of statistics in response to a freedom of information request or parliamentary questions.

I could make a controversial comment and say that, if we had done what is set out in amendment 8 before introducing the bill, we might have a better picture of the effect that the legislation might have or whether it is even needed at all. Amendment 8 would give us some of the data that we have been crying out for throughout the stage 1 process. That includes the information provided for in subsection 2(d):

"an analysis of the length of time that individuals spent within the remand population".

That might explain away some but surely not all the anomalies as to why our remand population is so high. We really would have loved to have had such data. I mean no disrespect to SPICe in saying that, because there are limitations to the data that is collected.

The point of interest to me is on bail orders and the relevant convictions off the back of that. Clearly, there is a cohort of people who go on to do one of two things after they have been given bail: some breach the bail conditions, whether those are simple or enhanced conditions, and

others commit entirely unrelated offences. With the limited data that I could unearth, I found that—I think that I have raised this in committee before—in 2020-21, 15,724 crimes were committed by somebody on bail. Those are the Scottish Government's own statistics. That is one in four crimes that were recorded in that year, which is a fairly substantial number. That might explain some of the uneasiness that some members had about the direction of travel of the proposals. If the effect of the legislation is to—

Angela Constance: As a point of information, I note that, in the period 2010-11 to 2019-20, the number of offences that were committed by a person while on bail fell by 18 per cent, from 8,261 in the year to 6,800.

Jamie Greene: Okay. I am just checking my statistics. Over which period was that?

Angela Constance: Over 2010-11 to 2019-20.

Jamie Greene: Any reduction is, of course, welcome. I am happy to find the provenance of the statistics that I have used for the benefit of the *Official Report*. Perhaps a link can be provided to that. I suspect that the figures in my briefing are off the back of some published reports. In any case, by the time that I have finished speaking, someone from my office will have texted me about that.

My point is that, clearly, there is a problem, because people on bail are going on to commit further offences. Within that number for 2020-21, there were serious offences, including seven homicides, and a number of serious rapes and domestic abuse incidents. That perhaps underlines why there was nervousness about the proposals: would increasing the cohort of those who are released on bail necessarily lead to an increase in the number of offences that are committed by those people while on bail?

Over the past few months, we have heard from victims organisations about people who are on bail under enhanced conditions but who continue to retraumatise their victims either through direct and overt breaches or through other means, including ways that are technically outside a bail breach. In those latter cases, the police really struggle to charge somebody and bring them back into custody.

That can be as simple as standing at the end of the victim's street, which means that they are technically not on that street, and being a menace to the victim. We have had a lot of anecdotal evidence about that, so I hope that the Government is looking at that live issue.

There is one other thing that is missing from the reporting requirement, and that the Government might be open to dealing with via an amendment. Reporting is helpful and data is useful, but what happens as a result of that? It would be useful to have an amendment on that at stage 3, which could be as simple as saying that, as a result of the above information, the Government will take any actions that it considers appropriate to achieve a remedy. In other words, if, after the legislation is passed, we see an unfortunate pattern that nobody wants to see, there would be a commitment from or a requirement for the Government to take action to remedy that without necessarily going back to the start of what the bill proposed. That might be helpful and would save the Government from having to repeal major sections of the bill. No one wants to see that, but there is clearly some nervousness that that might happen.

Russell Findlay: I, too, welcome amendment 8, which is pro-transparency and comprehensive. In her earlier comments, the cabinet secretary talked about the frustrations that the committee has felt in acquiring data. We all agree with her. It is important to make the observation that we embarked on this whole exercise feeling frustrated about the lack of the very data that is now being built into the bill, which is a classic example of putting the cart before the horse. We would all have benefited hugely if we had been readily able to access data that is similar to the type now proposed in amendment 8.

The Convener: I call Katy Clark to wind up and to press or withdraw amendment 37.

Katy Clark: Given what has been said, I will not press amendment 37, which I now withdraw. I also warmly welcome amendment 8, as lodged by the Scottish Government.

Amendment 37, by agreement, withdrawn.

Section 5—Time spent on electronically monitored bail

The Convener: I advise members, the cabinet secretary and her officials that we will pause proceedings once we have completed this group.

