The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 20 January 2015

Session 4

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JUSTICE COMMITTEE
3rd Meeting 2015, Session 4

CONVENER

*Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)

DEPUTY CONVENER

*Elaine Murray (Dumfriesshire) (Lab)

COMMITTEE MEMBERS

*Christian Allard (North East Scotland) (SNP)
*Jayne Baxter (Mid Scotland and Fife) (Lab)
*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (Ind)
*Alison McInnes (North East Scotland) (LD)
*Margaret Mitchell (Central Scotland) (Con)
*Gil Paterson (Clydebank and Milngavie) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Nigel Don (Angus North and Mearns) (SNP)
Peter Johnston (Risk Management Authority)
Colin McConnell (Scottish Prison Service)
Jim O'Neill (Scottish Prison Service)
Professor Cyrus Tata (University of Strathclyde)
Phil Thomas (Prison Officers Association Scotland)
John Watt (Parole Board for Scotland)
Paul Wheelhouse (Minister for Community Safety and Legal Affairs)

CLERK TO THE COMMITTEE

Joanne Clinton

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Justice Committee

Tuesday 20 January 2015

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning and welcome to the Justice Committee's third meeting of 2015. I ask everyone to switch off mobile phones and other electronic devices, as they interfere with broadcasting even when they are switched to silent. No apologies have been received.

Item 1 is a decision on taking in private item 4, on our approach to stage 1 scrutiny of the Human Trafficking and Exploitation (Scotland) Bill, and item 5, consideration of our work programme. Is that agreed?

Members *indicated agreement.*

Prisoners (Control of Release) (Scotland) Bill: Stage 1

10:01

The Convener: Item 2 is consideration of the Prisoners (Control of Release) (Scotland) Bill. This is our second day of evidence taking at stage 1.

I welcome to the meeting our first panel of witnesses: Professor Cyrus Tata, professor of law and criminal justice at the University of Strathclyde, and Peter Johnston, convener of the Risk Management Authority. Professor Fergus McNeill has sent his apologies as he is unwell, but he has given us a written submission; members will appreciate that the submission has come in late because his absence was unexpected. I thank the other witnesses for their written submissions.

We move straight to questions.

Margaret Mitchell (Central Scotland) (Con): Professor Tata's submission questions whether the bill's provisions distort sentences and gives the example of early release automatically kicking in for a nine-year sentence but not for a 10-year sentence. Will you expand further on that?

Professor Cyrus Tata (University of Strathclyde): The bill purports to increase public safety. It does that on the basis of the length of time for which someone has been sentenced, not on the basis of any assessed actual risk. In fact, someone who has been convicted of a non-sexual crime and sentenced for, say, nine years may be more likely to reoffend than someone who has been sentenced for 10 years, and yet it may be that the person with a slightly longer sentence, over the arbitrary cut-off point of 10 years, ends up in prison for even longer. It could lead to the quadrupling of that extra year that I mention in my written evidence.

Far from making sentencing clearer, the bill makes sentencing less clear. I share some of the criticisms that have been widely made about release. It is a thorny and difficult issue, but the bill attacks the very part of the release system that is most justifiable, rather than the lower end, where it is less justifiable. It will lead to incoherence, less clarity and less proportionality.

Margaret Mitchell: Is there a need for more wide-ranging reform of the system of early release? If so, where would you start?

Professor Tata: We are looking at back-door release, as we might call it, or back-door sentencing. You have to look at that together with front-door sentencing—judicial sentencing.

The Convener: Can you explain what you mean by "back-door sentencing"?

Professor Tata: By back-door release, I mean the release of prisoners by the executive branch of the state. We must look at that in relation to front-door sentencing, which is to say, judicial sentencing. The two things have to be put together. We cannot pretend that one works in isolation from the other.

That is the best way of having a proper root-and-branch review of the issue, which has been going on for decades. It is a difficult issue, and I have great sympathy with the successive Governments that have tried to tackle it. The Custodial Sentences and Weapons (Scotland) Act 2007 attempted to do so and had some merit in it, but it had a lot of serious problems. The bill that we are considering is in some ways even worse, I am afraid.

Margaret Mitchell: Do you have anything to say, Mr Johnston?

The Convener: If either of the witnesses wants to comment they should just indicate to me that they want to respond. Do you want to come in on that, Mr Johnston?

