

# **JUSTICE COMMITTEE**

Tuesday 19 May 2009

Session 3

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# **JUSTICE COMMITTEE**

## **15<sup>th</sup> Meeting 2009, Session 3**

### **CONVENER**

\*Bill Aitken ( Glasgow ) (Con)

### **DEPUTY CONVENER**

\*Bill Butler (Glasgow Anniesland) (Lab)

### **COMMITTEE MEMBERS**

\*Robert Brown (Glasgow) (LD)

\*Angela Constance (Livingston) (SNP)

\*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)

\*Nigel Don (North East Scotland) (SNP)

\*Paul Martin (Glasgow Springburn) (Lab)

\*Stewart Maxwell (West of Scotland) (SNP)

### **COMMITTEE SUBSTITUTES**

Aileen Campbell (South of Scotland) (SNP)

John Lamont (Roxburgh and Berwickshire) (Con)

Mike Pringle (Edinburgh South) (LD)

Dr Richard Simpson (Mid Scotland and Fife) (Lab)

\*attended

### **THE FOLLOWING ALSO ATTENDED:**

Dr Richard Simpson (Mid Scotland and Fife) (Lab)

### **THE FOLLOWING GAVE EVIDENCE:**

Mary Bruce

Jim Hunter (North Strathclyde Community Justice Authority)

Councillor Margaret Kennedy (Fife and Forth Valley Community Justice Authority)

Kenny MacAskill (Cabinet Secretary for Justice)

Right Hon Henry McLeish (Scottish Prisons Commission)

Professor Fergus McNeill (Scottish Consortium on Crime and Criminal Justice)

Tony McNulty (Lanarkshire Community Justice Authority)

Raymund McQuillan (Association of Directors of Social Work)

Elma Mitchell (Devonvale Hall Co Ltd)

Anne Pinkman (Fife and Forth Valley Community Justice Authority)

Yvonne Robson (Association of Directors of Social Work)

John Scott (Howard League for Penal Reform in Scotland and Scottish Consortium on Crime and Criminal Justice)

Professor Alec Spencer (Scottish Consortium on Crime and Criminal Justice)

Sheila Wynne

### **CLERK TO THE COMMITTEE**

Douglas Wands

### **SENIOR ASSISTANT CLERK**

Anne Peat

### **ASSISTANT CLERK**

Andrew Proudfoot

### **LOCATION**

Alloa Town Hall

# Scottish Parliament

## Justice Committee

*Tuesday 19 May 2009*

[THE CONVENER *opened the meeting at 10:07*]

## Subordinate Legislation

### **Crime (International Co-operation) Act 2003 (Designation of Participating Countries) (Scotland) (No 2) Order 2009 (Draft)**

**The Convener (Bill Aitken):** Good morning, ladies and gentlemen. I ask everyone to ensure that mobile phones are switched off. There are no apologies, although one member has intimated that she will be late. I welcome Dr Richard Simpson MSP.

It is very pleasant for the committee to be here in Alloa. This is the first time that the committee has been in this location, and we are very appreciative of the services that have been provided to us by the appropriate authorities.

The first item on the agenda is consideration of an affirmative instrument, the draft Crime (International Co-operation) Act 2003 (Designation of Participating Countries) (Scotland) (No 2) Order 2009. I draw members' attention to the instrument and to the cover note. The Subordinate Legislation Committee did not draw any matter to the attention of the committee.

Prior to the formal procedure under the next agenda item, this is an opportunity for members to ask questions of the Cabinet Secretary for Justice and his officials. I welcome the cabinet secretary, Kenny MacAskill MSP, who is joined by Gerard Bonnar, head of the summary justice reform branch in the Scottish Government's criminal procedure division, and Stephen Crilly, principal legal officer in the Scottish Government's legal directorate.

I invite the cabinet secretary to make a short opening statement.

**The Cabinet Secretary for Justice (Kenny MacAskill):** I welcome the opportunity to contribute to the committee's consideration of the draft order, and hope that these explanatory comments are of some assistance.

The Crime (International Co-operation) Act 2003 provides statutory powers under which the United Kingdom can both seek and provide various forms of mutual legal assistance concerning criminal matters. Some of those statutory powers can be

exercised only where the state in question is a "participating country", as defined in section 51(2) of the 2003 act. The draft order designates Norway, Iceland and Switzerland as participating countries in relation to certain sections of the 2003 act, as a consequence of agreements that the European Union has concluded.

On 6 May, the Home Office laid before the Westminster Parliament a draft order that makes a similar designation in relation to the provisions that apply in England and Wales.

I invite the committee to recommend that the draft order be approved by Parliament.

**The Convener:** Do members have any questions at this stage?

**Members:** No.

**The Convener:** We move to item 2, which is formal consideration of the motion to recommend approval of the instrument. I invite the cabinet secretary to move motion S3M-4035.

*Motion moved,*

That the Justice Committee recommends that the draft Crime (International Co-operation) Act 2003 (Designation of Participating Countries) (Scotland) (No. 2) Order 2009 (SSI 2009/draft) be approved.—[*Kenny MacAskill.*]

*Motion agreed to.*

**The Convener:** I suspend the meeting briefly to allow the witnesses to change over.

10:11

*Meeting suspended.*

10:11

*On resuming—*

### **Scottish Public Services Ombudsman Act 2002 (Amendment) Order 2009 (Draft)**

**The Convener:** Item 3 is consideration of another affirmative instrument. I draw members' attention to the instrument and the cover note. The Subordinate Legislation Committee did not draw any matter to the attention of the committee. Prior to the formal procedure under the next agenda item, members have an opportunity to ask questions of the cabinet secretary and his officials. The officials are Felicity Cullen and Ben Haynes, who are policy advisers from the courts and administrative justice division in the Scottish Government's constitution, law and courts directorate.

**Kenny MacAskill:** The draft order implements a consequential change resulting from the Tribunals, Courts and Enforcement Act 2007. Under that act of the Westminster Parliament, most tribunals in

England and Wales, as well as many that are UK-wide, have been abolished. Their functions have been transferred to the new first-tier tribunal and upper tribunal.

One of the bodies that has been abolished is the Criminal Injuries Compensation Appeals Panel. The CICAP was abolished in November 2008 and its functions were transferred to the first-tier tribunal. The CICAP is listed in schedule 2 to the Scottish Public Services Ombudsman Act 2002. The schedule lists those who are liable to investigation by the ombudsman. As the CICAP has now been abolished, it needs to be removed from the schedule. Its staff, who are part of the UK Tribunals Service, now come within the jurisdiction of the UK parliamentary and health service ombudsman.

The 2002 act gives Her Majesty the Queen the power to amend the relevant part of schedule 2 by an order in the Privy Council. Under the act, the Parliament must approve a draft order before it can be sent to the Privy Council for its consideration. That is why I will move the motion later. I make it clear that, although the Tribunals, Courts and Enforcement Act 2007 is an act of the Westminster Parliament and implements a policy of the Westminster Government, because the Scottish Public Services Ombudsman comes within the competence of the Scottish Parliament it falls to this Parliament to consider the draft order.

**The Convener:** That is definitely clear. Do members have any questions?

**Nigel Don (North East Scotland) (SNP):** Forgive me—I do not want to extend this item, as we have more important things to talk about. However, if the body no longer exists, why do we have to remove it from the list? Its presence on the list could produce no activity, so why do we need the bit of paper?

**Kenny MacAskill:** It is a matter of administrative tidying up. There is a need to get rid of things in laws that are in desuetude. You are correct to say that the reference could probably lie there for ever and a day; however, for clarity, we should get rid of it if we can.

**Robert Brown (Glasgow) (LD):** I am curious as to the background to this. I understand that the criminal injuries compensation scheme and the relevant tribunals come under the jurisdiction of the UK Government. That is all very straightforward. However, I cannot understand why the body that is being abolished came under the jurisdiction of the SPSO in the first place. The SPSO is a Scottish Parliament appointment relating, I assume, to Scottish bodies that are within the Scottish Parliament's jurisdiction.

**Kenny MacAskill:** That is a valid point. I do not know the answer to that, but I can make some

inquiries. Both matters preceded our arrival in government and, in the case of CICAP, the establishment of the Scottish Parliament. I am happy to make those inquiries, but I assume that the CICAP was placed under the jurisdiction of the SPSO on the basis that the SPSO is capable of dealing with a variety of matters. As Mr Brown knows, tribunals are complex. Some are entirely reserved, others are wholly devolved and many are hybrid.

**The Convener:** The legislation is fairly benign, in any event. I do not think that there are any problems with the proposal. Are there any further questions?

**Members:** No.

**The Convener:** We move to item 4, which is formal consideration of the motion. I invite the cabinet secretary to move motion S3M-3962.

*Motion moved,*

That the Justice Committee recommends that the draft Scottish Public Services Ombudsman Act 2002 (Amendment) Order 2009 (SSI 2009/draft) be approved.—  
[Kenny MacAskill.]

*Motion agreed to.*

**The Convener:** I suspend the meeting briefly in order that the witnesses can change over. Thank you, Mr MacAskill.

10:15

*Meeting suspended.*

10:16

*On resuming—*

## **Criminal Justice and Licensing (Scotland) Bill: Stage 1**

**The Convener:** Item 5 is consideration of the Criminal Justice and Licensing (Scotland) Bill. This is our substantive business for today. We shall take evidence particularly on the provisions in part 1 around sentencing and community payback orders. The committee held its first evidence-taking session last week, when we took evidence from judges, sheriffs and justices of the peace on the proposal to create a Scottish sentencing council. Today's session will build on that evidence.

Our first witness is the right hon Henry McLeish, who was the chair of the Scottish Prisons Commission. He is well known to most of us around the table. I welcome Mr McLeish and invite him to make a short opening statement, after which we shall move to questions.

**Right Hon Henry McLeish (Scottish Prisons Commission):** Thank you, convener and committee members, for the invitation to speak to the committee in this evidence-taking session. As you pointed out, convener, I chaired the Scottish Prisons Commission, which reported last year. There has been a great deal of debate since then. We have a unique opportunity for significant and radical reform of the criminal justice system. We tried to base our work on evidence because it was clear that, over the past 10 or 20 years, we had built up an enormous amount of research in Scotland and we were keen to take that forward. Importantly, we have the opportunity, in Scotland, to move to a greater degree of bipartisanship on the issues that are before us.

I have the benefit of having been in politics for 30 years—I was one of you, although I am no longer so—and I understand the pressures that you face from the public, the press and a complex constituency of criminal justice interests for certain things to be done and said. Members of the Scottish Prisons Commission felt that we were an impartial group, and we provided 23 recommendations on ways in which to take matters forward in the public interest. At the end of the day, whether we are in government or out of government, in Parliament or out of Parliament, we are essentially serving the public. We believed that we have a great opportunity to reform the criminal justice system; therefore, our proposals were designed largely to take practical steps towards that on the basis of the available evidence.

I am pleased to participate in the debate and will seek to answer your questions to the best of my ability.

**The Convener:** Thank you for that, Mr McLeish. We move to questioning specifically on the Scottish sentencing council.

**Bill Butler (Glasgow Anniesland) (Lab):** Good morning, Mr McLeish. You said that the Scottish Prisons Commission's report was evidence based. The report suggests that there are inconsistencies in sentencing. However, the Justice Committee has heard that there is very little, if any, empirical evidence to suggest that inconsistency exists. How would you address that seeming paradox? How would you respond to the charge that there is little empirical evidence of inconsistency?

**Henry McLeish:** I do not accept the premise that there is a paradox. There is sufficient evidence from various sources to suggest that there are inconsistencies in sentencing throughout Scotland. In a way, much of that is part of the judicial system. We have one of the best court systems and benches in the world. The judiciary's impartiality and the division between the judiciary, Parliament and Government are sound. In that sense, it is no surprise that different decisions will be taken on different cases in different courts throughout Scotland.

Society, parliamentarians and the Government have the right to look at issues surrounding court decisions. I do not believe that the sentencers are being undermined. Society, through parliamentarians and, eventually, through the Government and legislation, is looking for transparency in decisions. If there is one thing that I recognise from my sojourn in politics, it is that the general public, if they are interested, are largely confused about why certain decisions are taken and why certain outcomes happen. Transparency is one issue.

Secondly, we as a society surely have the right to outline a framework within which the judges and sheriffs operate. In a sense, that is the kind of accountability that we would talk about in other areas, and it is part and parcel of what we are discussing.

Thirdly, if we can get to a point at which there is a framework and transparency, the public will start to understand more fully some of the issues involved. What perplexes me about the public response, which is, nevertheless, often understandable, is that the public fail to understand why certain cases with characteristics that are similar to those of previous high-profile cases end in a completely different outcome. It is incumbent on us all—me, at one step removed, you and the Government—to ensure that the system is understood much more clearly.

Overall, I do not think that there should be any real issues of division between the bench, parliamentarians and the Government about setting a framework. If the sentencing council works effectively, there might be fewer concerns as we see what is happening. There is fear and apprehension at the moment. Of course, there is the traditional view among the bench that it would rather get on with things with less meddling from the political classes.

**Bill Butler:** I hear what you are saying, but you said in response to my initial question—I think that I am quoting you correctly—that there is “sufficient evidence” from various sources of inconsistency. Will you outline those sources and back up your assertion that there is sufficient evidence?

**Henry McLeish:** Different levels of sourced evidence were not in the commission’s report—I hope that the report was brief and crisp. The first generalised level is publicly recorded cases that generate public debate in Scotland. That is one area. Perhaps, like committee members, I would not set a great deal of store by what is covered in the annals of the press. Secondly, there are court decisions—volumes of material emanate from the courts and come through the Government and the statistical research side. Those decisions illustrate how certain cases are dealt with. Thirdly, there is anecdotal evidence, which I do not take as seriously as the sourced evidence that you would find in Government and Parliament publications, but which illustrates that there are genuine concerns.

I do not accept for a minute that we want to meddle with the court system. I cannot say that the court system is one of the best in the world while also saying that we have to be radical in our approach to it. However, there is a case for the sentencing council. In an ideal world, that should not be an issue that divides the bench from parliamentarians or from the public.

**Bill Butler:** I think you said that there were four sources. Let us set to one side the anecdotal evidence and, as you put it, the publicly recorded cases or those that are covered in press reports. You talked about two other sources: court decisions and statistical sources. Are you saying that the recommendations of the commission are based absolutely on court decisions and statistical sources? How much credence, investigation and examination did the commission give the court decisions and statistical sources in making its recommendations?

**Henry McLeish:** In the work of the commission, the sentencing council and the other national agency that we suggested were not the most important considerations. The commission made 23 recommendations. I would argue that, in the grand scheme of things—I mean no disrespect to

the Government’s concern about this—the sentencing council was not a high priority for the commission. Given what is before the committee, I still believe that it is not a priority.

**Bill Butler:** You said that transparency was one of the objectives of the commission’s report and of the proposed sentencing council. Other objectives were to promote consistency in sentencing and to assist in the development of sentencing policy. Do you think that the proposed measures represent significant progress from the present situation?

**Henry McLeish:** My view, as chairman of the commission, is that the sentencing council did not figure overprominently in the commission’s considerations. I say that not to escape the question, but because it was the reality. We felt—and I still feel—that the bench in Scotland faces much more important issues than just this issue around sentencing. I understand fully the emotions and concerns that the issue generates, but, for me, it is not a priority.

**Bill Butler:** That is very clear. Thank you.

**Stewart Maxwell (West of Scotland) (SNP):** Good morning, Mr McLeish. I want to take you back to the independence of the judiciary, which you touched on in your answers to Mr Butler. We heard oral evidence from judges and sheriffs last week in which they questioned the statement that the sentencing council would not affect, undermine or impinge on their independence. Do you accept their line of argument? What is your general view on the issue?

**Henry McLeish:** I do not accept that line of argument, because, as I said in my responses to Bill Butler, I do not think that the sentencing council is an important issue in the criminal justice system in Scotland. Secondly, that argument is a natural response from the bench, given its perception that the Parliament or Government wants to meddle in what it has regarded as its own sphere of activity. Leaving aside those two considerations, society as a whole has to be part of the process. I do not mean that society will be involved in any way in making judgments or decisions, but, in 2009, it is important that the public understand and appreciate more fully the workings of the system. Given what I have read and given what the make-up of the sentencing council will be, I do not think that the council can be regarded as a threat to the independence of the judiciary.

If you do not mind, convener, I will give an example of an area about which we hear a huge number of contradictory views. The presumption against six-month sentences is seen as a threat to the independence of the judiciary, but, at the same time, parliamentarians talk about having mandatory sentences for knife crime. My logic



suggests that having a mandatory sentence for knife crime takes away completely the independence of the judiciary in one area of crime. The arguments about the independence of the bench have become overemotional. That independence has been safeguarded and is respected. No one around the table or in Government wants to undermine it in any way. We are adding a bit of transparency, which will help the criminal justice system to operate effectively.

10:30

**Stewart Maxwell:** To sum up, your view is that a sentencing council would provide not complete, but greater, clarity for the public on the processes, enabling people to understand them to a greater degree. You rather pre-empted my next question, which was about the strange anomaly of those who call for mandatory sentences calling for judicial independence at the same time, so I will not ask it.

In evidence last week, judges and sheriffs asserted that the creation of a sentencing council would lead to their ability to sentence being constrained to such an extent that they would, in effect, have given up the flexibility that they have currently to the council, which would have the last word on sentencing. Do you accept that assertion?

**Henry McLeish:** I do not accept it as a premise for the future activity of the sentencing council. If I were asked today which of the 23 recommendations I would leave out, it would be the recommendation that a sentencing council be established. I am not surprised that the bench is making a song and dance about the issue, because it sees anything that it thinks threatens its independence as an issue. For the bench it may well be an issue, but in the greater scheme of things it is a modest measure. It has been discussed for some time, will not undermine the independence of the judiciary and will open a window for society generally. Other countries that have mandatory sentences are beginning to encounter problems—I am thinking of California's three-strikes-and-you're-out policy. We have a judiciary that is as independent as any judiciary in the democratic world could be. All of us, including members of the committee and the Government, value and prize that. Although I understand the bench's reaction, I would not lose much sleep over the proposal.

**Stewart Maxwell:** You said that if you were to leave out one recommendation it would be the proposal for the establishment of a sentencing council. However, I presume that you support the 23 recommendations and would prefer all of them to be implemented.

**Henry McLeish:** Indeed. I was trying to give an indication of my priorities—nothing more. I fully support the 23 recommendations.

**Robert Brown:** As I understand it, you are saying that inconsistency in sentencing and the need for guidelines are largely a matter of perception and that, in reality, there may or may not be inconsistency. Is my interpretation of your position correct?

**Henry McLeish:** There are both perceptions and realities. Bill Butler asked a fair question about the corpus of evidence. Our discussions with an enormous number of people indicate that there is evidence of inconsistency. It is important that the bench's perceptions of what a sentencing council would do and some politicians' perceptions of the benefits of having such a council are handled more reasonably, as there are extremes at both ends. The establishment of a sentencing council is a modest measure that should not get too many people too excited.

**Robert Brown:** Two arguments are entwined here. First, are guidelines needed in the first place? Secondly, if there are to be guidelines, under whose authority should they proceed? Do you accept that there is a difference between the Parliament passing legislation that lays down policy and the range of sentences that are available in particular cases, a quango such as the Scottish sentencing council giving instructions to judges, and the judiciary deciding matters with advice of a sentencing council? There are three different levels.

**Henry McLeish:** I share the concerns of many of my former colleagues in the Parliament about quangos. I would not want to talk about the sentencing council issuing instructions, as "instructions" is a value-loaded and threatening word. I am not yet convinced that the Government thinks that setting up a sentencing council is the most important issue on the agenda, but it would help in relation to the view of society at large. I see no threat to the independence of the judiciary. There is a widespread perception of inconsistency, which can be supported by evidence. However, I would hate the proposal for a sentencing council to dominate the important work that the committee has ahead of it. There is a grave danger of the issue becoming distorted.

**Robert Brown:** At the end of the day, if the sentencing council were an advisory council whose recommendations were considered by the appeal court in some appropriate way and sanctioned at that level, we would not face the constitutional issue that has caused so much angst in the higher and lower ranks of the judiciary. That is the key point that I am trying to get at.

**Henry McLeish:** You are absolutely right. We must debate, discuss and arrive at a format for the sentencing council. My low prioritisation of the recommendation revolves around society generally having better insight into what is happening. It is entirely up to members and the Government to decide the procedure for the council's operation. I have no strong views on the issue. My only concern is that the sentencing council should not appear as an ultra-quasi-legal body that looks like it is imposing its individual judgments on the work of the courts. That would be reprehensible and a backward step that would not help us to maintain the independence of the system that we value so much.