Section 5 relates to the time spent on electronically monitored bail. Amendment 67, in the name of Collette Stevenson, is the only amendment in the group.

Collette Stevenson: When I initially lodged the amendment, I thought that I would like to see section 5 removed. I have now done more groundwork on the issue and have looked further into it. I have serious concerns—especially in relation to public safety and victim safety—about cases of domestic abuse and sexual violence where bail and release involves the use of electronic monitoring. Although that is a restriction of liberty, that restriction might be for only nine hours or so, which means that victims of domestic

abuse or sexual violence would still be at risk of coercive behaviour or harassment.

I still have huge concerns and, although I will not move amendment 67, I will seek more help from the cabinet secretary on the issue. Particularly in cases of violent crime, bail should not involve electronic monitoring but should be commensurate with the crime.

I will not move amendment 67, but I seek movement on that section of the bill. [*Interruption*.]

The Convener: Collette Stevenson, do you want to move amendment 67?

Collette Stevenson: No.

The Convener: Does anyone else want to move it?

12:45

Jamie Greene: I was not sure whether we could speak to the group before the amendment was moved. That is the normal way to do it.

I move amendment 67.

Perhaps I can use the opportunity to speak about the rationale for that.

The Convener: Do you want to speak to the amendment now?

Jamie Greene: Yes, thank you.

When I saw amendment 67 on the daily list of amendments, I thought that it was very welcome. [*Interruption*.] Would you mind if I close the window before I carry on, convener? There is a very noisy, angry crowd outside—I am sure that it is nothing to do with us. I am not sure which flag they are waving today, but it is quite a protest.

To simply remove section 5, as Collette Stevenson's amendment 67 would do, is a blunt approach, but I think that that is the best approach. I am not sure what tinkering could be done to it. I fundamentally disagree with the concept in section 5 that time spent being electronically monitored should be considered as part of a person's sentence.

I do not have a problem with the concept of someone spending time being electronically monitored while they are on bail. However, section 5 relates to a court passing a sentence of imprisonment or detention and the time that is given for a sentence, and it sets out that any qualifying time in which someone is electronically monitored will form part of their sentence. We included that issue in yesterday's debate in the chamber, pre-empting our discussion today, but it was an important point to make, because electronic monitoring is a condition of bail. Effectively, it could be used by courts as an incentive to say to someone whom they would have previously placed in custody that they will grant them bail with enhanced monitoring. That is the point of the measure.

There are different monitoring tools and different ways to monitor people. Some of those are incredibly useful, including monitoring people's geographical location and movement, and monitoring abstinence from substances such as alcohol and drugs. We can have a positive and constructive conversation about those. However, the fundamental issue with section 5 is that, if a person spends time being monitored, that will be considered as part of their sentence. That is why victims organisations have been vocal in their opposition to it.

Collette Stevenson's approach to take out section 5 is the right one. Section 5 does not have a place in the bill and the Government will struggle to justify it. No amount of tinkering could fix the problem. The only tinkering that could be done with section 5 is simply to say that, notwithstanding all the above, it is entirely up to the judge. If that is the case, what is the point of having it?

Collette Stevenson: Will the member take an intervention?

Jamie Greene: I will, in a second.

The judge will decide on sentencing using the range of factors that are available to them when they are making that decision.

Pauline McNeill: I was trying to intervene, too.

Jamie Greene: I will take both interventions in a second. I want to make my point first.

If you want to put that provision in the bill, which is about bail, not sentencing, there are other mechanisms for doing so. Whatever your views are of the Scottish Sentencing Council, it exists. Other directions can be given to judges for when they consider sentencing.

The provisions in section 5 do not lie within the parameters of what the bill is all about. Part 1 is about changes to the bail test—we have had a full conversation about that—and part 2 is about what happens when someone is released. The bill is not about sentencing; it never has been. I do not know where the idea came from, but I think that it is quite bonkers. I am happy to have a proper chat with other members about it.