Peter Johnston (Risk Management Authority): Unless it is felt that I can help further, I think that the point has been well covered by Professor Tata.

The Convener: Is it your position that there has to be a review of sentencing policy in parallel with the proposed reforms, and that we cannot do one without the other?

Professor Tata: Yes. You have to look at both sentencing and release policy. In reality—this is why many people are cynical about release—release has been used as a form of back-door resentencing, particularly at the lower end, to cut the prison population. We have to be honest about that and look at it in the round, together with sentencing policy. That is why people are cynical and I understand their cynicism, because it is a surreptitious form of resentencing.

The top end, with long-term prisoners, is where the system actually works best and where there is most need to have some sort of managed process of release under supervision. However, although that is the very part of the system that is most coherent, most defensible and best in terms of public safety, the idea is to abolish it, supposedly because keeping people in prison for longer will make the public safer. We need to explain to members of the public that eventually prisoners have to come out and that if someone is released cold they are more likely to reoffend. I do not think that it is difficult for people to understand that.

Margaret Mitchell: Are you making a distinction between the cold release that would be the outcome of the proposals and the present system of release on licence?

Professor Tata: Absolutely. The public debate must be informed about what happens when people are institutionalised, no matter what great work the Scottish Prison Service does—and I applaud its excellent work in recent years—because we can never prepare someone for release in prison as well as we can by supervising their release and helping them upon release. There has to be supervision on release, otherwise this is just irresponsible. We are playing fast and loose with public safety if we just release people cold because they are deemed to be the most likely to reoffend. If they are released cold, that makes them even more likely to reoffend.

The Convener: Does Mr Johnston wish to comment on that from the point of view of the Risk Management Authority?

Peter Johnston: Our view is very clear, and it has to be because we focus largely upon effective assessment of risk followed by effective management of risk. From our standpoint, the rationale that underpins early release on licence is that the whole process of risk management, support and supervision in the community is vital to rehabilitation, successful return to the community and a reduction in the likelihood of reoffending.

Anything that produces a cold release, as Professor Tata has described, is a matter for concern from our point of view, and that is the nub of the challenge. It goes against what we believe Government has done well in tackling a difficult challenge, and we are concerned that cold release, which is perhaps an unintended consequence of the bill, could constitute a retrograde step. If, as is well documented—and, I think, universally accepted—effective supervision is vital, removing the possibility of that assistance is very worrying.

It is interesting that a lot of research establishes that offenders who are successful in returning to the community typically thank those who have been involved in their supervision and support. Their attitude is that they could not have achieved their rehabilitation without that support and supervision. That is why we are concerned about that aspect of the bill.

Another aspect that gives us some concern is that we believe there is a misunderstanding that sex offenders are riskier and more dangerous than violent offenders or other offenders in the round. Interestingly, Parole Board for Scotland statistics—albeit that they are from a few years back—support the proposition that sex offenders are less likely to reoffend and that if they do

reoffend, quite often it is in a way that is nothing to do with sexual offences.

We think that the differential aspect—removing automatic early release for sexual offenders serving sentences of four years plus and for violent offenders serving sentences of 10 years plus—has got it wrong and threatens to perpetuate that misunderstanding. It is very easy to understand where the misunderstanding arises, because the public are quite properly terrified of sexual offending, although the consequences of violent offending—which one hears about if one speaks to the victims concerned—can be pretty drastic, as well.

The Convener: It is a difficult issue in terms of public perception and from the point of view of the victims, quite rightly.

Roderick Campbell (North East Fife) (SNP): Further to Mr Johnston's point, the Government's policy memorandum states at paragraph 40:

> "While data about reoffending rates does not generally show a higher risk of reoffending by sex offenders, it is the very specific devastating impact that sex offending and reoffending behaviour has on victims, their families and wider communities which led to the development of these special arrangements in order to help protect the public and reduce levels of fear and alarm."

The Government is aware that the arrangements are not based on the statistical risk from sex offenders; that is made quite clear in the policy memorandum.

Professor Tata: That is true, but it is a sentencing matter. It is about denunciation—marking the gravity of the offence, the harm, the culpability and so on. It is not about assessing likelihood of reoffending—it is a sentence. The policy memorandum says elsewhere that the measure will not interfere with sentencing, but in fact it will. It will also encourage the use of extended sentences. I will come on to that.