**Robert Brown:** Thank you for those helpful comments.

**The Convener:** In a moment, we will move on to the issue of community payback and alternatives to custody, which is of particular interest, but I am still slightly troubled by the fact that there appears to be a lack of empirical evidence of inconsistency in sentencing. Much of the evidence is apocryphal. Do you know of any research that has demonstrated the existence of inconsistency? You say that you spoke to a number of people; can you give us examples that arose in those discussions and inquiries?

**Henry McLeish:** I will try to be up front with the committee. First, the issue did not take up a great deal of the commission's time during its work, which lasted about nine months. Secondly, there is an amazing array of court statistics in Scotland that could provide the committee with the evidence that it requires. Thirdly, it is clear that the issue has been rumbling around in parliamentary and Government debate for some time. For that reason, the commission and I thought that the proposal had merit. The laws that parliamentarians make provide frameworks for what the bench does anyway, so the establishment of a sentencing commission seemed to be a modest step forward, especially in relation to the public, who figured prominently in other aspects of our work.

**Bill Butler:** Are you saying that no analysis of the evidence took place and that there was no real research? If so, there is no evidential basis for the recommendation.

**Henry McLeish:** That is not entirely true. I have indicated that the establishment of a sentencing council was not a priority for the commission. After analysing the criminal justice and prison systems, we came up with recommendations. The proposal fitted in with the thinking of the commission, which wanted far more transparency to be injected into the criminal justice system in Scotland.

**Bill Butler:** With respect, the committee recognises that point; no member has trouble with

greater transparency. I will break the question down. Was any research undertaken?

**Henry McLeish:** We did not commission any research.

**Bill Butler:** So there was no scientific analysis of the data that you say are lying about in the court system.

**Henry McLeish:** We did not—

**Bill Butler:** Am I right in saying that there was no scientific analysis?

**Henry McLeish:** Let me answer your question. We did not seek any original research. However, the commission thought that the establishment of a sentencing commission was a sound idea, as part of wider society's view of the criminal justice system. That is why we supported it.

**Bill Butler:** You are telling the committee this morning that there is no scientific or evidential basis for the recommendation.

**Henry McLeish:** We did not seek any evidence base. As I have said to you, there are sources that would show inconsistencies. We happily acknowledged and accepted that. However, within the commission, we discussed issues—

**Bill Butler:** With respect, what were those sources? If you sought them out, did you look at them so that you were content to make such a recommendation? If you did not seek them out, look at them and analyse them as a committee and if there is no independent research analysis, your recommendation is mere assertion, is it not?

**Henry McLeish:** No, it is not mere assertion. It is confusing to suggest that we did not have any evidence. We did not seek any evidence.

**Bill Butler:** Therefore, you did not have any evidence before you. If you did not seek it out, you did not have it before you—is that right?

**Henry McLeish:** In our nine months of work right across the criminal justice system, the issue intervened at different levels, at different times and on different subjects. We did not commission any independent research because we did not consider the matter a priority. We know, however, that the court statistics in Scotland—I have seen a lot of them—show inconsistencies.

To answer Bill Butler's question directly, we did not have evidence on which we based the recommendation, but it was consistent with the wider thinking on most of the recommendations that we made. As a consequence, we were happy to make the recommendation.

**Bill Butler:** So, at best, you could argue that the recommendation—you say that it is not a priority, so I am astonished that it is a recommendation—

was based on an impression. Would that be correct?

**Henry McLeish:** No, it would not.

**Bill Butler:** What would you say, then?

**Henry McLeish:** It goes well beyond an impression. In looking at the vast array that is the criminal justice system, you are focusing on the issue of the proposed sentencing council. However, we were looking at the whole panoply of sentencing, including specific issues such as sentences of six months and less. We knew that there was significant variation in the court system in Scotland in relation to six-month sentences. We did not say, "The sentencing council is to be discussed today—let's have all the evidence," but it permeated our work on other considerations that there was a clear case to be made for a sentencing council.

**Bill Butler:** Would you recommend such an approach to a student who was writing a PhD?

**Henry McLeish:** I do not accept the inference of your questions. I started off by saying that the issue was not a priority for the commission. We did not need a PhD-type research programme to inform the commission members that, right across the board of our considerations, there was inconsistency in the court system.

**Bill Butler:** It seems that you did not need any research programme at all.

**Henry McLeish:** No, that is not true. I have tried to explain. If I may be robust, convener, this is a very unproductive line of questioning. I have said that the issue was not a priority for us. I have also said that, in coming to the 22 other recommendations and in undertaking nine months of work, we came across issues in every court in Scotland. Some of our recommendations are about the efficiency of the court system. I do not accept that there was no basis for including the recommendation in the commission's final report.

**Bill Butler:** I am obliged.

**The Convener:** We will leave that line of questioning and move on to the use of imprisonment and community payback.

**Robert Brown:** In many ways, this is at the heart of the commission's report. You had in the back of your minds issues such as overcrowding in prisons and the ineffectiveness of certain sentences, not least prison sentences. The report states that prison should be used for those offenders whose crimes are serious and violent and for those who present a risk to public safety. Can you give us some examples of how such an approach would change the current use of custodial sentences?

**Henry McLeish:** We were keen to find out the profile of the prison population. It seemed elementary to find out, first, who was in prison and why they were in prison. It is self-evident that for society, for the press, for politicians and for the public in general, people who commit serious crimes—we can define those—should be in prison, for serious reasons to do with the need for rehabilitation and, more important, public safety.

10:45

When we looked at the profile of the prison population, we found that the category that I have just described did not make up the majority of the prisoners in Scotland. For example, we found that, in 2007-08, there were more people on remand in prison than people who had been sentenced. Moreover, the 2007-08 figures confirmed that 76 per cent of those who were given a custodial sentence received a sentence of less than six months. Prisons were being used to warehouse people who had incredibly deep alcohol and drug abuse problems. We also found that, in most of our prisons, 75 to 80 per cent of prisoners had some mental or physical illness. The profile of the prison population in that respect again suggested that prisoners were being warehoused.

The next issue that we examined was compliance. We discovered that there had been a vast increase in the number of people who returned to prison not because they had committed further crimes but because they had broken the rules. The problem of prisoners serving life sentences by instalments was another major facet of the prison population—so much so that, in 2005-06, the 7,000 prisoners who were given a custodial sentence had between them 45,000 previous custodial convictions. That leads to the revolving-door syndrome.

The prison officers were keen to tell us that the more space there is in prisons and the less time they have to spend on churning and the administration of short-term prisoners, the more they can do with the serious offenders in our prisons who need rehabilitation and who need to be there for long periods to protect the public. The initial phase of the commission's work was to analyse the prison population and gauge what we could do with the group of offenders who need not be in prison.

**Robert Brown:** Many of us would accept the general logic of what the commission found in that direction. However, is there not a significant resource issue in terms of long-term savings in expensive prison costs versus the short-term need to fund the alternatives that you seek to put in place? How important was the resource issue in the commission's thinking on such matters?

**Henry McLeish:** Very important. In the final part of the report, we made it clear that no one should be under the impression that the proposed changes could be made without considerable input of new resources—the statement was as bald as that. There must be new resources. If we are successful in the long term, there could conceivably be a transfer of resources from prisons to the community, but that cannot happen in the short term. Therefore, we argued—I have argued this with the minister, too—that we need new resources. For community sentences to work, parliamentarians, the public and the bench must be assured that they can trust the alternatives. We need new resources to send a powerful message that community sentences can work and do not pose the risks that some people have implied. Resources are critical. We cannot move down the proposed path to any significant degree unless we have the resources—not money just shuffled around in a budget or produced through creative accounting in either the Parliament or the Government, but new resources physically on the ground to make community payback a genuine option.

**Robert Brown:** In fairness to the Government, I point out that £2 million has been invested to get current community sentences up to scratch. Do you agree, however, that that does not deal with the new community sentences that would result from the policies that you advocate in the commission's report? Are you able to give us any ball-park figures for the cost of those?

**Henry McLeish:** I do not have any figures, partly because we were not asked to consider that. The commission was seeking ideas and recommendations.

We looked at the cost—whatever it is—in this way. Let us take, for example, the issue of drug and alcohol abuse. Alcohol abuse is an embarrassment to us on a global scale. We have the eighth largest consumption of alcohol in the world, and there are those who abuse it. In prisons, there are enormous problems with drugs and alcohol. If we want any form of payback in the community, we must provide facilities for drug rehab and detox. In Scotland, there are simply not enough of those facilities to tackle the current problems, without planning ahead. That is why I say that significant resources are needed; £2 million is a start, but the indications are that much more is needed even to tackle the health issues that are related to the policy.

The problems of criminal justice cannot be solved by the criminal justice system alone. Drug and alcohol abuse are major health matters, so I see no reason why the health budget should not provide facilities and resources for the community payback scheme in each community. It would be

less significant to take a few million pounds from the health budget than it would be to redirect a few million pounds within the criminal justice budget, which is very small.

On a wider theme, three quarters of Scotland's prisoners come from one quarter of Scotland's local government wards. Those areas, by definition, suffer the most crimes, have the most victims and produce the most prisoners. We, as a society, must appreciate that the criminal justice system deals only with the symptoms and effects and that the wider causes of the problems are deeply rooted in inequalities in our communities. In Scotland, the inequalities are as bad as those in England, where the situation is only slightly better than the situation in America.

We have massive problems with inequalities and with alcohol and drug abuse. Unless and until resources are allocated to tackle those problems, there will be a shallow feel to recommendations that say that community payback and community options are the best way forward.

**Robert Brown:** We have heard evidence about the use that is made of short-term sentences. The sheriffs, in particular, have given us oral and written evidence to the effect that short-term custodial sentences can be effective and are necessary in some circumstances. They have also told us that the current use of such sentences is generally appropriate. Those people deal with sentencing at the sharp end, day in, day out in the courts. Do you have a view on that? Can you give us a feel for the circumstances in which, in your view, short-term custodial sentences will continue to have a place?

**Henry McLeish:** Yes. That takes us back to earlier discussions about the independence of the judiciary.

Certain countries have gone so far as to legislate to ensure that no custodial sentence is less than six months. That was an option for us—to legislate, and that would be it. However, to preserve the independence of the judiciary and to take a commonsense approach, we rejected that option. Of the people who go to prison for less than six months, a small group have committed what I would regard as serious offences, one of which is domestic violence. I will not go into it, but that is a heinous crime yet, for this, that or the other reason, a tougher sentence is often not imposed.

The policy memorandum to the bill states:

“We want to make it clear that sentencers should not impose a custodial sentence of 6 months or less, unless the particular circumstances of the case lead them to believe that no other option would be appropriate.”

That respects the independence of the bench but gives a hint that society wants the judiciary to look

more closely at custodial sentences of less than six months. Nevertheless, if the bench and the public are to have confidence in the alternative, we need the resources and a new mindset, and we must ensure that the alternative works.

In 2007-08, 16,700 custodial sentences and 16,700 community sentences were given in Scotland. It is not that community sentences are not playing their part, but the prison population has risen steadily whereas community sentencing has plateaued over the past four years. There is a good mix of sentencing, but we could go much further.

**Robert Brown:** The sheriffs argued that, at the moment, they do not send anybody to jail whom they do not have to send to jail. If all that the statute does is formalise that, we ain't going to make much difference to what happens. I assume that that was not the intention of the commission.

**Henry McLeish:** It certainly was not. There are circumstances in which six-month sentences have been applied and should continue to be applied. However, we proposed a presumption against short-term sentences, as there are other ways of dealing with offenders. If prison were working for a large section of the population, there would not be so much reoffending and so many reconvictions. Those outcomes show that we are not best served by the current practice. We believe that the bench could do more but, to be fair to them, they need alternatives, and the range of alternatives varies across Scotland. I would not like to think that they would imperil anybody in a community by placing an offender in the community when the full range of facilities was not available to them.

**Robert Brown:** Let me sum up the resource issue. If there were no more resource available bar the £2 million that has been allocated for community sentences, would you still recommend the substantial change in the law that you have proposed, which is a presumption against short-term sentences?

**Henry McLeish:** Yes, I would. I accept the basis of the recommendation, as there are solid ideas that we think can be pursued. As I have said, community sentences are equivalent to custodial sentences. However, if you speak to the public, to parliamentarians or to the bench, you will encounter a degree of scepticism or cynicism about community sentences and a degree of concern for public safety. Unless and until we overcome that, we will not get the full benefits of the commission's recommendations. That is why resources are a critical factor in moving us down that road.

**Dr Richard Simpson (Mid Scotland and Fife) (Lab):** Thank you, convener, for allowing me to speak even though I am not a member of the

committee. I was the Deputy Minister for Justice and have worked in the prison service, so this is a particular interest of mine. I also acknowledge Henry McLeish's views on the sentencing of women, which is where some of the debate started.

Things have already been tried in the sentencing of women. As the Deputy Minister for Justice, on the basis of "Women Offenders: A Safer Way", which was produced by Sheila McLean, I introduced the time-out facility in Bath Street, Glasgow, which now treats 500 drug addicts who would otherwise have gone into custody. However, at the same time that the number of women who are admitted to prison on fine default has fallen, the number who are on remand has increased substantially. The changes made—which were, in effect, to introduce the sort of community sentences to which you have referred in treating the major drug problems that we have—have not led to a reduction in the number of admissions to prison. We are still faced with the situation of more women going to prison and the number of daily residents also doubling—both factors are important. In a sense, community sentencing has been tried with women and is evaluated as helping to reduce reoffending by taking those people out of their drug problems. Nevertheless, how will it alter the continued build-up in prisons if it is used similarly for male prisoners with the same results? The logic of pursuing it seems problematic, to say the least, unless there is a huge increase in resources to introduce multiple time-out centres and alternative community sentences for those with alcohol addiction.

11:00

**Henry McLeish:** I will briefly give some context. Over the past decade, if the crime level has gone down, the prison population has gone up; if the crime level has stayed the same, the prison population has gone up; and if the crime level has gone up, the prison population has gone up. Those are the facts. There is therefore no correlation between the level of crime and the prison population.

Secondly, the bigger issue is that, although we did some in-depth analysis, we could not explain why the prison population at Cornton Vale has increased by well over 120 per cent in the past decade. There are issues to do with women on remand and younger women getting more involved in violent street scenes as a result of alcohol. To address Richard Simpson's point about the prison population, like most prisons, Cornton Vale is a very depressing place. We do not deny that there are some serious criminals in Cornton Vale who need to be there for their own

benefit and for public safety. However, there is a more substantial group of people in Cornton Vale who I believe need not be there. They have committed crimes, so they should be punished, but their punishments in Cornton Vale only add to their career in crime. They are pathetic and, in the main, they are some of the most serious drug addicts; their alcohol problems and the damage that has been done are also enormous.

Richard Simpson is right to say that community sentences have been tried. However, we see no conceivable reason why the female prisoner population should have increased. Does it have something to do with the Scottish mindset? The male prisoner population did not increase to the same extent. If the problem is alcohol and drugs, the offenders need significant rehab facilities. It is clear to me that, although there is the time-out facility in Glasgow, there are no comparable facilities elsewhere in Scotland. For drugs, there is a postcode lottery, which is an issue that we can tackle. Why has Scotland's women prisoner population increased by 120 per cent? I do not know the answer; I am posing the question.

Ten years ago, when I was the minister responsible for home affairs, I wanted the prison population at Cornton Vale to be halved from 200 to 100. That was to ensure that the serious prisoners would still be looked after but the rest of the prison would be part hospital, part detox facility and part rehab facility. It was also partly to ensure that serious support was provided for the women, some of whom were there because it provided respite from barbaric partners and domestic violence.

I went to Cornton Vale not long before we published the report. There was a young woman there who was in for alcohol and drugs offences. It was not the first time that she had been in. There was a round-table discussion with the governor and she said that she was getting out the next day. I asked whether she was pleased about that and she said, "No, because I'll be back." I asked the governor what support she was getting. She did not have a doctor or a house—or a family, because they had disowned her. The governor said, "This is only Wednesday. She's going out on Thursday." I upbraided the governor and said that that was a pathetic answer. Two weeks later, Lesley Riddoch, who was on the commission, found the woman lying in the gutter outside Starbucks. Please tell me how prison worked for her.

In Cornton Vale and Barlinnie, we see dysfunctional people who are suffering from a wide range of mental and physical illness. That is not an excuse for committing crime, but it suggests that different forms of punishment might be beneficial to them as well as to society.

**Dr Simpson:** I was not saying that the community sentences are not working. You have made the point extremely well, but I would like you to comment a little further. The problem is that if someone has a sentence of less than three months, they will not get on to any sort of treatment programme in the prison. As you said in your opening remarks, it is about warehousing for the prison. The prison concentrates on prisoners who get sentences of more than six months. Is the answer not to have the community justice authorities commence assessment and in-reach programmes in the prison, which will continue outside, rather than taking these people out of the prison? Many people need the boundaries of prison to start with. They need the containment of prison to get to the point where they can engage.

One illustration is the Airborne Initiative, which the Labour Government abandoned after I left office. It was abandoned because those with a drug problem who were sent to Airborne could not engage in treatment to tackle their drug problem and the default rate was therefore massive. The situation of short-term offenders is exactly the same. If they are not treated and managed and do not begin a treatment programme, we will have difficulties. Surely the key thing is to link the community justice authority and the prison and not going into all this stuff on different sentences.

**Henry McLeish:** We need both. The sentencing issue is important. The mindset that we are locked into in Scotland is that prison is a discrete alternative: it has walls, barbed wire and fences and it has been around for 100 years or longer. Community justice is a more complex and difficult alternative for the public and bench alike. That said, why can we not move to a situation where the prison and community sentences are merged? People have similar problems, whether they are dealt with in the community or in prison.

Why can there not be a major national health service provision at Cornton Vale? Why can we not offer a range of alternative services in the community? Why not have proper rehabilitation for serious offenders? We need to accept that remand prisoners do not get access to anything. The 2007-08 figures show that 50 per cent of prisoners got a sentence of less than three months and 76 per cent got a sentence of less than six months. In that short time, it is not possible to do anything coherent by way of the prisoner rehabilitation that we are discussing.

I want to see a complete shake-up in our thinking so that it is no longer a case of behind closed walls for some and in the community for others. We need an integrated criminal justice system, we need to change the mindset and we need to be able to shift resources more easily. Society as a whole needs to be involved, through

Government departments such as health and education.

Huge energy is involved in running Polmont young offenders institution. However, when you ask about the educational background of the young men there, the answer is that it was really hit and miss. Most of them either rejected school or were rejected by school. One would think that their arrival at Polmont would be seen as an ideal opportunity for second-chance basic learning, but no—not in Scottish prisons. We can do a lot in our prisons that we are not doing at present. More positive outcomes would result from people taking a more flexible view of the whole system.

**Nigel Don:** If I heard correctly your answer to Robert Brown's last question, you suggested that, even if it was unclear where resources for community sentences would come from, we should still push in that direction. I will put the question the other way round. If there were more resources in the community, would there be any need to do any of the things that you suggest? Would it not be clear to the bench that they should use community sentence disposals?

**Henry McLeish:** No. That is my bigger concern. As I have said in other fora, much of what we suggested in our report is common sense, and our view is that some of it could have been implemented some time ago. In talking of resources, we are talking about mindset. At Cornton Vale, there is also the mystery package—the vastly increased numbers—for which people, as yet, have no explanation.

We need both resources and the proposed changes. What I have tried to say honestly to the committee today—and I have been strong on resources—is that we can proceed with our recommendations. There are community options, and they can be used more greatly than at present. Criminal justice is a question of trust. I am worried about what the public, bench and press think, and politicians, too, clearly have to be reassured that this is the right step to take. For that to happen, trust has to be translated through physical developments including resources. We can do that, but resources would be a real help.

**Cathie Craigie (Cumbernauld and Kilsyth) (Lab):** If the presumption is against short custodial sentences, could that lead to the imposition of longer sentences?

**Henry McLeish:** We have an intelligent bench. One of our fears was that, if we said that there should be no sentence of less than six months, people would find a way of getting round that. That is why we came to the conclusion that we would rather work in a politically bipartisan way and with the support of the bench and the public by legislating for only a presumption against

sentences of less than six months. Essentially, if the sheriff felt that a non-custodial sentence would be inappropriate, he could make a case for applying a sentence of less than six months. That is the best explanation that I can give of that.

**Cathie Craigie:** Will we just need to wait and see on that issue?

**Henry McLeish:** I am an optimist in life. The judiciary on the bench have operated for a considerable time, they have lots of experience and they are concerned about their independence. The reason why we opted for six months—some people might call that a compromise, as other countries do not have six-month sentences—is that we do not want tariffs just to drift up.