Collette Stevenson: You touched on the idea of tinkering with section 5. As I have mentioned, we could see whether electronic monitoring could be more sophisticated, particularly given that stats show that addiction, particularly alcohol use at 62 per cent, is high up there as a contributing factor to violent crime. We could look at more

sophisticated use of electronic monitoring, such as sobriety cuffs or, as you have mentioned, the monitoring of geographical location. Do you not consider that there is scope to do that instead of simply removing section 5? That is why I did not move amendment 67.

Jamie Greene: I will respond to that intervention before bringing in Pauline McNeill, if she still wishes to intervene.

I agree with everything that you just said. I think that there is an enhanced role for electronic monitoring, especially given that, if the bill passes—as it inevitably will—people out there will be looking for the quid pro quo. Part of that might be about the Government utilising lots of different tools at its disposal and equipping our courts with as much as possible to improve outcomes for victims and those who are nervous about offenders. There is a conversation to be had about that, but that is not what the section in question does. It has to be removed, not fixed, because of its primary purpose: it is all about the time spent on electronic monitoring in proportion to the final sentence. It even goes so far as dictating what that should be.

I agree—I would like to see some Government amendments at the next stage that address how electronic monitoring can be better used in remand and bail decisions. However, none of that will fit anywhere from the bottom of page 3 to the top half of page 5 of the bill; the only way is to remove the section and put something else in. I say to Ms Stevenson that the section cannot be changed to do what she wants it to do in any meaningful way. For that very reason, I suggest that we take out the section, because it is about an entirely different matter. It is not about the enhanced use of electronic monitoring.

Pauline McNeill: I am very sympathetic to all the arguments that have been made, especially with regard to the section seeming to go a little bit too far in starting to prescribe things with regard to judges. Indeed, I think that the committee was particularly in agreement on that.

Does the member agree that, in that case, it is the objective that perhaps needs to be defined? As far as remand is concerned—Collette Stevenson is on record as arguing this, and I support this view, too—supervised bail is a really important alternative for courts. I agree with the member that there needs to be a conversation about that, but we perhaps need to sort out the principles first. For example, if someone spends time on remand, it is only right that that time be considered in the sentence, because they have been detained in a prison. If we are talking about someone with a restriction on their liberty, which can be the case for people who have an electronic tag, I guess that that is the principle behind the provisions of the bill that we are examining.

Therefore, my question for Jamie Greene is whether it is necessary for us to sort out which principle we are adhering to here. I am slightly sympathetic to the viewpoint that consideration be given to cases in which people who have an electronic tag as an alternative to remand have quite a substantial restriction on their movements for a long period. I agree with everything else.

Jamie Greene: The point is that someone who has been bailed has been neither tried nor found guilty of any offence. Therefore, any restriction is a by-product of the bail conditions; it is not part of their sentence.

As you have rightly said, there is a big difference between someone who has been bailed with some form of supervised or enhanced restrictions or parameters around the bail—in other words, the bail is conditional on certain activities or restrictions—and someone who has been remanded into custody and is awaiting trial. At the moment, the law takes the latter into account in sentencing—and rightly so. Somebody could have been stuck in prison for a year and a half because their case has been endlessly postponed and delayed. When they get their day in court—and if they are found guilty of the crime—the sentence might well be less than the time that they had already spent in custody, and they will walk free from court that day.

However, that is an entirely different matter. My point is that section 5 tries to conflate two issues: the idea that electronic monitoring could be useful in enhanced bail, which is the point that Ms Stevenson has made and which I agree with, and the issue that Pauline McNeill has highlighted of the time that people spend in custody on remand and the loss of liberty in that respect, which should absolutely be taken into consideration, too. However, the sole focus on this entire section is the time spent on electronic monitoring as part of a person's sentence.

That is why I think that the section needs to come out—and perhaps be replaced, which is something that we can work constructively on. The section cannot be amended in any meaningful or feasible way that provides a solution that we might all want and that we might, surprisingly, agree on.

I will end my comments there.

Russell Findlay: I will try not to go over the same ground that others have covered. If the Scottish Government wants to fundamentally change sentencing such that electronic monitoring on remand counts towards a discount on a future prison sentence, that needs to be done as a stand-alone piece of work. It should not be snuck into this bill, which is about bail and remand.

Jamie Greene's amendment to the motion for yesterday's Scottish Government justice debate pre-empted this discussion. He raised the subject because it is such an important and fundamental issue.