Christian Allard (North East Scotland) (SNP): Good morning. I want to concentrate on Peter Johnston's submission and in particular on the positive comments at the start about the aims of the bill's provisions. I would like to develop two of your recommendations, one of which is about the limit to the offenders whom the bill will target. In paragraph 19, you say:

> "Limiting the scope of the current Bill to prisoners serving extended sentences may merit consideration."

You recognise that the Government wants a staged approach. Would you like the bill to target fewer offenders? Does the bill's scope target too many offenders?

Peter Johnston: Our point at paragraph 19 is that if the bill is to proceed, we think that it would be more logical to confine its scope to those who are on extended sentences. That would limit the occurrence of release without conditional post-release supervision, where it is appropriate. Underlying that is our strong feeling that the process should be driven by a focus not necessarily on the offence but on the risk of real harm to the public. However, we really make that point because those who are on extended sentences will have the opportunity of post-release supervision.

Christian Allard: You talk about post-release supervision. We could extend the scope by introducing to the bill an element of pre-release supervision. If there was mandatory pre-release supervision for two or three months before the end of a sentence, would that remove some of your concerns?

10:15

Peter Johnston: Professor Tata made a good point: the SPS does a lot of valuable work, but in my view you cannot replicate the challenge for a long-term prisoner in returning to the community. It is a very challenging business indeed: there are anxieties about accommodation and the offender wonders whether they will get employment, whether they will have any money, how they will survive, whether they will have any friends and whether society will accept them back. The challenge is seriously heightened for the sex offender, because they can be hounded by the media and neighbours, as soon as it is known that a sex offender is in a given location.

There are two aspects to the issue. Critically, it is about public safety, but it is also about the rehabilitation of offenders. There must come a point at which society recognises that the seriousness of the offence has been recognised and the punishment has been served. The challenge is then to rehabilitate the offender, return them to the community effectively and reduce the risk that he presents to the public.

Pre-release supervision might help, but it is like having a mock trial. A mock trial is quite useful to teach law students, but it is no substitute for an actual trial.

We must understand that although the system as it stands has failings and challenges with resourcing, as everything does, it works very well a lot of the time. A lot of thought goes into the system and there is multi-agency involvement. The Parole Board, for example, has huge expertise in looking at the risk that the released offender will present. A whole body of effort goes into the process, which by and large works very well.

Of course there is reoffending—there always will be—but the system actually works. In colloquial terms, "If it ain't broke, don't fix it."

Christian Allard: Is there a failure to explain how well the system works? There is a public perception, and victims and their families strongly believe that the system is not working.

Peter Johnston: There is scope for education. Politicians and the Government should say more to extol the virtues of what we have. There is huge effort across the board—by police, social workers, prisons, the Parole Board and other agencies in the system—and a lot could be done to reassure the public by explaining that early release does not mean that somebody has got away with it. One of the respondents made the point that being subject to supervision is quite a weighty business; it is not an easy road. In a sense, it is an additional burden when someone is trying to get back to normality, but it is a burden that is very helpful.

Professor Tata: There are problems with the system, but I agree with Mr Johnston. It is much more difficult to justify things such as half-time release and so on in the lower end of the system, which is completely ignored in the bill. That is where there is understandable public and judicial cynicism, and I share some of the concerns.

At the higher end, we probably need to do more. The key point is that rehabilitation is not simply a matter of being nice to a convicted sex offender or violent criminal. I am not interested particularly in trying to do that; rather, we are interested in public safety. Effective reintegration is the prerequisite for public safety. If the Government decides that it does not want to bother with the people who are most likely to reoffend and those who are most dangerous and just releases them cold, surely that would be irresponsible?

Christian Allard: You agree with the aim of the bill, but you do not think that it targets the right offenders.

Professor Tata: That depends on what you mean by the aim of the bill. If that is simply to increase public safety, I would of course agree with that. However, there are arbitrary problems with the bill—it arbitrarily picks sentences of four years and 10 years. You must ask why that is, in terms of the evidence.

The bill seems incoherent. The Government is saying that the people who are most likely to reoffend and who pose the greatest risk and fear among the public—that risk is referred to repeatedly in the policy memorandum—will be the very people who are kept in prison and then let out cold to reoffend. Who will get the blame for that? It seems to me that blame shifting could be going on here in order that someone can put a tick in a box to say that we have started abolishing automatic early release. First, the Parole Board is potentially being sold a dilemma under the guise of empowerment. Secondly, community supervision more generally will get the blame. Reputationally, they are being set up for failure.