We have issued a challenge to everyone to make the proposals work, and we believe that they can work. As at the end of 15 May, we had 8,300 people in our prisons. The American experience suggests that—for a variety of reasons, known and unknown—the prison population will just go up and up. We have identified ways of keeping imprisonment for those who need it and providing other alternatives for those who could be better cared for. However, we will still punish people: our report suggested not alternatives to punishment but alternatives to prison.

**Cathie Craigie:** Let me move on to those alternatives. The commission's report stated:

"the key challenge is to make community sentences more meaningful, visible and immediate in their operation and impact."

Will the community payback orders that are provided for in the bill offer the immediacy and impact that the report rightly identified?

**Henry McLeish:** That is very much what we had in mind. First, we want to see the courts operate in a different way. Secondly, we want more payback options in the community.

Indeed, perhaps I have been listening to the convener too much—we agreed about this over a few refreshments at a dinner in Edinburgh—but I want a very tough line to be taken with those on community sentences. By that, I mean that, whereas a custodial sentence is dramatic, reportable and accountable—the offender leaves in a white van—a community sentence does not seem to the public to have the same seriousness, immediacy or urgency. An offender is not sent down to a community sentence as happens when a custodial sentence is given.

One of our recommendations that is meeting resistance—I want to explain this—is that we want the courts to act in the same way whether they impose a custodial or community sentence. We want a message to be sent to the public that a community sentence is a real sentence. The

person given such a sentence should also disappear in a van to start it, although they will then, of course, go back into civvies.

We want social workers to provide fewer reports. It was instructive that in America—justice is a bit rougher justice there—the judge who is equivalent to our sheriff has a computer in front of him with four parts to the information. He does not have a “This Is Your Life” report if the person has been involved only in some minor crime. The system there is much more efficient, and we want to see the same here. We think that the Government hands down far too many instructions about when reports are needed and what length they are required to be. Such reports are not needed in all cases but, sadly, they are often provided. There is a massive bureaucracy.

On another problem in the criminal justice system, we suggested to the Association of Directors of Social Work and local government that there should be a single-day response, but that has not been accepted. The latest suggestion is that community sentences should start within three weeks or 12 days.

On the efficiency of the courts, I think that we could do an awful lot to send powerful messages that the offender will be punished. Although a different sentence might be given, the sentence should look to all intents and purposes solid and secure.

In addition, we recommended that progress courts should be part of the sheriff court apparatus. Over the past decade, the biggest increase in people going to prison has been in those who are recalled for breaking rules of probation or whatever. We have had a 1,000 per cent increase in the number of recalls to prison over the past decade. Essentially, that means that, as a society, we are asking people who are totally dysfunctional to turn up for this or that meeting. We are asking them to do things that they have never done in their life, and if there is a breach the next step is to send them back to prison.

11:15

The Pew Center in the States has published a very good report on Kansas, which is a very conservative state—nearly a southern state, but not quite. Over the past two or three years, there has been a remarkable reduction in recalls through a series of incentivisations, some of them financial. As a result, the prison population has gone down.

If our progress courts are to come into play, what should happen is this: if someone is asked to turn up, somebody will go and drag them out of bed—and I know that there will be human rights considerations—so that they are at the meeting.

The system that we suggest does not pretend for a minute that people will just turn up, because that would be fanciful and ridiculous, but it will be tough in getting people to where they need to be. People should not need that, but those in question are so dysfunctional that they have probably never turned up for a meeting in their life.

Along with the progress courts and the way in which we deal with people, the third point about payback is that a wide menu of appropriate choices should be available to the bench. There would then be less pressure on sentencers to put people inside if they felt that it was a good idea not to do so.

**Cathie Craigie:** Robert Brown focused on resources. I think that the majority of committee members will agree with what you said, but making community sentences work with immediate effect will take resources. I do not think that the figure of £2 million that has been mentioned in relation to this bill will do the job. Without resources, and without the people to go to somebody's door and say, “Right, come on—you're coming along,” the ideas are meaningless. We are kidding ourselves on. What can be done without financial resources?

**Henry McLeish:** Powerful recommendations have been made, but I have made it clear that we need resources to make them work effectively and to give a wide choice to the bench.

In the era of austerity that we have been promised post-2011, public expenditure will be tight. I am not convinced that the money that we spend on criminal justice in local government or in central Government is being spent effectively. I have spoken about having more efficient court systems, fewer social work reports and less bureaucracy. Such things may have only marginal significance, but in the current economic climate I would like to think that, with new resources, every pound that we invest in criminal justice will yield a far better return.

The challenge is not only to central Government but to local government—to the 32 councils and to the community justice authorities. They have a contribution to make.

The recommendations are sound and should be taken up. My concern is that they will not obtain the maximum advantage for society unless a sensible level of resources is available.

**Cathie Craigie:** So, investment now would pay off in later years, when money might be redirected from the prison service.

**Henry McLeish:** Cathie, you probably know as much as I do about these issues. What you say is logical, but it is also illogical in a sense. If we could redirect funds now, it would be helpful. However,



given the prison population and the prison budget, it would be hard to transfer any resources until there were significant changes in prison numbers.

Even if we reduce—by a handful or even more—the population in any one prison, we will still not be able to shift resources because the capital asset and the overheads and staff will still be there. A huge transformation is required in the longer term.

I have spoken about bipartisanship, and I do not like the fact that Scotland is out of line with most developed, western European countries. I do not like the fact that we are suggesting policies that make no sense to people in any other country. If our policies were working and the outcomes were positive, we would not need to worry, but this is another benchmark of lack of progress. If we are interested in Scotland the brand, we should seek to have the best court system in the world. On many criminal justice activities, we are currently Europe's poor neighbour.

**Paul Martin (Glasgow Springburn) (Lab):** You raised the issue of fast-track disposals. Would community courts provide us with an opportunity to develop that principle?

**Henry McLeish:** We visited Finland and New York, where we saw the original Red Hook, whose equivalent is in Liverpool. We went to the Bronx, Brooklyn and downtown Manhattan, where we discussed the possibility of setting up special courts of one sort or another to deal with specific problems. The commission's view, to which I subscribe, is that radical reforms in every court in Scotland are preferable to creating special courts such as knife courts and drugs courts. From my political experience, I know that establishing a special court is good, generates publicity and moves matters forward for a while, but why can we not have a system in which more radical ideas—the best ideas in the world—are implemented in every court, so that every court becomes a special court in relation to the totality of problems that it faces? We judged that changes could be made in every court, with the co-operation of the bench and criminal justice social work.

**Paul Martin:** I appreciate your point—that existing courts should be more efficient—but if we established community courts some of the resources that are provided currently could be redirected to delivery in the community. The Lord Advocate and others with experience in the judiciary have advocated that approach on many occasions. You may have advocated a similar approach in your long political history.

**Henry McLeish:** I may have been there before—my memory is not as good as it used to be. The commission thought that resourcing courts throughout Scotland—getting changes in every court—was important. On the other hand, we

know where the bulk of crime, victims, prisoners and those serving community sentences in Scotland are located. It comes back to the point that Richard Simpson made—should we invest resources in community sentencing or in prisons? Should we put resources into the poorest areas in Scotland, which suffer from massive inequalities—from his experience, Paul Martin knows more about that than I do—and intervene before matters reach the courts? I would rather see all the courts develop and invest more resources in the courts that serve the areas with the biggest problems.

**Paul Martin:** You expressed concern about the timeframe for fast-track justice. Would the community court model not give us the ability to deliver fast-track, same-day justice in practice, as it would allow us to deal with the individuals who commit crimes in the communities in which they committed them? Might that not save considerable resources in the long run?

**Henry McLeish:** You are right to make the point that community is a powerful concept. The scenario that you have described could happen. I suggest three measures to ensure consistency throughout Scotland: first, we should establish progress courts to chase people up; secondly, we should offer a wide choice; and thirdly, the same-day justice that is provided for custodial sentences should be available in every court. However, I accept your point that there is a need to ensure that the maximum amount of resources go to the areas where they are needed. From the evidence base, we know where the problems are, but we are not doing a great deal, as a society, to tackle basic inequalities.

**The Convener:** You have pre-empted some of my questions. You dealt with the issue of offenders who lead chaotic lifestyles not turning up to meetings. I think that you would concede that the existing community service order compliance rate is much less than satisfactory, even though, for perfectly sound reasons, social workers are in many cases reluctant to report a breach. Some people simply have no intention of carrying out their community service order. How will the proposed legislation tighten that up?

**Henry McLeish:** We have to take as our premise that, for some people, there is no action that we—those who are here or the Government—could devise that would be of benefit.

You made a point about recall, breaches and rule breaking. In a modern society, it is ridiculous that we put people in a situation when we know that they will be unable to abide by its conditions. If they frequently break the rules, a custodial sentence is ultimately available. However, the commission's view is that not enough is being done. I agree that, in our so-called sophisticated society, there has to be a rougher end of justice. If

we want to stop people being recalled, breaching or going into prison, some tough action in the community would help considerably.

**The Convener:** Yes, but those offenders are not prepared to co-operate. We must remember that they have been sentenced to community service as an alternative to custody. They are drinking in the last chance saloon, and they are carrying on drinking—it would probably be more appropriate to say that they are taking drugs—and reoffending. How do you cope with such people? I see nothing in the provisions that you are suggesting that is likely to cope with that element.

**Henry McLeish:** Again, I would caution you on that. Although we have specific recommendations, they are interlocking. What I have tried to do—this answers one of Cathie Craigie's points—is to get certain measures to start to interlock to provide a better result. While I do not disagree with the cynical view, which is that for some people community sentencing will never be appropriate, I do not think that we have given community sentencing, in its widest sense, our best shot. By implementing the recommendations we can start to do that.

When a sheriff gives someone an order, it is often the last time that the sheriff will have any involvement until that person is sent away. Taking the criticism that we are talking about, we are trying to fill that gap. That is why the progress courts have a different role for social workers.

I saw something in Barlinnie that I fully support. Prison officers there have various forms of what they call buddying schemes. Why do we need fully qualified, skilled, professional social workers involved in the community when we can deploy resources on new ideas that have proven their worth elsewhere? To describe it as hard-line or tough is fair enough, but there are lots of things that we can do that we are not doing. I am confident that, in that sense, the recommendations can help.

**The Convener:** All of us around the table—I include you in that—have a duty to the victims of crime. In many instances, the victims of crime do not accept that community sentences work. You have outlined the lack of visibility and the lack of feedback into the community about what precisely happens. In short, the public think, “They’re getting away with it.” Is there anything in the report that would provide reassurance to the public?

**Henry McLeish:** Yes. I return to my earlier point. First, the interlocking nature of the recommendations, especially on the efficiency of the court system, will give that perceptible reassurance that justice is happening and that offenders are not walking away. The opposite perception worries me as much as it worries you.

Secondly, we have a situation in which the outcomes, whether in custody or in the community, are not good. We must improve those outcomes, and the recommendations can work to tackle some of those issues.

11:30

Bill Butler gave me a hard time about the evidence base, but we took an awful lot of evidence and considered an awful lot of reports on the public perception of crime. I do not mean to be critical when I say that it is interesting that, often, the view of the press and politicians does not square up with what the public actually think.

There have been recent cases in Scotland in which the public thought that the sentence did not match the crime. The public want longer and harder sentences to be handed down to people who commit heinous crimes, but they are often a bit more sympathetic than the press would have us believe when people who are involved in drugs and alcohol are given prison sentences of less than six months.

There is something out there that we can tackle. On sentencing and consistency, many of the people whom I used to represent would say, “Why did he get that sentence? I want longer sentences for crimes that matter”, but they would not want someone to be locked up in Cornton Vale for six months whose crime was theft but whose problem was that their brain was awash with alcohol and probably that they had been beaten by their partner. I am not a sentimentality merchant. We covered the whole prison population and did not single out Cornton Vale in our report. There are big questions for us all.

**The Convener:** I think that we can agree that the outcomes are not good under either heading. However, sometimes our communities require a little respite from the shoplifter who has offended 40 or 50 times, the person who has driven for the fourth time while drunk and disqualified and the small-time drug pusher who has previous convictions. Such offenders normally attract sentences of six months or less. Is the community not entitled to look to us to provide protection from such people, albeit in the short term?

**Henry McLeish:** That argument was put to us and we can see merit in it in the short term, but I reject it because what people want in communities throughout Scotland is a long-term future in which the crime figures go down and people are less afraid of crime and can have a sense of security. The respite approach is no more than a short-term consideration. When I was a member of the Parliament, the chief constable of Fife Constabulary said to me that if he could get authorisation to take 90 kids to Blackpool there

would be no crime in Fife that weekend. That would provide respite for the community, but it would not be a long-term solution.

The public want solutions for the long term. They want harder, stiffer, more appropriate sentences for serious offenders and they can be quite tolerant of short-term approaches that are seen to work and that involve some payback.

**The Convener:** We will not go down the road of considering the temporary increase in the Blackpool crime rate that might have arisen if the chief constable's suggestion had been taken up.

**Henry McLeish:** That would have been an English problem.

**The Convener:** Exactly—not our problem.

As there are no more questions for Mr McLeish, I thank him for giving up his time this morning, which we have greatly appreciated.

11:33

*Meeting suspended.*

11:37

*On resuming—*

**The Convener:** We welcome panel 2: Councillor Margaret Kennedy, convener, and Anne Pinkman, chief officer, of Fife and Forth Valley community justice authority; Jim Hunter, chief officer, north Strathclyde community justice authority; Tony McNulty, chief officer, Lanarkshire community justice authority; and Raymund McQuillan, vice-convener, and Yvonne Robson, professional development manager, from the Association of Directors of Social Work.

Councillor Kennedy is the Liberal Democrat member for Cupar in Fife Council and, since 2007, she has been vice-chair of the council's police, fire and safety committee. However, she attends today in her capacity as convener of Fife and Forth Valley community justice authority. I invite her to make some brief opening remarks.

**Councillor Margaret Kennedy (Fife and Forth Valley Community Justice Authority):** As convener of Fife and Forth Valley community justice authority, I welcome and thank you for your decision to come to Alloa to take evidence on the Criminal Justice and Licensing (Scotland) Bill. The proposed legislation is important. It has its roots in the Scottish Government's review of community penalties and the recent Scottish Prisons Commission's review, led by Henry McLeish. The CJAs positively welcomed the reviews and, likewise, we welcome the opportunity to participate in the bill process. The CJAs support and endorse the intentions of the bill, as outlined in the written

evidence that we submitted. We will be pleased to answer questions on our written evidence and any other questions that you wish to ask.

**The Convener:** Thank you. We will proceed to questions. The panel is fairly formidable, so I suggest that we pose the questions through you, Councillor Kennedy. If you feel the need to invite one of the officials to respond, please do so. We will obviously want to hear from them under specific headings that are part of their remit. Paul Martin will start the questioning.

**Paul Martin:** What are your views on the purposes and principles of sentencing as set out in the bill?

**Jim Hunter (North Strathclyde Community Justice Authority):** The principles of sentencing are always two or threefold. Punishment is certainly always part of sentencing considerations; rehabilitation and restoration to victims or the community are the other principal considerations.

**Paul Martin:** Do you want to highlight any areas of sentencing that could be added to the bill?

**Jim Hunter:** No—the purposes and principles of sentencing are covered fairly fully in section 1.

**The Convener:** We move on to the Scottish sentencing council, which was a fairly vexed issue this morning.

**Bill Butler:** Good morning, colleagues. Does more need to be done to provide sentencers with sentencing guidelines, and to provide the public with accurate information on the sentencing process? If so, could the proposed sentencing council play a role in that?

Would Councillor Kennedy like to lead, or direct someone else to do so?

**Councillor Kennedy:** I am happy for Ms Pinkman to lead.

**Anne Pinkman (Fife and Forth Valley Community Justice Authority):** The CJAs—both the conveners and the chief officers—support the recommendation on the establishment of a sentencing council. That is not to say that we wish to undermine the independence of the judiciary, but we feel, for some of the reasons that the right hon Henry McLeish outlined this morning, that it would add to the level of knowledge and understanding of the general public and to the level of transparency in the system.

The court sentencing statistics that are published annually bear out the fact that there are inconsistencies in sentencing throughout Scotland—those are reflected in the statistics for both males and females. My colleague Mr McNulty has some statistics.

**Bill Butler:** What are those inconsistencies? The committee and I would be grateful if you could outline them for us based on evidence.

**Tony McNulty (Lanarkshire Community Justice Authority):** The Government publishes statistics annually on sentencing in every sheriff court in Scotland. The sentences are listed, and the percentage of custodial sentences, probation orders, community service orders and fines that are imposed are highlighted. I will not mention the courts by name because you can look them up yourselves, but in some courts 22 per cent of the sentences that are imposed are custodial, whereas in other courts custodial sentences account for 11 per cent of sentences. There seems to be no rhyme or reason for such variations in sentencing. That is the main evidence: those statistics are published every year.

**Bill Butler:** What role could the proposed sentencing council play in providing accurate information for the public's delectation?

**Jim Hunter:** The sentencing council would have a major role in relation to the transparency of the system. That would involve explaining the purposes and the principles of sentencing in ordinary language; monitoring sentencing across the different courts and judiciaries in Scotland; and performing some kind of evaluation of that monitoring, and being able to comment on it and explain why sentencing in certain parts of Scotland may differ from sentencing in other parts.

The idea is not that we should have complete consistency throughout Scotland—that would probably be too ambitious and not a good thing in any case, because local circumstances differ. Someone needs to explain that.

**Bill Butler:** That is exactly what Lord Cullen said last week. Are you saying that we are seeking coherence, and not necessarily uniformity, in sentencing?

**Jim Hunter:** Yes, absolutely—I agree with what was said on that. The sentencing council, or another such body, should be able to explain that to people. The bill includes a requirement for the sentencing council to report annually; it should be able to use that and other mechanisms to explain that idea, so that the public understand why those differences occur.

**Bill Butler:** If a Scottish sentencing council is established, would you like any changes to be made to the proposals that are set out in the bill? Are there any ways of modifying that particular proposal?

**Raymund McQuillan (Association of Directors of Social Work):** At this stage, there is no great desire for any alteration to the proposals.

We will have to see how the sentencing council develops before we produce strong proposals or make our views known on how it is operating. However, I support the view that has been expressed on the statistical base that is available on inconsistencies in sentencing. The statistics to which Tony McNulty referred are widely available and highlight clearly the inconsistencies in sentencing across courts, a range of disposals and a range of similar types of offences. It is widely known that inconsistencies exist.

11:45

**Bill Butler:** Are not those bare statistics? Is it not the case that we would have to analyse the statistics and that we cannot simply infer from them that there is inconsistency?

**Raymund McQuillan:** I do not agree that that is the case.

**Bill Butler:** Why not?

**Raymund McQuillan:** Because the knowledge of inconsistencies is available from the statistics themselves.

**Bill Butler:** But we have to analyse, examine and interpret the statistics—we cannot simply take them at face value, can we, Mr McQuillan?

**Raymund McQuillan:** In some cases, we can. When we have statistics that show clearly differences in sentencing for similar types of offences across a range of courts in Scotland, we can take them at face value. I agree that further analysis is needed, and I suggest that the sentencing council will give us the basis for that.

**Bill Butler:** Last week, the suggestion was made by, I think, the Lord President and certainly by Lord Cullen that, if there is to be a Scottish sentencing council—of course they do not see the need for it, whereas you do—it should have a judicial majority. There would be a majority of people who have expertise and experience as sentencers, which is not what is proposed in the bill. What do you think about that?

**Jim Hunter:** I can give a personal view.

**Bill Butler:** That is what I am asking for.

**Jim Hunter:** I do not think that that would be a problem, provided that there were lay members on the council. That issue is not a major sticking point in progressing the matter.

**Tony McNulty:** One theme in community justice authorities is that our customer is the victim—that is who we are there for. I have no problem with that suggestion on the make-up of the sentencing council, but it is important that victims are well represented on the council because, just as we

are, the courts are there to serve victims. That would be my only proviso.

**Bill Butler:** I hear you loud and clear.

**Raymund McQuillan:** I do not regard that as a major difficulty. We must focus on the sentencing council's major purposes. If a majority of the members of the sentencing council were judicial members, that would not necessarily deflect the council from its major purposes. Those major purposes have been highlighted: they are to introduce a degree of transparency and greater clarity in sentencing and to provide an ability to analyse sentencing patterns—the need for which Bill Butler has highlighted several times—and a greater understanding of sentencing processes and patterns throughout Scotland.

**Robert Brown:** I am intrigued by Mr McQuillan's suggestion that we can use the bare statistics. Surely, among other things, the pattern of crime in different sheriff court areas must be taken into account, which requires deeper analysis. The pattern in Orkney must be different from that in Glasgow.