Bail conditions are commonplace. People might not welcome being subject to bail conditions, but it is a readily understood factor of the justice system that, although people are innocent until proven guilty, they might be subject to particular conditions pending the outcome of proceedings, whereas sentencing is a fundamentally different thing, which is the point that Victim Support Scotland made very strongly in representations to the committee.

When we questioned him about this, the previous cabinet secretary told the committee that such bail conditions are a diminution of rights. He seemed to be arguing that the direction of travel should be that sentencing should reflect that limitation on people's rights. However, that position needs to be properly explained and properly evidenced, which is what is lacking.

Katy Clark: I am grateful for the opportunity to make a short contribution.

I will not be pressing Collette Stevenson's amendment to the vote, but if it is pressed to the vote, I will support it. I think that the proposal from the Scottish Government is too restrictive and too prohibitive, and it goes way beyond the general concept that there might be circumstances in which the court has the discretion to take into account periods spent on electronic monitoring. I will touch on that point in relation to the amendment that we will debate next week, which I lodged as an alternative. That would involve the deletion of section 5 and the insertion of an alternative, whereby periods on electronic bail could be taken into account by the court.

The fundamental point is that electronic monitoring is not a sentence; it is a bail restriction in circumstances in which there is a risk that the accused poses a public safety threat or a threat to the victim. In the same way that a curfew or a condition that the accused must not approach the complainer is used, electronic monitoring is used only in situations where there are genuine risks. We must be really clear about the fact that that is the way in which it is used.

However, if that restriction is so great, there is an argument that compliance with electronic monitoring, or failure to comply, might be something that the court would take into account in sentencing. I believe that the courts already take into account such considerations. Whether someone has adhered to a curfew, electronic monitoring or other bail conditions can be facts that the court has the discretion to take into account. The problem with the Government's wording is the highly restrictive way in which the provision has been drafted. We will undoubtedly continue that discussion next week, but I support Collette Stevenson's amendment 67.

Angela Constance: There are a number of issues to clarify and put on the record, and I hope that colleagues will bear with me.

It is apparent that Ms Stevenson's amendment, which is to be pressed not by her but by Mr Greene, would remove section 5 from the bill in its entirety. I make it clear to Ms Stevenson and others that section 5 is not about the existence of electronic monitoring of bail—that already exists. There are important debates and factors to consider further in relation to how the use of electronic monitoring of bail could be enhanced. It exists now in 21 local authority areas, and it is coupled with bail supervision, which exists in 30 areas. That is a separate matter, and we need to be clear about that.

13:00

All that we are seeking to do is give the court the option to acknowledge good behaviour by a person who is being electronically monitored. Although a restriction of liberty is not the same thing as a deprivation of liberty, it is nonetheless a restriction. If someone is sentenced, it would not be unreasonable for the court to have the option to take their behaviour into account or not to do so, as it sees fit.

Our approach has been consulted on; I take exception to the suggestion that we have sneaked it in.

Russell Findlay: Will the minister take an intervention?

Angela Constance: In a moment, Mr Findlay.

For the record, before I make some more formal comments, I refer members back to the comments that I made when we debated the amendments in group 3. Remand remains an essential component and option to protect victims who are at risk of violence—including domestic violence—whether physical or coercive.

Russell Findlay: I seek more detail about the consultation that took place. My recollection of the evidence that the committee took was that the consultation was in the form of a written submission by a group of academics, who pointed to an international standard. They were not presenting something that they were pushing hard for or that had been subject to a great deal of analysis or to any more than a passing reference. The idea is one that seems to have been thrown into the mix.

Angela Constance: We are talking about a section of the bill as introduced. I am responding to endeavours to remove that entire section from the bill. Members are entitled to lodge any amendments that they wish, but I am entitled to put forward arguments to protect the overall integrity of the bill.

Section 5 is only a small part of the bill, but I will go through the reasons why I think that it has merit, notwithstanding the fact that there may be further scrutiny and debate and that other amendments may be lodged. Section 5 adds new section 210ZA to the Criminal Procedure (Scotland) Act 1995. It provides the court with discretion during sentencing to take into account a period that the accused person has spent on electronically monitored bail with a curfew condition, which is referred to as "qualifying bail". Section 5 also sets out how that ought to be taken into account.