If someone is released early and they reoffend seriously while on supervised release we know about that—that is the current situation. However, if someone, such as a sex offender, were to be released cold and they reoffended seriously soon afterwards, such a case, as you know, would be all over the media. When it emerges that the person was released cold and that they had no support network, questions will be asked. Why were they released cold? Why were they not given any proper supervision? Why were they not assisted? What is going on? Such an approach would be irresponsible.

Christian Allard: What safeguard are you looking for to stop the increase in cold releases?

Professor Tata: You must have a period of supervised release, particularly for the most dangerous individuals who are given determinate sentences. You can call that what you want. The policy memorandum uses the term "extended sentences" and suggests that there should be more of them or, indeed, more orders of lifelong restriction. However, someone could reoffend while they are on the release part of the extended sentence so that does not get us anywhere. Therefore, the extended sentences suggestion simply reinvents the same problem; we return to the same difficulty.

Elaine Murray (Dumfriesshire) (Lab): Unfortunately, Professor McNeill is not able to be with us today, but I will read out part of his submission:

> "I would support the view of other witnesses that the current Bill should be abandoned and that the complex question of how best to manage early release should be referred to the Scottish Sentencing Council, when it becomes established. Until then, our current arrangements seem likely to me to better protect the public (and support reintegration) than what is proposed in the Bill."

Do you agree? Should the Justice Committee suggest to the Government that the bill be abandoned, or can the bill be amended to improve it?

The Convener: I think that Professor McNeill's email was sent to members this morning. In any event, members now have a copy of the text in front of them.

Elaine Murray: I was quoting the final paragraph.

Professor Tata: I will base my response on what you said.

I agree with Professor McNeill. The bill would have to be amended out of all recognition if I were to be able to support it. There is a central contradiction and incoherence at the bill's heart. It claims that it will increase public safety whereas, in fact, it is playing fast and loose with public safety so that someone somewhere can tick a box to say that they have taken steps to abolish automatic early release.

The sentencing council is the sort of body that should look at these issues; I hope that it is minded to do so. It is the sort of thing that we should look at in the round, by looking at both judicial sentencing and release policy.

In many ways, the provisions regarding sexual offenders serving sentences of four years plus and violent offenders serving sentences of 10 years plus are a form of resentencing, because what is being said is, "We think those offences are so serious that people who commit them should, under certain circumstances, not get early release." That is really a matter of denunciation and of sentencing policy; it is not fundamentally a matter for the Executive.

The sentencing council has a role to play. One of the beauties of such a body is that it can be a buffer between the judiciary, the parole board, the SPS, social work and other parts of the system that are trying to do their job and, if you like, penal populism. It can take the heat out of the situation. If a case is given to the sentencing council to be looked at, that immediately takes it away from the control of ministers and the political pressures that they are under. A body such as the sentencing council can definitely make a contribution.

Peter Johnston: You will have seen in our written response that we think that the bill would benefit from

"re-focussing its inclusion categories on risk of serious harm rather than offence type."

That is coupled with the point that I made about the misunderstanding, as we see it, about sexual offences.

We have also recommended that further scoping should be undertaken, which basically means that more thought needs to go into quantifying the risks and benefits that the bill's provisions as drafted would create. We recommend that further thought be given to the bill, rather than proceeding with it as it stands.

Elaine Murray: Parliament has had a stab at this in the past—although, as one witness said, that was more about ending unconditional release—in the Custodial Sentences and Weapons (Scotland) Act 2007. The McLeish commission pointed out that the measure would be extremely expensive and difficult to implement, and the 2007 act was amended by the Criminal Justice and Licensing (Scotland) Act 2010. Do you have any views on that approach, as opposed to the sort of approach that is proposed in the bill?

Peter Johnston: There is no doubt that that approach would be expensive and that very careful consideration would need to be given to provision of appropriate resource—just how much it would cost. However, in these circumstances, one must always bear in mind how much reoffending costs, one way or another. That cost is colossal and is often quite hidden. If you start to work out what reoffending costs society, both psychologically and in hard cash, what you find is quite frightening.

The 2007 act was in many ways very thoughtful. Of course, it would have meant a vast increase in post-release supervision. However, sitting as we are, putting great store by effective risk assessment and management and the rehabilitation of offenders, all in the interest of public safety, we would have to take that view.