**Raymund McQuillan:** There are different patterns, but the available statistics break down sentencing patterns by type of offence. That gives us greater consistency in interpreting what is taking place.

**Robert Brown:** Yes, but my point is that the mere fact that 11 per cent of those who commit certain sorts of crime go to prison in one place whereas in another area the figure is 22 per cent does not tell us anything without further analysis. The real question is to do with the breakdown of crimes. Some research on or information about the situation is needed. For the sake of argument, assault can involve a fairly minor incident up to something approaching a murder—there is a range. Without a breakdown, how can we possibly draw conclusions about those matters?

**Raymund McQuillan:** I am not arguing that further analysis is not required; I am saying that we can draw conclusions from the available statistics. The statistics do what you suggest they do not do—they give a direct comparison by type of offence. For example, we can compare custodial sentence rates for housebreaking in one part of the country with those in another part of the country.

**Robert Brown:** The ADSW's written submission states:

"To improve public confidence in the Criminal Justice System it will be imperative that"

the Scottish sentencing council

"has the authority to address inconsistent application of the guidance".

I am bothered about that, because it refers not to producing guidance and general policy, but to monitoring, which does not sound as if it ought to be done by the sentencing council. In other words, that seems to refer to instruction to judges or a supervisory role over the courts. Will the ADSW witnesses elaborate on that point?

**Yvonne Robson (Association of Directors of Social Work):** As has been said, some analysis is required. If there is clear evidence of varying sentencing patterns throughout the country, the sentencing council could provide some guidance to try to eradicate anomalies where they are pronounced.

In one court, over a period of time, there were pronounced differences in custodial sentences. Following discussions with the bench about confidence in community sentences, those differences were reduced quite substantially. Mr Hunter will substantiate that. That example shows that trends can be changed when discussions take place and confidence in community sentences is improved.

**Robert Brown:** But is that a matter for the sentencing council? You are talking about relationships with judges and how the general guidance that is set is applied on the ground. There would be all sorts of implications for the separation of powers if a quango, which is what the sentencing council will be, had such a power or influence over the judiciary. Are you not concerned about that approach?

**Yvonne Robson:** The intention is to ensure that there is dialogue so that serious anomalies are addressed by people with expert knowledge.

**Stewart Maxwell:** Can I take you back to the point about inconsistent sentencing and statistics? Do you agree that, if there was no inconsistency in sentencing, that would be obvious from the statistics because, given the range of cases that go through the courts over a period of time, the sentences would average out? Do you agree that the statistics show a range of different sentences between different courts because there is an underlying problem of inconsistent sentencing and not because all the less serious assaults occur in one part of the country and all the serious assaults occur in another part? Do you agree that the averaging out deals with the problem and that the statistics can be relied upon to show that we do, in fact, have inconsistent sentencing?

**Anne Pinkman:** I agree.

**Dr Simpson:** I would like to hear your comments on the disjunction between prison and the community. For example, only 1,000 of the 18,000 offenders with custodial sentences are placed on alcohol reoffending programmes in any year, and a number of individuals in prisons

cannot be started on drug treatment programmes because they are not guaranteed to get a community place when they come out. Much of what is proposed does not address the problem, which is the disjunction between the community element and the prison element.

Can we improve the situation without changing the law—for example, can we ensure that someone who serves half a sentence in prison is placed on a community programme immediately when they come out? At present, people who could begin reoffending programmes while they are in prison do not do so because there is not enough time for them to complete the programme before they come out. Why are they not placed on a programme that is subsequently taken over by the community side, or does that already happen?

**The Convener:** Who will take the first cut at that question?

**Councillor Kennedy:** Dr Simpson's point is correct and well made. There is perceived to be a wall or barrier between the SPS and the wider community. Obviously, the prisons or the CJAs should remove that. In our CJA, we recognised early on that we needed to bring together health and the prison service. The drugs and alcohol programmes are a key part of that role, and mental health is inextricably linked to both issues.

I ask Anne Pinkman to expand on that and comment on our health forum.

**Anne Pinkman:** Fife and Forth Valley community justice authority puts great effort into bringing together the three Forth Valley prisons and our colleagues in NHS Forth Valley and NHS Fife. We are addressing the issues that Dr Simpson raised. That said, issues arise around short-term prisoners, one of which relates to attempts to put in place arrangements before an individual is released. It is easier to do that for those who are serving longer sentences.

We have made great strides in ensuring that treatment can continue when an individual goes into prison. One example is the maintenance of an individual's methadone script. People might ask why someone who is serving a short sentence should be maintained on methadone. The answer is that interrupting someone's methadone treatment over the course of a short sentence can be disruptive to the individual. On their return to their community at the end of their sentence, or on its expiry, the individual can be placed on a waiting list and, in some areas, they may have to wait considerable months before they can continue with their treatment.

We have made great strides in that direction. We now need to make a significant effort to ensure that we can replicate that progress for all individuals when they come out of prison. That will

be extremely challenging, given the increasing number of individuals who are serving short-term sentences.

**The Convener:** Would that be the general view in the CJAs?

**Jim Hunter:** Yes.

**Tony McNulty:** I think that what Dr Simpson suggested relates more to the previous legislation—the Management of Offenders etc (Scotland) Act 2005. Among other provisions, that act encouraged the CJAs to talk to the Scottish Prison Service about having what are called community-facing prisons. Previously, 400 of the 1,700 prisoners in Barlinnie prison were from Lanarkshire. The majority of prisoners in Barlinnie were from Glasgow, so most services were geared towards them—the focus was on Glasgow housing, social work and so on.

Those Lanarkshire prisoners are now in Addiewell. In all, 85 per cent of the 700 prisoners in the new Addiewell prison are from Lanarkshire. Lanarkshire housing and Jobcentre Plus staff are going into the prison, along with colleagues who specialise in literacy programmes, financial advice and help for families. Community people in Lanarkshire are no longer saying, "We can close the book, because that person is in prison. They will not be back for three months, so we don't need to worry about them until then." Instead of that, we are getting continuity.

The fact that someone has become a prisoner for six months does not mean they will not return to the community, that their families do not still live in the community or that the community no longer has a responsibility to try to reduce the chance of the individual reoffending on their return. That needs to be recognised, and that cultural change is far more important to the community justice authorities than formal programmes are.

**Raymund McQuillan:** In principle, I do not disagree with the contention that there should be greater joined-up working between prisons and community-based social work on the continuity of programmes. Community justice authorities across Scotland are working actively towards restoring greater consistency in the work of prisons and communities. In the context of today's discussion, however, that does not provide a solution. The problem with the current situation is the greater number of short-term prisoners who are released into the community with little or no supervision. Dr Simpson's proposal regarding short-term prisoners would involve community-based criminal justice social work in activity that it is not funded to provide at present.

In a wider sense, the ADSW contends that the direction of the bill should be to replace short-term sentences rather than to enhance co-operative

arrangements between the SPS and community-based social work, based on the current prison population. We would prefer to see a reduction in the prison population and an increase in work with offenders in the community.

**Dr Simpson:** I am not sure whether the panel heard the evidence from Henry McLeish. My point was that the Government tried successfully to do that for women offenders. From evaluation, we know that there was a reduction in reoffending among 500 women who went through the time-out programme in Glasgow and had their drug problems treated. Despite that evidence, we have seen a continuing rise in the prison population. Your hypothesis is that, if we put the money into a community resource, the prison population will drop. That is not proven by the reality of the women's prison system.

12:00

**Raymund McQuillan:** I do not think that that is my hypothesis. The ADSW supports the view that the prison population should fall, but I do not contend that that will be achieved simply by enhancing programme work.

Over recent years, the prison population has grown substantially; each day now, more than 8,000 people are in prison. Over the past 20 years, during which time the contribution of community-based social work interventions has increased significantly, there has also been an increase in prison populations. The sentencing council would allow us to analyse in more detail the reasons behind the continued growth in prison populations when crime rates are falling and the quality of community-based provision is increasing.

**Dr Simpson:** In the past five or six years, during which we have been trying community sentencing, the number of prisoners being admitted on sentences has dropped by 5,000—from 23,000 to 18,000—whereas the number being admitted on remand has gone up from 18,000 to 23,000 or slightly more. Much of the rise in the daily population is because of longer-term sentences for serious offences, but the other reason is remand. We have been moving in the right direction, but remand and breaches really need to be tackled as they are the two areas in which substantial rises have occurred. In one case the percentage is high, although the numbers are small. In the case of remand, the increase is about 28 per cent. Huge numbers of additional people are going into prison.

**The Convener:** I take it that that was a question and not a comment. Can someone please respond?

**Anne Pinkman:** SPS statistics for 2008-09 show that half of the liberations of prisoners to Fife

and the Forth valley were people who were remanded only. They were remanded into custody, and at the point of sentence received either a backdated sentence that allowed them to be freed from the court, or a non-custodial disposal.

**Jim Hunter:** I want to follow up on Dr Simpson's point. Over the past few years, progress has been made on the interface between prisons and communities and examples of good practice exist across Scotland and can be developed. However, the huge problem that prevents significant progress is what Alex McLeish referred to as the "churn" within prisons. It is just—

**The Convener:** Alex McLeish is the manager of Birmingham City Football Club.

**Jim Hunter:** I beg your pardon—Henry McLeish referred to churn. What happens is that a wall of people comes in and out of prison day after day. That prevents the Scottish Prison Service from beginning to do anything with the very short-term prisoners.

Mr McLeish also referred to "warehousing", which is really what it is. No matter what we try to do to develop good practice, no matter what social work departments do in the community, and no matter how good is the will of prison officers, that wall of bodies prevents any progress.

**The Convener:** The interventions from Dr Simpson, welcome as they have been, have diverted us slightly from our track. We will move on to ask about community payback.

**Cathie Craigie:** The community payback order will replace a number of current community disposals. Would there be any value in retaining any of those disposals, or does the bill encompass what is needed?

**Jim Hunter:** Briefly, we fully support the establishment of the new community payback order, which we think will simplify matters and help people to understand. I do not think that any of the three orders that will be removed would be worth retaining in its own right.

**Cathie Craigie:** I note that the written submission from the community justice authorities states:

"We do note that while the CPO is designed to replace most existing community sentences, this does not include the DTTO and RLO which remain in place. We believe there may be potential for confusion".

Can you expand on that?

**Jim Hunter:** Under the new community payback order, the court will have the opportunity to include an additional requirement for drug treatment. That is right and proper. However, drug treatment and testing orders will be retained under the bill. We

merely make the point that, if the bill's aim is to simplify things to make them much more transparent and easy to understand, leaving both measures in place could cause a difficulty in that people might get them confused.

**Cathie Craigie:** If there are suggestions about how that could be improved, now is the time to make them.

**Jim Hunter:** We were not sure why drug treatment and testing could not have been made a requirement of the new community payback order, within the same criteria.

**Cathie Craigie:** Do any of the other witnesses want to comment?

**The Convener:** I take it that no one from the Association of Directors of Social Work wants to comment on that.

**Cathie Craigie:** As those who were present for our earlier evidence session will have heard, it is accepted that many offenders live chaotic lives that can make it extremely difficult for them to complete a community sentence by turning up when they are supposed to do so. Getting Henry McLeish to drag them out of bed might be a bit extreme, but many people whom I represent would certainly think that that would be reasonable. Can anyone outline to the committee the problems that, in the wealth of experience that the panel has, currently exist on the ground?

**Raymund McQuillan:** In terms of offenders' compliance rates with community service orders, we have considerable difficulties, although it should be noted that the vast majority of offenders comply with and complete their community service orders. Those who either choose not to comply or are unable to do so tend to present a range of difficulties and problems that are associated with background issues such as addiction, which cannot easily be overcome during the course of a community service order.

In terms of what currently happens, there is potentially a three-way dynamic involving the offender, the supervising officer and the courts. From time to time—although not in all cases—that can lead to a situation in which offenders might not turn up because they know what they might get away with. For example, with a view to ensuring that the order is completed successfully, the supervising officer might be reluctant to register a breach at a particularly early point. In the event of a breach, an offender who is taken back to court might, in any case, be returned to the community to complete the terms of the order. The three-way dynamic that can exist in some cases requires that each of the parties be clearer about their roles and responsibilities.

From a community-based social work point of view, I believe that local community-based organisations should be very clear—clearer than we currently are—with offenders about our expectations about compliance: we should be clear about what action will be taken and when. We should also ensure that that action is taken. The current guidelines suggest that an offender who does not turn up without a satisfactory excuse should be given a first warning, then a final warning, and that thereafter breach proceedings should take place. Within the community-based social work scenario, situations sometimes arise in which people are given more than those three warnings.

I suggest that each of the three parties—the offender, social work staff and the courts—needs to take due cognisance of their roles and responsibilities. From a community-based social work perspective, I think that it is imperative that we enforce the client's obligations more rigorously. In doing that, the intention would clearly not be to increase the levels of breach but to enhance the levels of compliance.

**Cathie Craigie:** Will the new community payback order lead to improvements?

**Raymund McQuillan:** I am quite convinced that the new order as outlined and the timescales that pertain to it give an opportunity to those of us in community-based social work to address our responsibilities by ensuring that orders start quickly, and by being clear with offenders about their responsibilities and what actions will be taken if they fail to comply. That must be within a framework of providing necessary support to offenders who have underlying difficulties, for example by providing addiction services.

**Cathie Craigie:** What opportunities will the new order give you that you do not already have?

**Raymund McQuillan:** It provides for a substantial tightening of timescales, which sends an important message from the courts to the public and to offenders about the commencement of new orders. We support the view that orders should be started and should finish quickly. The current arrangements provide for the work to commence within three weeks; under the new arrangements, that period would be reduced to one week. Current legislation allows one year for completion of a community service order; the new guidelines suggest that orders should be completed within three to six months. It would be in the interests of justice and of the efficiency and effectiveness of community-based social work if, alongside that, local practices took due cognisance of their responsibility to enforce compliance and to ensure that offenders who fail to comply are dealt with swiftly.



**Yvonne Robson:** The new order will also provide an opportunity for the imposition of electronic monitoring, if someone is taken back to court for breach. As Mr McQuillan said, if an offender is in breach currently, the court either allows the order to continue or considers sending them to prison. The imposition of electronic monitoring, with the support that the community payback order will provide, may be sufficient to help some offenders to move away from non-compliance towards compliance.

**The Convener:** Offenders are not complying at the moment. I return to the point that orders will be made as a direct alternative to custody. How many last chances do people get?

**Raymund McQuillan:** At present, compliance rates are about 75 per cent. We cannot assume that people generally do not comply with orders. The breach rate is about 25 per cent.

**The Convener:** I understand that it is a bit higher than that. Your figures may be more up to date than mine.

**Raymund McQuillan:** Yours may be more up to date than mine.

**Cathie Craigie:** Are the figures that you have given those for the Fife and Forth valley area?

**Raymund McQuillan:** No.

**The Convener:** We will sort the matter out.

**Jim Hunter:** There is some confusion about breach. Mr McQuillan is correct: the completion rate for community service is probably much higher than the breach rate, because people who breach community service orders are taken back to court, where a sheriff decides whether to terminate the order and send the offender to custody, to take other action or to continue the order. If the order is continued and the offender is given a chance to finish the sentence, the breach still counts. Often the figure that is reported as the breach rate does not reflect the number of people who successfully complete community service.

**The Convener:** The figures may not be inconsistent.

**Angela Constance (Livingston) (SNP):** What do you think of Henry McLeish's suggestion earlier this morning that people should start their community sentence on the day on which it is given?

**Raymund McQuillan:** People who are given custodial sentences are taken away on the day, so what has taken place is highly visible to the public. It is unfortunate that, occasionally, when someone is given a community sentence, the public perceives them as having got off, which is clearly not the case. I support the view that it is important that something visible is done on the day. Under

the arrangements that are being discussed with the Scottish Government, an order will be served on the day on which the court makes its decision. A social work representative will have the opportunity to discuss the order's parameters and the obligations that it imposes, and to make arrangements for the offender to start work within five days.

**Angela Constance:** I was interested in Mr McLeish's suggestion that there should be more frugal or targeted use of social work resources. He gave the specific example of social inquiry reports being used less often to assist in sentencing. What do you think of that suggestion?

**Raymund McQuillan:** I do not have the statistics to hand, but I think that the number of social inquiry reports produced in Scotland is about 40,000. There are discretionary reports, which sheriffs may request, but in some circumstances reports are required by statute.

When reports are required by statute, there is little differentiation between cases that might lead to custodial sentences and cases that might not. As a result, the same type of report can be produced in all circumstances, regardless of whether the outcome is likely to be custody. On most occasions, there is little guidance from the bench on sentencing intentions and whether custody is being considered. That can tend to lead to reports being produced in a standardised form.

12:15

Some authorities in Scotland are participating in pilot exercises in which different formats and timescales for social inquiry reports are being considered—I think that three or five authorities are involved in the pilots. The exercises are due to be completed by the end of June and we hope that they will provide interesting lessons for us.

**Stewart Maxwell:** How will the bill address the public perception that community sentences are a soft option? What else needs to be done to improve understanding of, and confidence in, community disposals?

**Yvonne Robson:** There is much evidence that community service orders are meaningful and beneficial to individuals and communities. The ADSW has embarked on a 12-month public relations strategy, which will help the public to understand much more about social work and criminal justice. There is an on-going process in which we need to engage.

Most, if not all, areas in Scotland publicise work that is done through community service. We must go further and publicise other disposals that currently operate and will be incorporated into the new community payback order. We must explain

to the public what probation orders are and what community payback orders that involve supervision, unpaid work or drug treatment are. There is evidence that when the public have some knowledge and understanding of the matter, they are much more sympathetic to, and tolerant of, the court's approach to offenders, as Mr McLeish said.

**Anne Pinkman:** There is much to be done to raise the profile of and levels of understanding of community-based disposals. CJAs very much welcome the proposed requirement for consultation about the undertaking of unpaid work in communities.

Yesterday, I received the results of a survey on community service that we conducted. Our area was one of three that received short-term funding for the community service visibility project, which ran for six months. The project was not costly—it cost a little more than £11,000. We surveyed residents of four local authorities in Fife and Forth valley in November and we did so again last month. It was interesting that we were able during that short period to raise awareness of community service by 50 per cent, through a combination of posters, newspaper articles, advertisements on radio and invitations to listeners of a local radio station to vote for a community service project. The approach paid dividends. It is interesting that respondents have indicated that their awareness was raised most through the newspaper articles.

I will highlight a couple of other interesting points from the residents survey, which we can make available. Just under 50 per cent of residents considered that community service is an easy option, but it was reassuring that more than 60 per cent accepted and understood that it was an alternative to custody. More than 50 per cent of the respondents considered community service to be a way for offenders to make amends to the community for the wrong that they had done. Finally, on the type of work that offenders should undertake, almost 90 per cent of those who participated in the survey felt that offenders should be involved in work that helped the community, but 57 per cent also thought that the work should allow offenders to improve their employment skills. The residents survey produced a lot of useful information that will help us to improve and continue to develop knowledge and understanding of community service, and to inform the work that we have our offenders undertake, not just in Fife and Forth valley but throughout the country.

**Stewart Maxwell:** That is very interesting: thank you. I think that the committee would benefit from seeing a copy of the survey. I would certainly appreciate seeing the results.

**The Convener:** I was about to say that that would be useful. What was the size of the sample?

**Anne Pinkman:** The survey sample was 3,500 residents, which was considered to be a reasonable size.

**Stewart Maxwell:** You said that awareness was raised. It is certainly useful and valuable to raise awareness—I would not say otherwise—but it is not the same as changing perceptions about whether community service is a soft option. Was there any impact on that?

**Anne Pinkman:** I would prefer to defer that question and respond later, if I may, because I received the results only late yesterday afternoon and I have had only a quick read of them. I would not want to mislead you about what the survey did or did not say.

**Stewart Maxwell:** That is fair enough.

**Anne Pinkman:** I will make the survey available.

**The Convener:** That is an entirely appropriate response.

**Robert Brown:** It has become clear that there is agreement among the panel about the importance of the community dynamic and the perception of community service. If I have picked this up right, there is also agreement about the formal requirements of community orders, such as that they must start quickly and that there must be robust enforcement if they are breached. The cast-iron test is whether these things work. Many of us have significant concerns about the effectiveness of some of the current community orders—for some individuals, at least. How good are community orders at the moment? What has to be done to make a significant difference to the reoffending rates of people who undertake community service, other than the formal matters of getting the orders to start more quickly and enforcing them more satisfactorily?