The system is based on a similar one in England and Wales. For example, a person might be on qualifying bail for a period of six months. If, on conviction, they were to receive a sentence of 18 months, new section 210ZA of the 1995 act would enable—but not mandate—the court to decide how much, if any, of the six-month period was relevant for sentencing purposes. That might be none, some or all of that period.

The court will make its assessment on the basis of the circumstances of each individual case. For example, if the person has not complied with the curfew, the court may decide that none of the six-month period is relevant, which would mean that the person would enter custody to serve their sentence with none of the time spent on qualifying bail being treated as time served. Equally, if a person has fully complied with the curfew, the court may decide that the whole of the six-month period spent on qualifying bail is relevant.

Once the court has decided what the relevant period is, the bill provides a formula for the court to apply. Importantly, the formula does not treat time spent on qualifying bail and time spent in custody as equivalents; they are not. Instead, the formula in the bill converts every two days of the relevant period spent on qualifying bail as meaning one day of the sentence served. The use of the formula will ensure that a consistent and fair approach is taken if the court considers that the time spent on qualifying bail should be accounted for at sentencing.

Jamie Greene: The proposed new section appears in the bill as drafted, but that does not mean that it has to stay in it. We have a new cabinet secretary, and we have a new focus on victims. The cabinet secretary has an opportunity to do the right thing on section 5. I feel uncomfortable with her response. I appreciate that she has inherited the policy, but that does not mean that we have to live with it.

Who was consulted on the formulation? During our stage 1 deliberations, all that we heard on this aspect was evidence from two academics who said that they had heard an idea about it somewhere else. We certainly took no evidence on it, and members of the judiciary did not indicate that they had been consulted. Where on earth did the formula whereby two days on electronic monitoring means one day in prison come from?

Angela Constance: The formula is informed by practice in England and Wales. It is not for me to opine on the evidence that the committee heard at stage 1. However, I am well within my rights to point to the fact that the Government undertook a full public consultation on the bill. As we always do, we published the responses to that consultation. If, after today, any member or, indeed, the committee collectively would like me to provide further information on any remaining issues, I will be more than happy to do so. That is not a problem.

To return to the example that I have just given, applying the formula to the six-month period would mean that, as a maximum, the person would enter custody being treated as having served three months of their 18-month sentence. Although a person who is subject to electronically monitored bail with curfew conditions is not in the same position as someone who is in custody, such a measure represents a significant restriction of their liberty, as I indicated earlier. Therefore, the bill enables—rather than mandates—the court to take cognisance of that, should it wish to do so, in a proportionate way when a custodial sentence is imposed. The measure brings Scotland into line with similar arrangements in England and Wales, which I believe that the committee supported in its stage 1 report.

Therefore, with respect, I ask committee members to vote against amendment 67.

The Convener: Just to be absolutely clear, I will come back to Collette Stevenson and ask her to make any final winding-up comments and to indicate whether she wishes to press or withdraw amendment 67.

Collette Stevenson: I have no further comments. I will not press amendment 67.

The Convener: The member has indicated that she wishes to withdraw amendment 67. Does any member object to its being withdrawn?

Jamie Greene: Yes.

The Convener: Therefore, the question is, that amendment 67 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Clark, Katy (West Scotland) (Lab)
Findlay, Russell (West Scotland) (Con)
Greene, Jamie (West Scotland) (Con)
McNeill, Pauline (Glasgow) (Lab)

Against

MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Nicoll, Audrey (Aberdeen South and North Kincardine) (SNP)
Stevenson, Collette (East Kilbride) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0. As there is an equality of votes, as convener, I will use my casting vote to vote against the amendment.

Amendment 67 disagreed to.

The Convener: I suggest that we pause our stage 2 proceedings at this point. We will resume consideration of amendments at our next meeting, which will be on Wednesday 17 May.

I thank the cabinet secretary for attending.

Meeting closed at 13:09.

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

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

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

The Scottish Parliament
Pàrlamaid na h-Alba