Professor Tata: The 2007 act was described as unworkable by a very senior civil servant. In a previous incarnation of the committee, I was highly critical of the bill a couple of times: there were a lot of problems with it, particularly at the lower end. That said, I can understand the attempt to label sentences as kind of combined sentences, with an attempt to be up front and say, "Look: when someone is sentenced to a period of imprisonment of, say, two years, part of that will be supervised release," rather than let people think, "Oh well, he only served a year. He got away with it." However, there were so many fundamental problems and contradictions in the bill's details that that was a serious problem.

I return to the point that the fundamental difficulty with the bill was that it looked at only the release end—the back-door, if you like—and not what went in. We have to look at the two things together. At the end of the day, that is where the incoherence comes from. It would be very good if the sentencing council was willing to and really wanted to look at that.

10:30

Elaine Murray: I think that the 2010 act enabled ministers not to bring in measures in the 2007 act for very short sentences. Obviously, there was an attempt to address issues to do with the overload that would have occurred if the measures in the 2007 act had come in as they were.

Professor Tata: Yes.

Alison McInnes (North East Scotland) (LD): Mr Johnston, the Risk Management Authority's written submission says:

"We are aware that the Scottish Government is currently considering the feasibility of extending the scope of the MAPPA to establish arrangements for certain non-sexual offenders".

Does not that suggest that some part of the Government understands the issue? Therefore, is it not contradictory to bring forward the bill at the same time?

Peter Johnston: I would certainly hesitate to suggest that the Government does not understand. We have pointed to what we think is an unintentional consequence, which we regard as unfortunate. We are certainly working on the extension of multi-agency public protection arrangements, as I am sure members know. We think that extending MAPPA to other offences beyond sex offences could be most valuable.

Alison McInnes: What legislative framework is needed to extend MAPPA?

Peter Johnston: I am not sure that I am qualified to answer that question. I assume that at least some form of order or possibly primary legislation would be needed.

Professor Tata: Mr Johnston is better qualified to talk about this, but I want to make a point. Whatever is done with MAPPA simply will not fill the gap that the proposals to abolish supervised release for the people who are most likely to reoffend would leave. I am talking about the tailored, individualised work that those release arrangements put in place.

Alison McInnes: Okay.

Peter Johnston: Yes; it would be helpful rather than a panacea.

The Convener: Will you clarify something for me? The bill does not say that if we abolish automatic early release, we will abolish supervision. To make things plain for anybody who is listening, why is that a consequence of doing that?

Peter Johnston: Because the sentence has been served.

The Convener: Correct. I have seen MAPPA in operation in my constituency. Are you saying that if we could bring in MAPPA provisions in some way, whether in the bill or by the existing means of doing so—I do not know what they are, but we will get a note on that—that would allay your concerns about cold release?

Professor Tata: There is a problem in doing that. The implication of your question is that these are determinate sentence prisoners. The judge has said that there is an end point.

The Convener: Yes, I appreciate that it is on licence, but is there a way of doing things? I do not know whether there could be relabelling or whatever. We in the committee appreciate your concerns that there is no improvement if there is cold release, but if we bring in something with it, particularly for sex and violent offenders, so that there is some statutory support for people if we end automatic early release, would that alleviate some of your concerns?

Professor Tata: I suppose that the question then is: are we not just reinventing parole and giving it another name?

The Convener: So your answer is no: it would not really help.

Professor Tata: I think that my answer is no. The only benefit of doing that—as far as I can see—would be that someone somewhere could say, "We have abolished automatic release." It is called that, but we would have something similar anyway, which we have had to reinvent.

The Convener: I am chewing that over.

Roderick Campbell: I direct the witnesses to the policy memorandum which, for the record, states that if there is no automatic early release at the two-thirds point, there is an incentive for prisoners to engage with efforts to change their behaviour, as they will know that, if they do not engage, it is likely that they will do the full sentence. Do the witnesses have any thoughts on that?

Professor Tata: For some prisoners, that might be helpful. Other witnesses, such as Peter Johnston, will be able to answer the question better than I can.

The fundamental problem here is that there is not, for the most part, a lack of interest among prisoners in getting on the programmes. There will be litigation in this area; prisoners will say, "You're saying to me that I now have to demonstrate that I'm not an unacceptable risk, and the best way that I can show that is by going on the programme, but I cannot get access to it."