**Anne Pinkman:** Although reoffending rates across the piece are high and we would all like them to be lower, the reoffending rates for community service are the lowest recorded; they are lower than the rates for those who receive prison sentences and considerably lower than the rates for those who receive periods of imprisonment and also—

**Robert Brown:** You are dealing to some extent with a different tranche of prisoners—or, rather, people who have been convicted—are you not?

**Anne Pinkman:** Not necessarily, because many individuals who receive community service have served custodial sentences, and vice versa. Those who serve short-term sentences and those who receive community-based disposals are similar—they are the same group. We know that the reoffending rates for those who receive community service are lower.

**Robert Brown:** We are, however, talking about reoffending rates of something like 42 per cent, if I recall correctly, which is still pretty high, given the expense involved.

Can you give us any guidance about the different sorts of community orders? There are drug treatment and testing orders at one extreme, with probation orders at the other—and other things in between. Where are the big gaps in service that prevent us from producing a better effect with regard to reoffending rates and the improvements to people's lifestyles that we want?

**Raymund McQuillan:** The critical test of any order is the reoffending rate. We must accept that premise. When we analyse the effectiveness of sentencing and community disposals, we must consider the reoffending rates. There are a couple of caveats about how we do that, however. This goes back to statistics again, but our analysis is not yet as good as it must be. The information that we currently have about reoffending rates perhaps tells us how many people reoffend, but it does not tell us about the actual level of reoffending. We might measure the number of people who reoffend, but those who reoffend might be doing so at a reduced frequency or they might, for all we know, be committing more serious offences. We need better analysis of what we mean when we say "reduced levels of reoffending". Are we talking about people who reoffend once or more or about the level of reoffending? Do we include in our discussion analysis of the seriousness of the offences? I do not think that we do, at present. The figures are misleading, to some extent.

I support the premise that the critical test of the effectiveness of any disposal, including custody, has to be its impact on reoffending rates. Although custody is the most important measure, I would add that it is not the only measure. We would also like to consider the effectiveness of community disposals in particular in addressing the risks and needs that are presented by each individual offender, which will of course vary. We must have a view to the effectiveness of disposals in addressing addiction, employability and accommodation issues, as well as a host of other issues that individual offenders present.

**Robert Brown:** That is a useful analysis—although it was not quite what I asked for, which was where you think there are major gaps.

For the sake of argument, let us consider somebody who is sent out on a community sentence, cleaning off graffiti or picking up litter. If the mental health and employability problems and the other things that Mr McLeish talked about earlier are not tackled early on, and if the disposals are not properly targeted, people might end up more alienated than when they began. Is there a need to look afresh in some detail at the

appropriateness of what we are doing in relation to community sentences and at how it is matched to the individual offender's needs?

**Tony McNulty:** The community justice authorities have been tasked with reducing reconviction rates. Obviously, someone can reoffend but not be caught, which is why we talk about reconviction rates. The aim is to reduce rates by 2 per cent across the whole range of disposals, including custody. The most recent figures that I have indicate that there is a reconviction rate of 42 or 43 per cent after two years.

**Robert Brown:** That is right.

**Tony McNulty:** I understand that the rates for prison and probation both run at about 63 per cent after two years. One of the biggest, most immediate gaps that we had in Lanarkshire, as shown by the figures, concerned short-term prisoners. They were in and out, on remand or because of short sentences. Nobody touched them. Most of them were men, and they were not prioritised in relation to child care, health or social work—they were beyond social work as they were not statutory cases. They were tried on probation and community service. The police picked them up, but they were released and caused immense problems for the communities that they returned to—drinking and committing breach of the peace. Basically, they were lawless. They were not working, they were not part of society and they were going in and out of prison. That was the case at Barlinnie, and now it is the case at Addiewell. That group of people were not just caught and reconvicted; they were caught so many times in one year that they were a nightmare. We were not touching that group with disposals at all.

Then the routes out of prison project came along—some members will have heard of it—which was a simple, straightforward project involving people who had been through the prison system or who had been involved in the justice system, and who talked the same language as the prisoners. Obviously they were put through a selection process—I think that there were about 400 applicants for five jobs. The advert in the *Sunday Mail* said that the project would employ ex-prisoners.

Those people go into prisons, but it is six weeks before they build up a relationship with the prisoner. With the Scottish Prison Service and the prison officers, they address the range of needs of the prisoner to reduce the chances of their reoffending. It might be about employability, literacy—many of the prisoners cannot read or write—signing on at the job centre or getting a general practitioner, which many of them need. It might also be about housing or getting in touch with their family and returning to a family situation.

They need to be taken by the hand—I do not mean literally, but almost—and shown round a range of agencies on their release to help them settle back into their community.

The figures show that that approach might be successful, although it is too early to say. Like Anne Pinkman, I will not say that we have had success, but the early indications are that that approach might help to reduce the 63 per cent reconviction rate. I could give the committee other examples, but I will not, because they are available in our three-year plan and our annual reports.

12:30

The key point is that not only the police, the courts and social work but the community must deal with crime. The basis for having CJAs is that communities are affected by crime. I want to involve communities, local health boards and addiction services and explain what we do. People who go into prison or are given a probation order for committing an offence are from a community, so we must generate community services for them.

There is a smashing initiative to address domestic violence in North Lanarkshire called MARAC—multi-agency risk assessment conferencing—which was lauded by Her Majesty's chief inspector of constabulary. When a policeman is called to a domestic violence incident, they immediately fill in a one-page form and pass it to their superiors, and a risk assessment is done right away. The main agencies involved, such as health and, for children, education immediately get round a table and discuss how to protect the victim. I have attended Coatbridge MARAC. If the offender gets bailed, we go to the court and get bail conditions put on them, which the police strictly supervise. Everything gravitates towards ensuring that the victim is protected.

If the offender is taken into custody, that is fine, but we want to know when they will come out. We can protect the victim by, for example, placing a tag in their house, so that if the offender comes anywhere near it, an alarm will go off and the police will know. We need such imaginative ways of working, because there is no single answer. There is a lot of hard work for us to do. I think that the bill's community payback orders will help us, but they will be only one tool.

**Robert Brown:** The witnesses must have many social work and CJA contacts across Scotland, and there must be examples of good practice in different local authority areas. Can you send us further information on that? I see that the witnesses will.

The direction of travel of the community payback order is okay, but it covers a multitude of sins and a series of practical disposals, some of which are more effective than others. It is therefore important to get a handle on what works.

I have a question about resources, which were referred to earlier. If the bill is passed, there will be more community disposals, in the form of community payback orders. What will be the resource implications for criminal justice social work services? Do you have concerns about that?

**Jim Hunter:** We provided written and oral evidence to the Finance Committee on our concerns about the bill's financial memorandum. We are concerned that the baseline for calculating the cost of community payback orders was the funding that is currently in place for probation orders, community service orders and supervised attendance orders. Those disposals are not sufficiently funded at present, therefore that fault has been carried forward in calculating costs for the new order. That is our first concern.

Our second concern is around the Government's postulation in the financial memorandum of a zero per cent, 10 per cent and 20 per cent increase in the number of orders as a result of other measures in the bill, such as the presumption against short sentences and the attractiveness of the new community payback order. The Government has perhaps underestimated the increase in the number of social inquiry reports that will be a direct consequence of the presumption against short sentences. Our view is that sheriffs might ask for social inquiry reports when they would not previously have done so—in other words, they will ask for social inquiry reports in cases in which they would have imposed a straightforward short sentence of imprisonment and would not have required a social inquiry report because the person was over 21 and had been in prison before. Because of the presumption, they will be able to ask for a social inquiry report so that they have all the information about what is available in the community, which may increase the number of requests. That was not taken into account in the financial memorandum, but it would have been reasonable to do so.

**Robert Brown:** Does that not pale into insignificance in comparison with the sheer cost of paying for 20 or 30 per cent more community sentences? I presume that we are talking about interventions at the more expensive end, given that you are trying to do something effective with people who would otherwise have gone to prison.

**Tony McNulty:** Angela Constance and Henry McLeish mentioned the number of social inquiry reports that may be required. The cost of those may not be high, but the important thing to remember is that the money for community

payback orders is money for working with offenders to reduce the chance of their reoffending. Background reports for the courts are costly, as they involve six hours of a qualified social worker's time. If the issue is appealability—if the sheriff asks for a report so that the decision will be harder to appeal—that would be an inappropriate use of social work. It would not be using the process to tackle offending; it would be using it for the sake of the court.

The bill provides that

"A court may pass a sentence of imprisonment for a term not exceeding 6 months on a person only where the court considers that no other method of dealing with the person is appropriate."

When a court imposes a custodial sentence of six months or less, it will have to state its reasons for doing so. However, the report in *The Herald* on the committee's meeting of 12 May stated:

"Sheriffs were no more enthusiastic about the proposals, with the Sheriffs' Association being highly critical of the proposal to make the Bench offer an explanation before handing down any sentence of less than six months."

If I were a sheriff, I would be greatly tempted to ask for a background report so that I could say that community service and probation had been tried and failed, which was why I was giving the offender a six-month or three-month custodial sentence. That could result in the expenditure of scarce resources that, frankly, would not go towards reducing reoffending.

**Robert Brown:** I accept that point. I have, perhaps, sent you off in the wrong direction. Do you not also have to take account of the increased number of sentences and the need to fund and support them? Do you accept that the level of intervention would have to be high if it is to work?

**Tony McNulty:** Yes, I absolutely agree.

**Robert Brown:** Do you mind if I make one other, brief point, convener?

**The Convener:** No, please carry on.

**Robert Brown:** In their evidence, the ADSW witnesses talked about supporting a resource scoping exercise to ascertain accurate unit costs for community service and other community sentences. Were you asked to do that, in some way, during preparation of the bill? I presume that the Government approaches you for that sort of information.

**Yvonne Robson:** That goes back to what a CJA colleague said. We are given allocations under specific headings and the probation allocation is based on the cost of a standard probation order. However, 56 per cent of all probation orders have additional conditions, some of which—particularly group work programmes or community sex offender group programmes—are very intensive,

and the supervision of high-risk offenders can be very intensive. We therefore support what CJAs have said—we do not have accurate costings.

Given the projected increase of 20 to 30 per cent in the number of community sentences, we need to break down the allocation into more realistic costings. At present, the total is divided by the number of new orders to give the annual cost, but that is insufficient. We must break down the cost to understand it. There are also differences between what it might cost to provide a service in an urban area with good transport services and what it might cost in rural areas where resources are much more stretched.

**Robert Brown:** Whatever else comes out of the bill, community payback will not involve a standard probation order in most instances, at least in terms of new people.

**Yvonne Robson:** That is correct.

**The Convener:** I remind members that the Finance Committee will report to us on the financial issues relating to the bill in due course.

**Angela Constance:** I had intended to ask about how drug treatment and testing orders could cause confusion with the drug treatment requirement in community payback orders, but Mrs Peattie rather effectively addressed that point earlier. I will therefore move on to another question.

**The Convener:** I think that you mean Mrs Craigie.

**Angela Constance:** I keep doing that, Cathie.

**Cathie Craigie:** I am used to it.

**Angela Constance:** I apologise.

I want to ask the CJA witnesses a question, perhaps because HMP Addiewell, in my constituency, houses a lot of Lanarkshire people. The CJAs expressed concern in their written evidence that the bill does not refer to the availability or prioritisation of programmes that offenders will be required to undertake. Will you elaborate on your concerns and say how they can be addressed?

**Tony McNulty:** We are almost returning to the previous point. Our concern is that people talk about programmes, but programmes are expensive. If resources are not available for programmes to be put in place, they will become a wish list; they will exist in people's minds more than in reality.

Programmes have a place and can be successful, but there is a danger that they will not produce results if we overly rely on them. Almost by definition, they quite expensively target a low number of offenders. There will always be a

question about a programme's value compared with a wider blunderbuss effect on people who constantly reoffend but do not quite hit the heights of getting statutory supervision—I talked about them earlier.

The eight CJAs in Scotland are clear about their spending priorities. Obviously, our first priority is the most vulnerable, who may be subject to crime by sex offenders and violent offenders. The multi-agency public protection arrangements, which involve agencies coming together, are a terrific success in Scotland and are the first spending priority. If funding was cut, money would still be spent on them. The second priority for CJAs is statutory services, because they deal on a day-to-day basis with people coming out of prison, people who have been sentenced to four years or more, violent offenders and sex offenders. Sadly, the third-placed priority is probably reducing reoffending and dealing with the group that does not hit the heights that I have mentioned.

Programmes must be viewed in that context. Our concern is that it is easy to talk about programmes, but finances and the reality of putting programmes in place must be considered.

**Stewart Maxwell:** I want to return to something that we discussed earlier and to the evidence that we received from the sheriffs last week. They stated that short custodial sentences can be effective and that the current use of such sentences is appropriate. What are your views on that?

**Jim Hunter:** I imagine that a sheriff on the bench with a number of cases every day will not want to reduce their options. I see exactly where they are coming from, but the question why Scotland has the third-worst custodial rate in Europe remains. Is it because we are much more aggressive, abusive or antisocial than people in other European countries? Nobody has yet been able to convince me that that is the case. The use of short sentences must therefore be questioned. I am not denying that using them is justified and that in some cases there are no other options—and the opportunity to use them has been left in the bill—but the problem is simply that they are being used far too frequently.

**Tony McNulty:** A year ago in October, I attended an ADSW conference, which obviously was full of social workers. A sheriff in the audience—I cannot remember where he was from; it may have been Dundee—stood up and talked about short sentences. He said with a lot of feeling that, with certain offenders, he was left with no option but to give some respite to the community by handing down a short custodial sentence. The social workers applauded him, because they knew exactly where he was coming from. He did not want to hand out such sentences, but he did not

think that he had any alternative. He was as frustrated as everybody else in the hall was that that was the only tool left to him. Perhaps, sadly, the issue is not short sentences but our inability to deal more smartly with offenders.

**The Convener:** Can we hear from the social workers?

12:45

**Raymund McQuillan:** There is no doubt, as Jim Hunter has pointed out, that a range of agencies and individuals in Scotland are deeply concerned about the continual growth in the use of short sentences. I do not propose to comment on or criticise individual sentencing decisions, but I think that it would be unusual if sheriffs turned up and said, "Our sentencing decisions are wrong." There is no doubt that there is a consensus that many of the growing number of short sentences that are being issued are not successful in terms of reducing reoffending or changing people's lifestyles or patterns of offending.

I support Tony McNulty's view that more work needs to be done on the alternatives that are available, which leads us back quite neatly to the question of resources. Currently, the level of service that is provided for by national standards amounts to a minimum of 17 contacts a year, which is not high, but many areas struggle to achieve that level. We have touched on the funding issues and discussed what the appropriate level of funding might be.

I agree that there is a need for community-based criminal justice social work services to scrutinise what they do. That has to be done within a consensus that accepts that we must seek to fund the level of service that is described as adequate.

**The Convener:** The bill seeks to amend the custody provisions in the Custodial Sentences and Weapons (Scotland) Act 2007, prior to those provisions being brought into force. The political thinking of the Government is that amending that legislation will help to create an effective regime for managing offenders. What are your views?

**Anne Pinkman:** The CJAs agree with your statement.

**The Convener:** It is not my statement; I was paraphrasing the Government.

**Anne Pinkman:** I beg your pardon. The CJAs agree with what you have just said. There is, however, concern about the timescales within which changes could be introduced. Clearly, there will be considerable resource implications if offenders serving sentences are to be routinely supervised on release or if they receive sentences that combine prison and community service.

We are reassured that the financial memorandum suggests that the changes would be introduced in five years' time. That should be a sufficient timescale to allow for the reduction in the prison population that will be necessary if the new provisions are to be introduced.

**The Convener:** In the shorter term, will the changes impact on criminal justice social work services?

**Anne Pinkman:** We agree that the provisions should apply to offenders who are sentenced to one year or more, but that should be the case after a phasing-in period, in which supervision initially applies to those who are sentenced to two years or more.

**Yvonne Robson:** We support that.

**The Convener:** As we have no further questions, I thank the members of our panel for their exceptionally useful contributions.

12:49

*Meeting suspended.*

14:11

*On resuming—*

**The Convener:** Good afternoon, ladies and gentlemen. I remind those who were not present this morning that it is important that mobile phones are switched off so that they do not interfere with the proceedings. Those who have not switched off their phone should do so now.

We enter uncharted territory this afternoon, in that we will now have an open-mike session to enable those who have not been called as formal witnesses to give their views on the issues under discussion. For all committees of the Parliament, it is important that every effort is made to engage with the public and with the people of Scotland generally on the issues that we, as politicians, are considering. The Criminal Justice and Licensing (Scotland) Bill covers many different aspects. Issues of sentencing and the sentencing measures that are potentially available—from imprisonment to a range of other options—are of interest to all communities. We are very keen indeed to hear the views of this community today.

Anyone who wants to contribute to the debate should indicate that they wish to do so by raising a hand so that our very able assistants in the hall can pass a microphone to them. If people feel more comfortable sitting, they may sit. If they want to stand up, they may stand up. Perhaps those who represent an organisation could introduce themselves and their organisation briefly before they make their point. Obviously, contributions are also welcomed from private individuals. All

contributions will be recorded and will form part of the record of parliamentary proceedings.

Who will ask the first question or make the first point? At this stage, as is inevitable, there is stony silence, but I am sure that someone wants to offer a point. Councillor Kennedy, do you want to say something? I think that you felt that a couple of issues that arose this morning were not properly ventilated. This is an opportunity for you to put your point on record.

**Councillor Kennedy:** The point that I want to make is about the linkage between community justice authorities and community planning partnerships, which has a direct impact on how we manage or deliver certain services in the community. That has been the experience not just in the Fife and Forth Valley community justice authority area but in other CJA areas. The issue is perhaps complicated by the community planning set-up—I accept that that differs from one local authority to another—but there is also perhaps a lack of understanding among some people in the Society of Local Authority Chief Executives and Senior Managers about where the CJAs should sit. Some in SOLACE take the view that the CJA should be part of the community safety partnership. Although community safety is part of our remit or role, I feel strongly that we should be at the community planning partnership level to deal with the more strategic policy setting. We deal with not just the antisocial behaviour management side of things but health, education, employability and so on. In the opinion of Fife and Forth Valley CJA, that needs to be articulated a little bit more at the top. We need a better understanding of where we should all sit together.

14:15

**The Convener:** Thank you—that is now on the record.

Would anyone else like to ask a question or raise a point? Please do not feel in any way inhibited. We have allocated this time for you; we have come a long way, and it has cost a lot of money.

**Elma Mitchell (Devonvale Hall Co Ltd):** I am the secretary of Devonvale Hall—

**The Convener:** Could you perhaps give your name—*[Interruption.]*

**Elma Mitchell:** I am sorry. I am Elma Mitchell—is that your telephone?

**The Convener:** Yes, it is. *[Laughter.]* Mega-embarrassment.

**Bill Butler:** There will be a short custodial sentence.

**Elma Mitchell:** I am the secretary of Devonvale Hall. We run the hall in Tillicoultry and we have the criminal justice boys to help us. They do an exceptionally good job; we could not run the hall without them. However, they have only one vehicle, and there can be only five of them for each supervisor. That means that a lot of the boys are not out helping the community. I feel that a lot more money should be put in, so that the boys can have another supervisor, and so that they can have two more vehicles. That would be the bottom line.

**The Convener:** Thank you for that. You have raised a resource issue for the local authority and the CJA. Your point is well made.

**Stewart Maxwell:** Is there demand for people to do more work, but not enough resources even to allow them to do the work that there is at the moment?

**Elma Mitchell:** We use the young people regularly. They clean the hall and set it up for the next function, and they look after the grounds. They do virtually anything that we ask them to do. Only two of us run the hall during the day, but we are poor pensioners and we cannot do it all. The young people—although they are not all young—have been absolutely exemplary and a great help to us in the three and a half years during which we have run the hall.

**Stewart Maxwell:** Do you believe that more communities could benefit from such work?

**Elma Mitchell:** Yes, more communities could benefit, but more resources are definitely needed.

**The Convener:** As there seem to be no further points at the moment, we will move on to take evidence from our final panel. After that, we will perhaps hear more points from members of the public. We are keen to do that.

14:18

*Meeting suspended.*

14:19

*On resuming—*

**The Convener:** We will now hear from our final panel of witnesses, who represent the Scottish Consortium on Crime and Criminal Justice. The members of the panel are Professor Fergus McNeill, who is professor of criminology and social work at the University of Glasgow; John Scott, who is chairman of the Howard League for Penal Reform in Scotland; and Professor Alec Spencer, who is from the University of Stirling and was formerly the director of rehabilitation and care on the board of the Scottish Prison Service. I thank

you all for coming, gentlemen; it will be invaluable for us to hear your evidence.

**Paul Martin:** Good afternoon, gentlemen. In your written evidence, you state that the purposes of sentencing, as set out in the bill,

“raise almost as many questions as they answer.”

Will you elaborate on the questions that arise, and suggest what the answers might be?

**Professor Fergus McNeill (Scottish Consortium on Crime and Criminal Justice):**

The difficulty with the way in which the bill is drafted is that it simply lists a range of purposes that sentencing might serve. The list is familiar, covering exactly what is found in similar legislation or in the relevant textbooks in various jurisdictions. It provides no coherent rationale that a sentencer might employ when thinking about which principles should apply or have priority in particular circumstances, or how to choose between different purposes of punishment or sanctioning that might conflict in certain ways.

The bill makes provision not just for attending to the issue of rehabilitation, but for punishment. Sometimes punishment may affect adversely the prospect of rehabilitation, whereas sometimes promoting rehabilitation may seem not to be doing enough in terms of punishment. The bill does not help to clarify how those competing priorities should be balanced in individual cases or even in general terms in the system.

**Paul Martin:** Can you make any practical suggestions that would improve the bill?

**Professor McNeill:** One of my suggestions is covered not in the submission from the Scottish Consortium on Crime and Criminal Justice but in the submission from the Scottish centre for crime and justice research. It would be helpful if we stated an overall purpose of the sanctioning system, under which the separate principles could be subsumed and to which they might refer. For example, some jurisdictions might have an overarching statement that the criminal justice and sanctioning system should serve to promote the existence of a just, decent and fair society. Although that sounds bland and general, it allows at least some way of looking at how specific principles are applied in particular cases and how they connect to one another.

Another specific value that I strongly urge the Parliament to consider including in the bill is a commitment to the principle of parsimony. When judges impose custodial sentences, they are exercising the greatest degree of power over individual citizens of the state that is possible in a democratic society. In one respect, they should always do that with a bad conscience, because although it is sometimes necessary, it is a bad



thing to do in its own right. We should always seek to impose the least intrusive measure that is consistent with the requirements of justice. The principle is not stated in those terms in the bill—certainly not with that degree of clarity. Its inclusion would be very welcome.

**Nigel Don:** I detect a resistance to generate a hierarchy, but I will push you on the issue. I suggest that society would like to minimise the tendency to offend in the first place. By definition, once someone is in the justice system, that opportunity has passed. Would a reasonable priority be to minimise the incidence of reoffending? Would that find some favour as an overarching principle?

**Professor McNeill:** Yes and no. It is a laudable objective for the system to pursue, but if adhering to the principle allowed disproportionate sentences—perhaps even incapacitating sentences of a duration that was not merited by the gravity of the crime—to be applied, that would be contrary to the interests of justice. Although reducing reoffending is necessary and desirable, I would not have it as an overarching principle. A better approach than putting the reduction of reoffending first is to try to approximate to fairness and justice in the first instance, before thinking about the specific outcomes that we might pursue through a properly proportionate penalty.

I will give you a slightly extreme example. If I were to take the book or film “A Clockwork Orange” a bit too literally, I might say that the Ludovico method—the particularly brutal version of aversion therapy that is deployed—was an effective way of reducing reoffending, as it appears completely to disable the offender and prevent them from reoffending once they have been through it. However, the cost of the treatment is too high, because it is so brutal and inhumane. For me, there are principles that take priority over reducing reoffending.

**Nigel Don:** You made a fair point about the list of principles being indiscriminate—we realise that it is. Policy requires some kind of prioritisation, or it is not policy. I take your point that minimising reoffending is probably not the overwhelming priority—it occurred to me that capital punishment is the most effective way of reducing reoffending, with transportation possibly coming next. However, is there a risk that if we go for fairness we will end up with a principle that is so wishy-washy that it allows anything and is no longer a principle?

**Professor McNeill:** I do not agree. We can be robust in creating opportunities for people to make reparation—or pay back, in the language of the bill—without that necessarily meaning that priority is given to reducing reoffending. The example that you heard from the member of the public was not

first and foremost about the extent to which community service reduces reoffending; it was about the valuable public service that people provided.

In a sense, those people paid forward. They might have been in debt to society and they might not have remedied the situation in relation to the victims of their crimes, but they paid forward by undertaking work that was of benefit and value to the community. In and of itself, that is robust and sufficient, but if community service or payback has the additional effect of reducing reoffending, which it might well do, so much the better. However, that is a secondary benefit and not the one that I would prioritise.

**Professor Alec Spencer (Scottish Consortium on Crime and Criminal Justice):** On whether the reduction of crime should be set out as a purpose of sentencing, it is a mistake to believe that the criminal justice system can cure the ills of society. It is the ills of society—inequalities, deprivation and so on—that are primarily responsible for levels of crime.

The criminal justice system cannot resolve the problem of the crime rate, so we must start somewhere else. The criminal justice system is a response to people who offend; it is not a method of reducing crime—and I do not think that there is much evidence that deterrence, as a concept, works.

**Angela Constance:** We have heard an erudite discussion about the merits of including in the bill the purposes and principles of sentencing, but what does the panel think about the practical application of those principles? In Scottish legislation in recent years the trend has been clearly to set out principles—without applying a hierarchy to them—that were intended to be used by the practitioners who would use the legislation to intervene in a way that would have an impact on other people’s liberty. I am thinking about the Adults with Incapacity (Scotland) Act 2000 and the Mental Health (Care and Treatment) (Scotland) Act 2003.

The inclusion of sentencing principles in the bill is surely just about asking sentencers to consider and apply principles of best practice. It is surely more pragmatic than the erudite and intellectual discussion that we have heard suggests.

**Professor McNeill:** I agree. You provided good examples—we can also include section 16 of the Children (Scotland) Act 1995, which enshrines important principles that are intended to govern the judgments that are made by key decision makers in the relevant system. I am in no way against the articulation of principles in the bill. Indeed, I do not think that the bill goes far enough

in articulating how the principles might best be put into operation by the relevant practitioners.

**John Scott (Howard League for Penal Reform in Scotland and Scottish Consortium on Crime and Criminal Justice):** If we do nothing, the current record-level prison populations will simply continue to increase. It might help if, at the beginning of the bill, there is something that gets sentencers' attention and makes them think about what they are doing—and which makes them change their mind in some cases. I was at an event last week at which sentencers were wringing their hands and saying, "Why do we have a record prison population? We don't know; we'd like to find out." Whenever sentencers gather, they usually agree that there are too many people in prison and that some of those people should not be there. However, each of those people has been sent there by a sentencer who no doubt thought that that person had to be in prison.

A statement of principles would be good, but the danger is that sentencers will simply say that they have been following the principles anyway. They need to think about their approach to sentencing more than they might have been doing and, in some cases, change it.

14:30

**Angela Constance:** Will they not have to provide evidence of how they have applied the principles?

**John Scott:** Yes, although that can sometimes be done rather too easily. Since the change in the bail laws, sheriffs have to give reasons for granting or refusing bail. In some situations—I am not saying that this is universally the case—it is clear that not much more is done than ticking boxes. In fact, a form with the boxes is provided to the sentencers. Obviously, they want to get through the business, but there is a danger that sentencing is reduced to a mechanical process or a case of the sentencer saying, "I've taken rehabilitation into account—of course I have," rather than stopping to think how it features in the sentence.

**The Convener:** Having dealt with the somewhat esoteric issue of purposes and principles, we will move on to a more practical level and deal with the proposed Scottish sentencing council. I note that the witnesses do not have an agreed position on the proposal, but we will pursue it with them individually.

**Bill Butler:** Good afternoon, gentlemen. As you know, the objectives of the proposed sentencing council are to promote consistency in sentencing, assist the development of sentencing policy and support transparency in sentencing. Do the proposed measures represent significant progress on the current position? As you do not have a

collective view, we will start with Professor Spencer.

**Professor Spencer:** With the convener's indulgence, I will start somewhere else if I may. Why are there proposals for a sentencing council? Because the Scottish Prisons Commission talked about recommending a prison population level of 5,000, and sentencing lies somewhere behind that. The first thing that the Government and the Parliament need to decide is the appropriate prison population level. Such levels have been decided in other countries. For example, Finland decided as a matter of social policy to reduce the numbers in prison and, over a period, set about reaching its desired level through legislation, sentencing and the interventions that the state provided. It reduced its prison population by three quarters.

Therefore, politicians must start by deciding what they want the prison population to be. My personal view is that the prison population is too high. I accept the commission's proposal of 5,000, although I would have gone for a slightly greater reduction and halved the prison population to 4,000. In my experience, and according to the evidence, quite a number of people in prison do not require to be there. We have heard about remands already. A large number of people on short-term sentences go to prison. They create churn and a digression from the work of prison, which is to lock up the people who commit serious crimes and present a danger to the public. There will be others who should not be there. Removing them would give a population of 5,000.

Fergus McNeill has already talked about parsimony in sentencing. That means that prison should be the last resort, not the normal response in our society.

**Bill Butler:** Will the sentencing council aid that, to draw you back to the original question?

**Professor Spencer:** Thank you. I was going to say that, therefore, the proposal for a sentencing council is a case of using a sledgehammer to crack a nut. I am not sure that I completely favour a sentencing council, because we have to get the number of people in prison down, and judges have to fit in to that framework.

**Bill Butler:** How would you reduce the number? You say that the sentencing council would be a sledgehammer to crack a nut. What would be your much more sophisticated tool of preference?

**Professor Spencer:** I think that judges should sit down together and work out how they are going to reduce the number of people in prison. They need to say that only the most serious of crimes warrant imprisonment. I certainly agree with the proposal in the legislation that sentences of less than six months should not normally be custodial.

**Bill Butler:** One of my colleagues will come to that, professor, but that was an interesting comment. Can we now move on to Professor McNeill?

**Professor McNeill:** Are principles, and is a council, progress? In my view, yes. It is helpful to go back to the Scottish Prisons Commission's "Scotland's Choice" report and think about the context that it provides for the discussion of the measures in the bill. The report suggested that paying back in the community should be the default position and that, rather than thinking about imprisonment and alternatives to imprisonment, we should think about such community payback and alternatives to that. It is about trying to invert what is at the centre of our sanctioning system and our judicial consciousness, for want of a better expression.

**Bill Butler:** I am sorry to interrupt, but, in your view, does imprisonment have a place? If so, what is that place?

**Professor McNeill:** I was about to go on to say that it does. "Scotland's Choice" states explicitly that imprisonment should be reserved for offences that are so serious that no other sentence is appropriate, and for situations in which there is a significant risk of serious harm to the public that must be dealt with through the detention of the offender. It says—

**Bill Butler:** If I may interrupt again, what about a situation in which someone offends time and time again, such as a burglar—although perhaps not one who is involved in the theft of a masterpiece of fine art? Is there not an argument that a custodial sentence would, in the end, have a salutary effect?

**Professor McNeill:** I do not know that there is evidence for the argument that a custodial sentence would have a salutary effect.

**Bill Butler:** What is the evidence against it?

**Professor McNeill:** Well—the fact that burglars recidivate at such high rates in spite of sentences of imprisonment being handed down to them.

If you will permit me to return to your original question, "Scotland's Choice" explicitly states that a key and initial function of a sentencing council would be to establish the precise practical meaning of the two principles of seriousness and risk and how they should be applied and put into operation. The current proposals do not make it explicit that that would be an immediate function of a sentencing council, which is a serious missed opportunity.

To be fair to my colleagues in the consortium, although I am prepared to say personally—and probably with a greater degree of enthusiasm than other consortium members—that I think

sentencing principles and a sentencing council are a good idea and probably long overdue, I am not so sure that the specific proposals in the bill are the best way to go about establishing guidelines or a council. You will have seen from the consortium's submission that there is a great deal of anxiety among its members about certain risks that are created by the way in which specific proposals in the bill are drafted. I will happily leave it at that, if you want to move on.

**Bill Butler:** I have one further question. Do you agree that a sentencing council should be advisory rather than anything else? If you do, you will be agreeing with the Lord President and Lord Cullen, who gave evidence last week.

**Professor McNeill:** Is that intended to encourage or discourage me?

**Bill Butler:** That is, of course, a matter entirely for you. I would not constrain you in that way.

**Professor McNeill:** No, I do not think that such a council should be merely advisory. If it were, it would be too straightforward for judges to depart from the advice that the council issued.

I would want a sentencing council to produce mandatory guidelines—I am giving a personal view, not a consortium view—but I would nonetheless hold to a position that judges should be able to depart from the guidelines and give reasons for doing so in individual cases. Where sentencing councils operate in other jurisdictions, one benefit of such a procedure is that it allows a jurisprudence of departures—in other words, the development of legal reasoning and debate about what should and should not permit a departure from the rule to be applied.

**Bill Butler:** Is that jurisprudence not in place at the moment? That is what the sentencers argued last week.

**Professor McNeill:** No. At the moment, there is a system in which, after the fact, through an appeals process, guidelines come to be issued or appeal court decisions might have some effect in moderating individual sentences and also in communicating messages to the wider community of judges. However, that leaves us vulnerable to jurisprudence developing only on matters that happen to come before the appeal court. That is not a rational way to go about establishing a sentencing policy—it is at the mercy of events as opposed to being principled and thoughtful. I would much prefer guidelines to be developed in advance to set a framework.

I will give an analogy; it will not take long to do so. It is, I admit, an imperfect analogy, but it helped me to formulate my views. As an academic, I am a judge all the time. At the moment, examination boards are looming, and I

am judging a ridiculous volume of student scripts. In exercising my professional discretion and deciding which mark to award to each individual script, I continually refer to stated guidelines that determine—

**Bill Butler:** Do you refer to grade-related criteria, as we used to call them?

**Professor McNeill:** There are criteria for each grade and for each separate module that I assess. The designers of the module will have indicated what it was trying to achieve. I apply to each individual case both the general guidelines on grades and the specific guidelines on the outcomes that we are after. Moreover, I willingly and happily subject my individual professional judgment to moderation by my colleagues internally in the university and externally in the academic community. I am talking about important decisions that affect my students' career prospects and futures, but those decisions are in many respects far less important than the decisions that sentencers make every day in our courts. However, the process of moderation and the guidelines that are produced in advance of the decision making to which sentencers are subject are much weaker than the procedures that I am happy to submit myself to as a professional academic.

**Bill Butler:** The analogy is very good although, as you say, not perfect.

**John Scott:** I am on the sentencing council sceptic wing of the consortium.

**Bill Butler:** Is that the wing that has more members?

**John Scott:** It is hard to say. I think that a lot of people are in the middle and that the two sides are about even.

I think that the sentencers and judges were right last week when they said that sentencers do not start with a blank piece of paper and end up with something that bears no relation to what has happened in equivalent cases. There is a fair degree of consistency in sentencing in Scotland. However, I have problems with the meanings of the words "consistency" and "inconsistency". The word "inconsistent" is more often used to describe a sentence that is perceived as lenient. There is rarely an outcry about a sentence that is seen to be too hard, although that does happen. I am concerned that a march towards consistency is really an attempt to ensure that sentences are levelled up.

Given what is proposed in the bill, it is interesting that the appeal court has used its own powers to issue guidelines, although, I admit, it has done so on only a handful of occasions. However, that has happened in the past couple of

years, and the appeal court may be prompted to use those powers by the thought of what else might come in its place. Doing things in that way is useful, because although, as Fergus McNeill says, whatever is placed in front of the appeal court will be reacted to, whenever there are particular issues that are problems, even if the issue is just a local one, they will usually end up in the appeal court. Things will take a bit longer, but I am concerned that the sentencing council would be under immediate pressure to react immediately to condemn and force the judiciary into adopting a more severe stance towards a particular offence that happened to attract the attention of the editor of a tabloid. Perhaps the sentencing council would be more susceptible to such pressure, although I think that sentencers are also susceptible to it. In recent years, sentences have gone up—there has been an inflationary drift. Someone who is convicted of an offence today will get a higher sentence than someone who was convicted of that same offence 20 years ago would have got. That is partly because of the backdrop of increased penalties in legislation, and also because of public pressure.

14:45

**Bill Butler:** You say that you are sceptical about the proposed sentencing council. Does that mean that you are wholly against it, or do you think instead that it should be modified and adapted in a way that makes more sense to you and meets your concerns and doubts?

**John Scott:** It could be modified to ensure that it plays a useful role. It could be an advisory body rather than a body that issues guidelines. The relationship between the council and the court would require to be spelled out better than it is.

One of the things that are clear but, perhaps, surprising is that our sentencers do not know why the prison population is as high as it is. Perhaps the sentencing council could have a useful role to play with regard to research. It could also get involved with explaining matters more clearly to the public. Traditionally, courts have been bad at explaining anything that they have done. In recent years, however, that has improved significantly—when a case is of significant interest to the public, the press officer at the High Court will try to prepare some material to explain the situation. However, an issue that arises is how that is reported, which means that the newspapers have to be part of that process as well. The sentencing council might also be able to conduct events with the public, which would be helpful because, the more information the public get, the more they can see that a decision that might seem to be inconsistent is actually an appropriate decision

that takes into account factors of which they were not aware.

**Bill Butler:** Would you say that, sometimes, the public's view is coloured by the proprietors of certain newspapers, who simply want to sell more newspapers?

**John Scott:** Absolutely.

**Bill Butler:** I absolutely agree with that, too.

**The Convener:** As the only active practitioner present, you are not under common-law caution in respect of that answer, Mr Scott.

**Stewart Maxwell:** I agree that there tends to be public outcry about sentences being too lenient. However, there has also been outcry about sentences being too harsh, usually when someone who has been defending their property has injured someone, for example. Although there is not usually outcry about sentences that are seen to be too harsh, I assume that the courts' appeals process deals with the cases about which there is such an outcry. What are your views on that?

**John Scott:** The appeals process deals with the majority of cases. When a client is charged with a particular offence, I can tell him what the sentence is likely to be, within a band, provided that the Crown has made the information available. However, there are judges who operate beyond the upper end and below the lower end of the band. The sentences that are imposed by those sentencers, whether they are exceptionally lenient or exceptionally severe, do not necessarily always end up in the appeal court—the Crown would have to decide whether to appeal if it thought that the sentence was unduly lenient.

There is a different dynamic around what happens in the appeal court. The fact that something is seen by the public as being excessively harsh or lenient is not a guarantee that the appeal court will deal with it. Further, the appeal court often decides to leave sentences alone if the sentence is deemed to be—in the form of words that it uses—harsh but not severe. Again, at that stage, we are down to playing with words.

**Stewart Maxwell:** You say that, because of your experience in this area, you can use the information that the Crown has provided to tell someone what sentence they are likely to get, within a band but there will be judges who will issue sentences beyond the upper end and below the lower end of that band. Does that statement not suggest that a sentencing council that produced guidelines would be a useful tool?

**John Scott:** I am not sure that guidelines would be useful in that regard, as the appeal court already issues similar guidelines. Judges have a necessary degree of independence, and the sort of judges to whom I am referring will not change

their behaviour based on sentencing guidelines, whether those guidelines come from the appeal court or the sentencing council, even if that results in repeated appeals.

**Stewart Maxwell:** Earlier, we heard that only some cases reach an appeal and result in a judgment being given, which results in an anomalous situation in which we have guidelines from the appeal court in some areas but not in others. If we had a sentencing council that issued guidelines, we could see clearly whether someone was continually sentencing too harshly or too leniently.

**John Scott:** You are right to point out that flaw in the current set-up. The fact that a matter requires attention does not mean that it will necessarily end up in the appeal court.

**Professor McNeill:** You have hit on one of the reasons why I am generally in favour of the notion of a sentencing council issuing guidelines. Through the activity of such a council, we could achieve a coherence in our approach to sanctioning that does not currently exist. That coherence would be intelligible not merely to judges but to lawyers, defence agents, accused persons and—importantly—social workers struggling with the task of writing a court report and going to a court without being sure who is going to be on the bench or what that person might consider to be a suitable range of realistic penalties. We have ample evidence that social workers are struggling to come to terms with making a judgment about what is and is not realistic. Part of the reason for that is that they do not have a common framework or an expressly articulated framework for sanctioning to which they can look for guidance that might help them. I think that we can get better coherence and communication between the relevant professionals if we have stated principles and guidelines.

To reflect properly the views of my colleagues on the consortium, I should underline the fact that there is grave anxiety that the sentencing council might be exposed to undue political pressure and that the kind of media attention that has already been referred to could have an exceptionally detrimental and damaging effect on its operation, which could lead to serious consequences for the operation of the criminal justice system. Our hesitation is about the specifics of the proposals, as drafted.

**Stewart Maxwell:** Professor Spencer, would you like to add anything?

**Professor Spencer:** I think that inconsistency is useful, if we have an independent judiciary, but, on the other hand, that usefulness depends on the inconsistency not being too inconsistent and being

able to fit into a coherent system that everyone can understand and there not being mavericks.

If we have a coherent framework whose boundaries everyone understands—which is achieved through good judicial training, benchmarking, judges discussing cases and using the information technology system that enables them to compare sentences and so on—it is entirely appropriate for judges to make independent sentencing decisions based on the merits of the individual case. My concern has always been that there is an upwards drift. That needs to be addressed and, as a group, judges have to be encouraged to reverse the direction of that drift, so that we can have a manageable number of people in prison.

**Stewart Maxwell:** On that very point about the independence of the judiciary, do you therefore agree with the argument that a sentencing council might undermine or inhibit that independence?

**Professor Spencer:** Again, that depends on the format. If the council is advisory, it will provide guidelines but will not necessarily instruct. We are in Alloa, and I am pleased that, if the Government statistics are correct, the court in Alloa has the lowest level of custodial disposals. However, other courts have higher levels. So be it. That depends partly on the decisions of individual sheriffs. If sheriffs and judges were constrained and told what they had to do, that clearly might fetter their independence. They must be able to judge individual cases, taking into account the individual circumstances, the nature of the offence and the offender and putting all that together. As we have heard, the judge must also consider reports from social workers and find out about the backgrounds in trying to reach a reasonable outcome. That is what is required.

**Stewart Maxwell:** Is it not the case that having a set of guidelines, with the ability to depart from them, would provide a framework that would give consistency and clarity and all the other things that we have discussed but would also give the correct balance in relation to judicial independence?

**Professor McNeill:** That is part of the answer, but the bill raises a slightly more vexed constitutional question. How I read the bill is that it is not trying to interfere with judicial discretion in individual cases. It will leave decisions in the hands of the judges, but within a framework of guidelines that the council will produce. The question is under what authority the council will produce the guidelines. Although the Parliament in all sorts of ways sets frameworks, limits powers and establishes duties of judges already through legislation, will the sentencing council act with the authority of Parliament when it issues a guideline or will it, to an extent, act under pressure from the executive arm of government? What precisely will

its relationship be to Parliament and the Executive? Further, the council's relationship with the appeal court is not entirely clear from the bill. Those issues require clarification.

There is a risk of undue political interference in the process of establishing the guidelines. I want Parliament to exercise its democratic right—I argue that it is a duty—to make clear statements about the systems of punishment and sanctioning that should exist in Scotland. I am happy for Parliament to create a body that exercises some functions on its behalf and maybe goes into a level of detail that the Parliament and the Justice Committee could never go into in their own right. However, I am slightly worried about the Cabinet Secretary for Justice having a role in the appointment of members of the council. I am not sure what the independence of those members would be once the council was operational.

I have other problems with the proposed composition of the council. For example, I am not sure why a constable is to be represented, when those involved in the administration of punishments are not. It seems obvious to me that somebody from the Scottish Prison Service and somebody from criminal justice social work ought to be involved in the council, given that they have practical day-to-day experience of making the sentences of the courts take effect. That strikes me as an exceptionally valuable form of expertise to bring to the deliberations of the sentencing council. The prosecuting arm of the justice system is already to be represented through the nomination of a procurator fiscal or a representative of the Crown Office. I am not sure what the police function is in the proposed constitution of the council.

**John Scott:** Given that my preference is for a council that is an advisory body, questions of independence do not really arise.

**Stewart Maxwell:** I have one final point, just to nail down the issue. If there were to be a sentencing council and it was not going to be advisory, what proposals would make it acceptable? Professor McNeill made some points about the make-up of the council. Should the balance be changed? For example, it has been suggested that sentencers—judges and sheriffs—should make up the majority on the council. Should it be subject to the appeal court judges, as has also been suggested? Professor McNeill questioned the proposal that the Cabinet Secretary for Justice would appoint members. Who else would appoint them?

15:00

**Professor McNeill:** There could—and perhaps should—be a role for Parliament in determining

appointments to a sentencing council. Through that mechanism, the Executive's direct involvement would be moderated.

On the specifics of how I would constitute a council if I were in a position to do so, I do not feel that my expertise or knowledge of these councils around the world allows me to answer your question. I encourage you to put the question to Professor Neil Hutton when he gives evidence at a later date. He has an exceptional level of expertise in the operation and constitution of councils around the world.

**Angela Constance:** Professor McNeill has intimated who he would like to be included on the sentencing council. Does any other panel member have a view on that? Also, where should the balance of power on a sentencing council lie? Should the majority of members be judges?

**Professor McNeill:** I do not have a firm position on who should be in the majority. I can see why judges might think that the maintenance of judicial independence requires them to be in the majority. It is interesting to hear them talk about it. A job remains to be done in teasing out what they mean by "judges" in that context. As I see it, as the council's constitution is proposed in the bill, it will have five judges, although I am not sure that that is the view that the two senators took last week.

Given that the greatest volume of business, particularly involving short sentences, is in sheriff courts, there needs to be better representation of sheriffs and not of more senior judges. I am not sure that sheriffs are adequately represented. At the moment, there are eight lawyers as against four laypeople. I am not sure that I favour that. I am sorry to be equivocal and not to have a straight answer for you. I can say only that I remain to be convinced. I am open to argument on both sides.

**John Scott:** I would lean towards having a majority of judges on the sentencing council, if it were going to be more than just advisory, for the reasons of independence that Fergus McNeill mentioned.

**Professor Spencer:** I do not have a view. I share the view that Fergus McNeill gave.

**Paul Martin:** Professor McNeill spoke about independence. Section 8, "Ministers' power to request that guidelines be published or reviewed", makes a number of references to ministers' powers. For example, it says:

"The Council must have regard to any request made by the Scottish Ministers."

Is that the kind of reference about which you are concerned?

**Professor McNeill:** Yes. It gives some pause for thought, although I do not want to suggest that

the Cabinet Secretary for Justice or, more properly, Scottish ministers should not have input into the work of the sentencing council. That would obviously not be sensible. It all depends on how we interpret the vexed phrase "must have regard to". If that means "must consider, but can ignore", I am not too alarmed by section 8. If it means "is under some obligation to respond to"—if "must" means "must"—does that mean that the council must respond to the request but can respond in the negative? The practical effect of the section is unclear.

Section 8(3) says:

"If the Council decides not to comply with a request made by the Scottish Ministers, it must provide the Scottish Ministers with reasons for its decision."

What reasons are acceptable and what are unacceptable? What happens if the Scottish ministers are unhappy with the reasons that the council has given? Could we end up in a ping-pong battle of referral, re-referral and refusal to consider and reconsider? I am not sure that the relationship between the Parliament, the Executive and the judiciary has been adequately thought out in relation to the constitution of the council.

**Paul Martin:** It is difficult to envisage the relationship. If there is going to be one, I suppose that the minister would hope that the council will have regard to any request that he makes. It is difficult to strike a balance; it will have to be one or the other. It will be difficult if, when the minister makes a particular request, the sentencing council says, "Well, we are independent," but the legislation says, "Well, sorry, you're not. You 'must have regard to' a request." We cannot have our cake and eat it, can we? We have to decide one way or the other. Do you agree?

**Professor McNeill:** I am sorry, you will need to clarify—decide one way or the other between which two positions?

**Paul Martin:** The phrase "must have regard to" is difficult. I appreciate your point that the Government must have some sort of relationship with the council, but it is difficult to envisage, because of that phrase, where the balance will be struck.

**Professor McNeill:** It would depend on what kind of referrals the Scottish ministers would pass to the sentencing council. If section 8 means that ministers reserve the right to refer to the council, for whatever reasons, particular practical or political concerns, then that is fine. It would be entirely appropriate for ministers to ask the council to consider such issues. However, if the section means that ministers would be able to say to the council, "You will now produce guidelines on this," I would be slightly more hesitant in saying that it was appropriate. I would like the council to be able

to say, "We've considered the request for guidelines to be produced in relation to particular matters, but at the moment we have more pressing priorities." The council would then explain why those priorities were more pressing. The issue in question is the relative authority and power of the different arms of government.

**Cathie Craigie:** The consortium's written evidence says:

"The case for and likely effects of a Sentencing Council are far from clear."

From the evidence that we have heard so far, I think that we could all agree with that statement. In the same paragraph, you say:

"a sentencing council would cost £1 million a year."

You then suggest that that resource could be more effectively used elsewhere. Will you give us some examples of how the resource could be better used? Other than by the creation of a sentencing council, how might the objectives that have been set for the council be met?

Who wants to answer? Professor McNeill, you seem to be here all the time because you are in the middle.

**Professor McNeill:** I know—it is just not fair. I demand guidelines.

**The Convener:** But you must answer.

**Professor McNeill:** Right. I will have regard to the question, although I may not answer it.

What does £1 million buy you in the criminal justice system? Alec Spencer will correct me if I am wrong but, by my calculations, it buys you 25 prison places for a year, or fewer than 1,000 community penalties—which range in price from about £1,000 to £1,500. I think that those figures are roughly correct at the moment, although, as we have heard this morning, that is not by any means an adequate level of resourcing if we want community penalties to be as effective as I feel they could be.

I have to state clearly that what I have just said reflects a range of views within the consortium. Speaking personally, I would say that investing £1 million in producing a coherent and rational approach to sentencing would be an excellent use of taxpayers' money—as long as a coherent and rational approach was indeed the outcome. However, from the earlier discussion, the committee has already heard all the caveats about whether the proposals as they stand would achieve such an outcome.

I think that £1 million would be an entirely acceptable price to pay for greater coherence in our approach to sentencing. Whether the present

proposals would deliver that coherence is a question that the consortium is debating.

**Cathie Craigie:** Does anybody else wish to comment?

**John Scott:** No, I have nothing to add to that.

**Cathie Craigie:** All right, I will move on to ask about consistency in sentencing. Evidence that the committee has heard, last week in particular, has suggested that more research is required to establish whether there really is inconsistency in sentencing. We heard this morning from social work representatives that there was evidence of inconsistency. That evidence came from Government statistics. Do you think that a sentencing council would produce consistency?

**Professor McNeill:** Would it produce consistency? Let me go back to the premise on which the question is based.

**Cathie Craigie:** Would it produce consistency, and do you believe that there is inconsistency at the moment?

**Professor McNeill:** That is where I wanted to start. Do I believe that there is inconsistency? Yes, I do. What do I base my belief on? Several things. Let me first define consistency and inconsistency, as that was troubling for the senators last week.

Technically, to demonstrate inconsistency in the sentencing of offenders one would have to be able to show that exactly the same offender appearing before different judges for exactly the same crime would be sentenced differently. That will never happen, so there is no way for any research to be conducted that would absolutely nail the question of judicial consistency or inconsistency—it is simply not possible. Judges will always be able to say that every case is unique, and they are right to make that argument. In that respect, I have no argument with what the witnesses said last week.

However, is there variance in sentencing that seems to be beyond what is defensible? I think that the answer to that question is yes. This morning, you heard evidence of the statistical patterns of sentencing in different courts. There is clear evidence from those statistics that there is significant variance between different sheriff courts in Scotland. The question is whether that variance is defensible in relation to what is going on in different sheriff court areas and the different business that comes before different courts. On that issue, I can cite three studies from the 1990s that looked at that directly or indirectly in researching various aspects of sentencing. I will give you the references later if you want them.

The studies all found evidence of a degree of consistency across sentencers but some evidence of inconsistency. One study—to which Professor Hutton can speak when he comes to the



committee—looked at three sheriff court areas and found that, by and large, the sentencing by the 10 practitioners in them was within a reasonable range of variance with the exception of the sentencing of one sheriff, who was significantly out of line with his or her colleagues—I must be careful how I phrase that.

I did some research in the 1990s that looked at three sheriff court areas. To eliminate the tension around the similarities and dissimilarities between cases, I ran all the cases through a particular instrument that tries to assess the likelihood of custody. I discovered that, of the three courts that I was looking at, the one that sentenced most people to custody was the one that apparently dealt with the least serious cases. That is *prima facie* evidence of inconsistency.

The third study was the one that generated the instrument that I used in my study. It, too, found variance that could best be understood as the result of different judicial sentencing practices. I am convinced, therefore, that there is a degree of variance in sentencing that goes beyond what is reasonable and defensible.

A more pragmatic source of evidence that suggests variance in the system is the fact that accused persons going before the courts and the lawyers who defend them know full well that going before different sentencers requires different tactics. At intermediate diets, some people will plead guilty instantly if the judge whom they are going to appear before is deemed to be a relatively lenient sentencer. If a harsher or more punitive sentencer is on the bench, the person will not plead guilty in the hope that, when they return to court later, they will face a different judge.

Judges know that that happens. It is called judge shopping, and it goes on all the time in our system—sorry, that is an exaggeration; it goes on to a significant degree in our system. Social workers know about it because they have to cope with it in the reports that they write. My first court report was for Ayr, and my second court report was for Kilmarnock. Foolishly, I wrote them on the presumption that roughly the same thing would go on in the two courts, but my practice teacher told me that I could not possibly submit the report that I had written to Kilmarnock. It was okay for Ayr but it would not have done for Kilmarnock, as things are done differently there—at least, they were during the early 1990s.

Everybody understands that that goes on. When we say that such evidence is anecdotal, we are not doing justice to the weight of evidence that shows that there is significant variance. That is partly why I am in favour of establishing a system that aims for greater coherence.

I think that your initial question was whether a sentencing council will work and eliminate inconsistency. It will help us to make progress, and it will improve on the current position. It will expose judicial decision making to a degree of scrutiny against agreed standards—which do not currently exist in the system. That is why I am in favour of progressing in that direction, albeit with all the caveats about whether the measures that are before us provide the right way to proceed.

15:15

**Cathie Craigie:** We are getting deeper and deeper. Your response has not helped me to make any progress in my thinking about this. Although we might expect the Government to have to hand all the necessary research and information, anecdotal or otherwise, even the policy memorandum that accompanies the bill, in discussing public perception, says that there is no

“empirical evidence to support the contention that inconsistency is present”.

**Professor McNeill:** That is actually very simple to explain.

**Cathie Craigie:** Well, explain it.

**Professor McNeill:** There are two clauses in the relevant sentence in the report by the Sentencing Commission for Scotland. The first says that there is no compelling empirical evidence that inconsistency exists. The start of my answer agreed with that—it is impossible to provide compelling empirical evidence that inconsistency exists, because no two exactly similar but separate cases are ever sentenced. I agree with that clause of the sentence.

The second clause says that there is a perception of inconsistency and that that perception is not unfounded. That is lawyerly, and the position that emerged from the Sentencing Commission was one of compromise, but both statements are entirely true. There is evidence that provides a foundation for a view that there is a degree of variance—I use that word carefully—but whether that amounts to inconsistency, in the strictest terms, is another question. I know that that is pedantic, but that is the way it is with the evidence on this question.

**John Scott:** One danger that I see in this part of the bill is that it proposes legislation that attempts to end a perception of something, but legislation is not terribly good at doing that. An important part of the proposed Scottish sentencing council would be its work to explain what goes on. That can sometimes be difficult even for those who are involved in the system—it is quite a challenge. If the public are presented with fuller information, they will come down from a position of wanting

hanging and flogging, but trying to get the necessary information is a challenge in itself.

**The Convener:** Some inconsistencies might be explicable by local circumstances that determine sentencing policy. For example, Professor Spencer tells us that here in Alloa there is a very low ratio of custodial sentences. That presumably reflects on the fact that there is very little trouble in Alloa. [*Laughter.*]

**Professor McNeill:** You have been tried in the court of public opinion, convener.

**The Convener:** I got exactly the response that I was looking for.

**Robert Brown:** I am impressed with the personal experience that Professor McNeill has brought us, which I think reflects the experience of those of us who have been in practice in different courts—Kilmarnock has been instanced in that regard.

I have a slightly different thought on the matter. If there were a sentencing council of the sort that is proposed, would repeated departure from guidelines by a particular sheriff raise any implications about their continuance in office? Has there been any thought about those implications?

**Professor McNeill:** That is one implication of the bill. It is not easy to countenance a situation in which a sentencing council issues guidelines that are implemented throughout the courts with the exception of one or two judges, who are repeatedly appealed against when they refuse to comply with the guidelines and who do not provide satisfactory explanations for departure from the guidelines. Because of judicial independence, are they simply allowed to remain in office forever? There would be considerable pressure in such cases to do something about such judges—to get rid of them if they are not going to change. That is a dangerous piece of ground.

**Robert Brown:** Is it, or is it not? The issue is quite difficult in some ways.

**John Scott:** It depends. When I agree with a sentence I am not terribly troubled about it, but if something is inconsistent it attracts my attention. My fear is that judicial decisions could be the focus of adverse comment, perhaps because of a failure to comply with guidelines that had come about through intense public or political pressure or ill-judged comments about a single case. Such guidelines would potentially not be just but could not be resisted by the appeal court because of the dynamic whereby the proposed Scottish sentencing council had the upper hand.

**Robert Brown:** Is there a risk of what we might describe as defensive decision making by judicial persons? The fear of medical negligence

processes can lead to a defensive approach taking precedence over sensible decision making.

**John Scott:** There is certainly a risk of that.

However sentencers justify their decisions, I want the process that they go through to be better. I want a change in judicial behaviour so that thousands fewer people go to prison, on the basis that sending people to prison is an expensive way of doing things badly. I am not convinced that the bill will help us in that regard.

**Professor McNeill:** I agree with John Scott. If a particularly recalcitrant judge continually refused to react to guidelines or appeals, questions would be asked about their professional competence. I would have grave anxieties if the decision to discipline that judge rested with someone other than the judiciary, but that does not mean that there ought not to be an internal discipline process in the profession, as there should be in any profession, to manage practice that is out of kilter with accepted norms.

**John Scott:** We are in dangerous territory, but there would be situations in which a judge's repeated behaviour would require to be considered if they were to continue in the job.

**The Convener:** The Judiciary and Courts (Scotland) Act 2008 provides for such situations.

We move on to consider the use of imprisonment and community payback.

**Robert Brown:** These issues are perhaps more central to our consideration of the bill. The Scottish Prisons Commission said in its report:

"It is the view of the Commission that prison should be used for those whose crimes are serious and violent, and for those who present a real risk to our safety."

Does the panel agree? In practical terms, what are the implications for how we tackle these matters?

**Professor McNeill:** I agree whole-heartedly. We rely far too much on imprisonment, which seems to be the sanction that we countenance imposing repeatedly, irrespective of the evidence of its ineffectiveness. That might be because an offender has no choice but to comply with imprisonment, whereas all sanctions in the community require an element of co-operation if they are to work.

If short custodial sentences are related to exceptionally high rates of reconviction, if they overcrowd the prison system and inhibit the effectiveness of what can be done in prison with people who are serving longer sentences, and if they produce bigger problems for the communities to which prisoners return, I can see no logical or rational basis on which to continue the upward drift in the use of imprisonment that we have experienced in the past decade or two.

I did not quite understand the second part of your question. Were you asking about the measures in the bill?

**Robert Brown:** My question was about the implications of the Prisons Commission's approach to short-term sentences and what it means for the way in which the courts operate and for the facilities that need to be put in place to deal with additional community sentences.

**Professor McNeill:** The genuinely radical aspects of the Prisons Commission's report have come into the Criminal Justice and Licensing (Scotland) Bill in only a refracted and partial way. For example, the three-stage approach to sentencing that is articulated in "Scotland's Choice" is not in the bill. The provision for the use of progress courts that was envisaged by the commission is not included in the bill in the same way. Progress courts are an option that sentencers may consider when a community payback order is imposed, but the commission envisaged that every community payback order would involve the offender accounting for their progress in public in court. Progress courts were intended to be specialist courts, using particularly trained judges who understand the problems of people involved in persistent offending, the complexities of the process of supporting those people to change and the realities of managing issues of compliance constructively. The bill includes no provision for the creation of a specialist court.

The Prisons Commission required a huge, up-front investment in services in the community that would have allowed the creation of a system in which judges could have confidence—a system in which criminal justice social work and community justice authorities were well and truly prepared and properly resourced. No one could have anticipated what has happened in the global economy since the publication of the report, but those events have created a climate in which it is much more difficult to make the proposals work in practice. I have anxieties about the level of resourcing for the reforms that are planned. Would you like me to comment on whether I think that the reforms could work?

**Robert Brown:** I will come back to that after asking your colleagues about the resource issue, which is central. Is there agreement that there must be significant, short-term but up-front resource to kick-start the reforms and to make them happen? I know that Professor Spencer has views on the issue.

**Professor Spencer:** I support the commission's recommendation that custodial sentences be limited to those who require them—serious and violent offenders. Such sentences should be used to deal with serious offences and for the protection

of the public. Community disposals should be the default position: we should talk not about alternatives to prison but about alternatives to community disposals, which should be the option for most people.

Resources are a difficult issue. I agree with the McLeish report that a large amount of resources are needed up front, but I am a realist and am not sure that that will be possible. I have suggested that there may be ways of organising things. For example, local prisons could be handed over to community justice authorities; their resources and those of the community could be merged and managed by such authorities. That would enable a better movement of staff and financial resources and allow local prisons to be used for programmes.

There are ways of starting the change. If we continue to have two separate organisations—community structures and prison structures—money will not flow from one to the other, because there is enormous pressure on the prison system, where numbers are rising.

As we know, 81 per cent of court sentences—14,686 in the last year for which we have statistics—are for six months or less. The prison system counts its numbers up to but not including six months—I do not know why we count our statistics in different ways—so it had 8,191 receptions last year of people who were serving less than six months.

Most of those sentences are very short—10,000 of the 14,686 sentences of less than six months were actually less than three months—and the average time, which the prison system's statisticians use to calculate population levels and projections, that someone who was serving a sentence of less than six months spent in prison was 23.25 days. That is a not very long time—one cannot do anything with people in that time, but it costs an enormous amount of money to process them.

15:30

I have heard the convener talk this morning and on other occasions about community respite, but a sentence of such a short period does not give that respite. I am not advocating long sentences, but that is a complete waste of money and resource. If we want to start focusing resources on the community, we have to get rid of that big churn and use the money to help with health, employability, literacy, housing and so on, and with addictions such as alcohol and drugs.

**The Convener:** I think Nigel Don would be grateful for a bit of clarification on that point.

**Nigel Don:** Can you just clarify that number—the 23 point-whatever-it-was days?

**Professor Spencer:** It is 23.25 days.

**Nigel Don:** I will not worry about taking it to significant figures any more than you would, but I would like to know whether that is the number of days that the individual actually spent in prison on remand and after sentencing, or whether it is just post sentencing.

**Professor Spencer:** It is post sentencing. If the remand is being rolled into that, it is counted in a different way.

**Nigel Don:** So that figure is for after the sentencing.

**Professor Spencer:** It is for after the sentencing, but, of course, one does not work with offenders until they are sentenced.

**Nigel Don:** I realise that. Is it possible that those who generated that statistic could also tell us what the average remand period was? It need not necessarily be this instant, but although we have established what the number means it is frequently misunderstood. We need to know what the total numbers are, or the number that you gave will not mean much.

**Professor Spencer:** Perhaps you can get that figure. I might find it within a few minutes; it might be in the Scottish Prison Service annual report. The statistics come from the SPS statisticians—perhaps your committee can get those details.

**Nigel Don:** I am sure we can—thank you.

**The Convener:** We must also seek the statistics on the actual sentence that was imposed, which in the case of a 23-day sentence would be about three months, bearing in mind that so many people are released after serving 25 per cent of their sentence, albeit that they might be tagged.

**Professor McNeill:** I am sorry to jump in ahead of John Scott, but I have some numbers on resources that might help to provide a frame of reference. The proposal to implement the Custodial Sentences and Weapons (Scotland) Act 2007 at a cut-off point of one year, at which point the new release process kicks in, is costed at about £47 million. Unless I am wrong, that figure is somewhere between a half and a third of the total current budget of criminal justice social work services.

The cost of Addiewell prison is £25 million to £30 million per annum and—with inflation and various other costs built in—possibly £1 billion over 25 years. If we consider the cost of investment in community penalties and community payback in relation to what we get for our money in prison expansion, it still seems—even in financial times as dire as those that we currently

face—that that is a critically neglected area of investment in a civilised country such as Scotland.

**Robert Brown:** That is helpful, but I will query one further relevant aspect. As you mentioned, the convener talked about community respite, which is an important aspect—perhaps not in the prison sense but in the sense of effectiveness of disposal to stop people committing offences.

I have some concerns about the community sentences as they currently exist, and as they would presumably continue under the new regime, with regard to whether they might be made more effective within their context. It is clear that they cover a range of sins, from probation to drug treatment and testing orders and various other things in between, and some of those methods are more effective than others.

What needs to be done to make community sentences more effective, particularly in reducing offending? I think that we can take for granted more formal aspects such as starting early and dealing more effectively with breaches, but I wonder whether with their expertise panel members can give us some views on the matter.

**Professor McNeill:** Again, that issue is not unconnected to resource questions. The Prisons Commission report, for example, referred to an 80 per cent increase in a decade in the volume of reports that social workers are writing. That increase and the effects of the release reforms in the Custodial Sentences and Weapons (Scotland) Act 2007 mean that social workers in the community are getting busier and busier writing reports for court and managing people coming out of prison.

The only thing that can suffer in that economy is the management of people on community payback orders. I am seriously concerned that criminal justice social workers simply do not have enough time to spend on proactively addressing issues of compliance with offenders on community penalties and supporting what is for many of them a very complicated process of change. Frankly, I would love to see the skills of our criminal justice social workers unshackled by adequate resourcing and by a move to redirect their energies away from report writing and post-release supervision—important though those activities are—and towards the delivery of the new community payback order.

There have been advances in our understanding of how people change—in other words, the process of desistance. In fact, that is my principal field of research and writing. I could go on incessantly about the issue; I will not do so, but I am happy to provide documentation about it if the committee is interested. I am already involved in working with criminal justice social workers,

community justice authorities and the Scottish Government on trying to ensure that the emerging evidence informs approaches to practice. That said, we need a systemic context that allows our social workers to use their skills and ensures that they are not distracted by having to deal with the front end and back end of the business, which simply leaves the core underresourced.

**Robert Brown:** A summary of that information would be helpful. Do other witnesses have other thoughts about the community payback orders?

**John Scott:** The question of the effectiveness of community penalties—and the issue of resources, which ties into it—is crucial. In fact, it is one of the issues that I am most concerned about. We should bear in mind that there is no law to prevent the proper funding of what is going on in criminal justice social work and that the range of community penalties in the different parts of Scotland is probably as wide as that in any other country.

I imagine that the courts will have raised expectations about the community payback orders, but the fact is that, when they come into play, there will be only the same—or perhaps even less—funding than there is at the moment. At the moment, a community penalty is judged as having failed when, in fact, the supervising officer might not have been able to do everything that he wanted to do. Some of the time, that comes down to resources.

As for the transformative effects of this rebranding, the fact is that much of what is in the community payback order is covered by existing orders, and the approach might founder when judges find that it gives rise to similar problems—especially in light of the suggestion that they should not use short-term custodial sentences, about which, as members will be aware, there has been a degree of resentment. As a result, they will have higher expectations about what should go in place of existing community penalties, but the penalty itself might be destined to fail.

**Angela Constance:** What do the witnesses think of the suggestion that was made by a sheriff at last week's meeting that short custodial sentences are effective and their current use is appropriate?

**Professor Spencer:** I have not read the *Official Report* of that meeting and I do not know who said that, so I will not comment on that individual's remarks. I think that the use of short-term and very short-term sentences is complete eye-wash. It has no effect at all on reducing crime. We know from research from around the world that where prison is used on its own—in general, short-term sentences involve only prison—crime increases by between 1 and 3 per cent. I can give the

committee references to that research later. We know that when people are sent to prison for a short while, it is likely to be disruptive in a range of areas. A person's tenancy might be lost, their employment will certainly be lost, and their family support might diminish. If they have financial problems, those problems will be worse when they come out of prison.

Time should be taken to consider what the issues are in determining what is most effective. I think that I said earlier that the criminal justice system cannot resolve the ills of society. In general, the ills of society—inequalities and so on—generate the conditions that lead to people offending and committing crimes, which is unfortunate. Time is needed to work with people so that they learn job skills, how to relate to employers, literacy skills, life skills, how to sort out their addiction problems, how to boil an egg and so on. Such things take time and resources.

There needs to be tolerance for people serving community payback sentences. When most of us bring up children, we do not say to them when they are two or three, "Don't do that," then punish them the next time they do it; it can take years for them to learn what is and is not appropriate behaviour. The same applies to offenders. They may want to change, but perhaps they do not have the capacity to do so, therefore they need to be worked with over a period. Of course there will be lapses, but if the trend is right, that is the way that they need to go.

I think that we heard this morning that looking at reconvictions, for example, will not tell us about the nature of a person's offending, whether its frequency has reduced, whether the amount of harm has reduced or whether the person is on the right track. Only bald statistics will be seen. An holistic approach that is not easy to define needs to be taken. A generic payback sentence might allow social workers or people who counsel offenders to try to achieve that.

**Angela Constance:** Professor Spencer, given your background in the Scottish Prison Service, can you comment on how prison officers at the coalface view short-term sentences?

**Professor Spencer:** I do not think that they think that short-term sentences are very helpful. We understand why people are given long-term prison sentences—they have committed a serious offence. Staff have time to get to know such people and to try to work out what their issues are, to assess them, to work out what the risks are, and to try to sort out interventions. It is to be hoped that they will have contributed to a change in the approach of such people when they come out of prison. However, if a person is in prison for the average of 23.25 days, for example, there will not be time for such things. The prisons are

overcrowded. There are two or three prisoners to a cell, and large numbers of them are processed and moved elsewhere, so staff do not have the time to get to know them individually. They certainly do not have the capacity to do individual interviews and to assess prisoners and work out which interventions would be best for them. Very short sentences are a complete waste of time. Prison staff are frustrated by them and by people going in and out of prison. The staff have to service those people by providing bedding, laundry and food and making all the other necessary provisions, therefore they cannot do the job that they want to do, which is about making society safer.

15:45

**Professor McNeill:** I will try to be brief, although the question is an invitation to talk about desistance.

**The Convener:** Feel free to adopt Professor Spencer's arguments.

**Professor McNeill:** I will add a very brief comment, if I may. First, the sheriff could not possibly have had in mind reducing reoffending as the measure of short custodial penalties' effectiveness. I have not read the *Official Report* of last week's meeting, but I presume that that cannot possibly be what he or she had in mind. I say that because three things help people to stop offending: getting older and becoming more mature; developing social ties that mean something to them; and changing their view of what they are about as a person. Short periods in prison do not help with any of those three things. Prison takes away responsibility and inhibits the development of maturity; it damages and often breaks already fragile social ties; and it confirms a negative narrative of a person as an offender, a prisoner and, often, a hopeless case.

From a desistance point of view, or from any evidence in relation to reconviction, we cannot argue that short sentences are effective in that sense. However, to be fair, the sheriff might have had in mind two other possibilities. One is that the approach is effective because it hurts. On a straight retributive, pain-for-pain analysis, maybe that is true the first or second time—I do not know. The Cabinet Secretary for Justice clearly disagrees, but maybe pain for pain works. The other possibility is that the sheriff was thinking about containment and respite, which I take seriously. Like everybody else, I live in a community and I have concerns about crime and antisocial behaviour. However, as a criminologist, when I think about those concerns and how I want them to be handled, I do not want people who cause trouble in my community to be sent to prison to do not very much for a short period of

time except have their prospects of stopping behaving that way when they come out damaged. That just does not make sense, as it is a way of storing up trouble for the community, not a way of solving the problems for the community.

I would much rather have people working in the community—perhaps in a community hall, as we heard about earlier—making a positive contribution, building social ties and perhaps seeing themselves in a different light, as they recognise in other people's eyes that they have made a positive contribution and understand that they might be able to continue to do that in other ways. I would feel safer as an individual if fewer people went to prison, because I understand the evidence, which compels me to acknowledge that short prison sentences simply are not the best way forward.

**John Scott:** The evidence last week that defended the continued use of short-term sentences was pretty apocryphal. Obviously, each individual sentencer has their own experience. A sheriff might sentence the odd offender to a relatively short custodial sentence and never see them again. However, that experience is not a terribly good basis on which to justify the continuation of something that we know does not work very well at all in the vast majority of cases. Even in such individual cases, we do not know what happened when the people came out of prison.

**Paul Martin:** A form of payback is already in place by virtue of community service. What evidence is there that community service is more effective than short-term sentences? You have said that short-term sentences are no good, but will you clarify what percentage of them are no good? Are we saying that all those people who receive a community disposal such as community service, which is in effect the same as payback, become model citizens?

**Professor McNeill:** Payback is a bit different from community service, because, as set out in the bill, it involves more flexibility and a range of measures that are not currently applied to community service. However, we know that, in general, the reconviction rate with community service is significantly better than that with imprisonment, particularly short sentences, but we do not know—

**Paul Martin:** What is the percentage?

**Professor McNeill:** The two-year reconviction rate for people who are given community service is 42 per cent, as against 60-something per cent for people with prison sentences in general and an even higher rate—which escapes me—for people with short prison sentences.

The general picture is that community service performs better, although a selection effect might apply. I note the comment that was made before lunch that the two populations that receive prison sentences and community sentences are not as dissimilar as we might expect but, nonetheless, a selection effect might be at play.

Why might community service work better? An intriguing bit of research on that came from Scotland. Some time ago, Gill Mclvor at the University of Stirling examined community service in operation. She discovered that, although community service has—strictly speaking—no rehabilitative intent and is meant to be a punishment whereby people pay back through work, it fares better than probation, which is meant to be the rehabilitative option to tackle offence-related needs. She also discovered that contact with beneficiaries of community service—offenders coming face to face with people who benefit from the work that they do—and a sense that the work is meaningful contribute to the reduction in reoffending.

That is only one study, but it links with desistance literature in several ways. I could point the committee to numerous such references. Payback provides a potential opportunity for people who have for a significant time seen themselves as and received the message that they are a detractor from their community—a troublemaker in their community. If they embark on payback with the support of a good social worker and they begin to make a go of it, the possibility of change occurs to them as they gradually see themselves in a different and more valued social role. That is why community service has significant rehabilitative potential.

**Paul Martin:** A sheriff who gave evidence last week talked about the prolific or repeat offender who appears before him regularly and who poses a problem for the community. Are we suggesting that no short sentences should be given to such an individual, who might already have participated in payback programmes or who might not want to comply with those programmes? What will we do in such instances?

**Professor McNeill:** There are two ways to approach that. First, are we content that the opportunity that we have provided for an offender has been sufficiently resourced and properly supported, to give it the best possible chance to work? The evidence that the committee has heard from sheriffs suggests problems with the resourcing of community service in some areas. One problem is that I am not entirely convinced that we can always attribute the failure to take the opportunity simply to the offender.

Secondly, the provisions in “Scotland’s Choice” to avoid short sentences were to apply at first

instance. The commission said that nobody should go straight to a short custodial sentence, but that that would remain a possibility when default on a community penalty—community payback—could not be handled in any more constructive way.

I want the courts and criminal justice social workers to work as hard as they possibly can to support compliance and to be realistic about how difficult the process of change is. As in the drugs courts, I want lapses and relapses to be handled robustly but sensitively. Nonetheless, I recognise that the public require a backstop. If somebody who has been given every opportunity and all the support, and for whom the right opportunities have been supplied at the right time, still does not avail themselves of those opportunities, a time might come when a custodial sentence is necessary. I am just not sure whether our current recourse to short custodial sentences is always necessary.

**The Convener:** I think that the question has been answered, so I ask Professor Spencer to be brief.

**Professor Spencer:** We are talking mainly about young people, of whom we lock up far too many in Scotland anyway.

**The Convener:** Mr Martin’s question was general.

**Professor Spencer:** Prison sentences do not work. We lock people up, but when they come out of prison, they are still prolific offenders. If it costs us £40,000 a year to lock somebody up, we would have a much better bang for our buck and a much better chance of reducing their reoffending if we spent that £40,000 on them in the community. There are organisations that provide intensive support to and supervision of offenders and which show much higher levels of success. Of course that costs more, but nothing like the amount that it costs to keep someone in prison.

If you want impact, you get it not by sending people to prison only for them to continue to be prolific offenders when they get out, but by using the resource in the community, although it may cost more.

**The Convener:** Professor McNeill referred to the fact that the Criminal Justice and Licensing (Scotland) Bill will amend the Custodial Sentences and Weapons (Scotland) Act 2007 prior to its coming into force. Are your concerns purely on financial matters?

**Professor McNeill:** Far from it. Where do I begin? The matter is dealt with in the submission from the consortium and, at length, in the submission from the Scottish centre for crime and justice research. I will put it bluntly: the 2007 act is a dreadful piece of legislation, which will have very negative consequences for the operation of the

prison service and criminal justice social work. The money that it will cost to implement it would be far better spent on making community payback work. The money must be spent up front on community payback and not on a peculiarly muddled and ill-considered set of release reforms.

I accept the argument that release arrangements needed to be reformed, but I would rather scrap the whole thing and start again. If we were to do that, it would be almost impossible to come up with a worse piece of legislation. I am sorry to be a little intemperate, but that is my view on the matter.

**The Convener:** It is not in the least intemperate; it is an honest view. I am aware of what you said in your submission, but my question gave you the chance to say it for the *Official Report*. Do I take it that your colleagues concur with that view?

**Professor Spencer:** Yes.

**John Scott:** Not only do I concur, but I would be even less temperate in stating my view than Fergus McNeill was. If the provisions were to be implemented, Scotland would be less safe. We do not have enough people to do risk assessments. We would need a parole board that was about 20 times its current size. Instead of dealing with the most serious crimes, it would have to deal with some of the least serious ones. The legislation is a waste of professional resources that could be better targeted towards making Scotland safer.

**The Convener:** Thank you.

I thank the panel for their attendance. I am sorry that the session has been fairly lengthy—there was a fair amount to go through.

I return to the earlier agenda item, under which members of the public were given the opportunity to raise any issues. We are once more in open session and have a few minutes in hand. If anyone wishes to raise a point with the committee, I invite them to do so.

**Sheila Wynne:** I am a volunteer from Clackmannanshire with too many volunteer positions to mention. The view of the community in Clackmannanshire of the Alloa court system is that the sheriff does not do anything. People who visit the court for various reasons—for a day out or whatever—think that the public are allowed to run riot in the court building. It seems that there is no way of saying, “Right. You must shut up or get out.”

Although I agree with community sentencing, where are the human rights of the victims? Not much has been said about that in recent times. The human rights of the accused seem to be more important—they have far more human rights than the victim has. When habitual offenders are given community sentences, the community has to deal

with it. The health and wellbeing of the community should come first.

I am talking on a personal level, having had 10 years of that. I am coming out the other side only now. My views were not taken into account and I know that, in saying that, I speak for many others.

16:00

**The Convener:** Thank you. The individual difficulties, as you perceive them, at Alloa sheriff court are not a matter for the committee. As you will appreciate, we are here to conduct an evidence-taking session on the operation of the bill, and your views will be taken into account in that regard.

**Elma Mitchell:** You asked about the benefits of community service. Many of the people who have worked for us have come back to us and said, “Thank you for what you have done.” A lot of them had to be taught how to use a hoover, because they did not have a clue how to do so. We have taught them how to garden and so on. We are continually trying to educate them. There is a benefit in their doing community service.

**The Convener:** Thank you. Does anyone else wish to speak?

**Mary Bruce:** Having spent 10 years as a member of visiting committees at our two local prisons, I am pleased that the issues that we are addressing today are being addressed, and I am pleased to be part of that discussion. I believe that the committee’s visit is the first positive step towards creating an interface with the community.

The last panel concentrated on the community, which is an important matter. We in the community see how the process works and can see examples of good work, such as that which is done by Elma Mitchell. I have been involved in situations in which prisoners have been working on projects that have been of great benefit to the community and to the young people who were involved.

This morning, Councillor Kennedy asked for there to be more liaison between the groups of people who are involved in providing the support for offenders that we are talking about. One of the areas that have not been mentioned today is the way in which the statutory organisations can work together with the voluntary organisations and churches to enable the skills and knowledge of people in the community to be used properly. You brought your committee here today. If the new authorities and the other people who are involved in this area would act in a similar way and publicise what they do in order to ensure that people were more informed about the system, the benefits—to the victims of crime, as well as the perpetrators—would be immense.



**The Convener:** Thank you. Are there any further contributions?

**Sheila Wynne:** Earlier this afternoon, you talked about the community safety partnerships. In some areas, the communities have become effectively involved in the partnership teams but, in many other areas, that has not happened. Are there guidelines that could be given to the partnerships to help them involve the community? Clackmannanshire's council for voluntary services is involved in our local partnership, but it would be useful if members of community groups such as neighbourhood watch groups or the tenants and residents federation could be told how they can get voted on to the partnership and become properly involved in it as well. Would it be possible to get guidelines that the whole of Scotland can work from?

**The Convener:** I cannot answer your question, but Government ministers will be able to read your comments in the *Official Report*.

I thank everyone who has contributed. This has been a novel event, but I think that it has been worth while. I am pleased that some members of the public have felt able to contribute.

16:05

*Meeting continued in private until 16:10.*



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