This is not a criticism of the SPS, but the committee may be aware that there might be difficulties and resource issues in getting prisoners places on those programmes. There will be litigation, because a prisoner will say, "Look—that's not fair. I'm not being given a fair opportunity to demonstrate that I'm not a risk. I believe that I'm not a risk, but I am not allowed to show that because I can't get on the programme."

If the bill goes through, we should expect more headlines about outrageous human rights cases brought by prisoners complaining that they did not have those opportunities, and more criticism of prisoners' human rights by the red-tops, fulminating and frothing at the mouth, unless there is a huge or major increase in investment in those programmes.

Mr Johnston may be able to say more on that point.

Peter Johnston: One can speculate on the matter, but the people who can best advise the committee in that regard are probably the experienced prison governors who, day and daily, see how prisoners react and co-operate—or do not co-operate, as the case may be.

I am interested in the assertion that has been made, and I have spoken with one such experienced prison governor. His attitude was that there are some prisoners who co-operate—funnily enough, sex offenders tend to co-operate in prison and in post-release supervision much more than violent offenders do—and respond to engagement, but there are other prisoners who do not.

I am not able to give you a firm answer to the question, but I have spoken to a person who should know, and that was his attitude.

Roderick Campbell: Is there any international experience that we can draw on?

Peter Johnston: There may be, but I am not aware of any. If it would be at all helpful, I have colleagues in the RMA who could probably answer the question swiftly. I could get a note passed to the convener in a day or so, I would hope.

Roderick Campbell: We touched on the use of extended sentences earlier. Can anything further be said on their use? How feasible would a significant expansion be?

Peter Johnston: Anything that we would be able to say on that has been said in our written submission. Clearly the disposal is very useful in appropriate circumstances, but, as I have said, we feel that the focus should be on the risk of real harm. That is what it goes back to.

It is really horses for courses. A variety of sentences are available, for very good reasons. The current situation as regards available sentences is comprehensive and largely satisfactory.

The Convener: I call Gil Paterson, to be followed by John Finnie and Jayne Baxter.

Gil Paterson (Clydebank and Milngavie) (SNP): Convener, my questions were about the area of rehabilitation programmes in prisons that Roderick Campbell asked about. As far as I am concerned, the matter has been adequately covered.

The Convener: In that case, we will move on to John Finnie.

John Finnie (Highlands and Islands) (Ind): Good morning, panel. You will have read Professor Fergus McNeill's evidence. He makes a plea to the committee to raise the level of public debate, which I thought was very interesting and challenging, given that terms such as "sex offender" and "violence" are involved.

Earlier on in his submission, Professor McNeill talks about definition and clarifications, saying:

> "The question of the 'conditionality' is much more complex. In my view, it is not helpful to refer to early release of short sentence prisoners as 'unconditional'".

I certainly subscribe to that view. Can you point the committee to ways in which we might address the terminology issue and raise the public debate on this matter?

Professor Tata: I, too, read that in Professor McNeill's submission and perhaps enjoyed it in the same way as you did.

There are two issues to highlight. The first is that we need to reclaim or, indeed, claim the tough ground by making it clear that we are not opposing the abolition of automatic release for the most dangerous individuals because we want to be nice or soft or kind to dangerous people. I would want to turn that around and say that such a position is all about being tough and ensuring public safety. We need to claim that ground and make it clear that, on the contrary, it is the idea behind the proposals that is soft and irresponsible and weak.

Secondly, I want to follow up on the comments that Professor McNeill has sent the committee this morning about raising the public tone. The best way of doing that is to give the matter to a body such as the sentencing council that is relatively insulated from the populism that, as you have suggested, surrounds issues of violent offenders and sex offenders. In any case, I do not think that it is difficult to say to people, "You might not like violent offenders or sex offenders or what they have done. Neither do I, but this is all about public safety." The best way of ensuring that the public are safe is with managed, controlled and supervised release in which an individual's needs are addressed and their behaviour monitored.

John Finnie: I do not think that Professor McNeill is capable of putting anything in a crude way, but further on in his submission he says:

> "To put it crudely, simply 'storing the risky' for a little bit longer doesn't in fact serve to reduce it—the key issue for public safety is the condition in and conditions under which people are detained and then released, not how long they serve."

Would you subscribe to that view?

Professor Tata: Yes. It stores up risk.

Peter Johnston: One has to come to that view. What good is it doing to the prospect of rehabilitation and return to the community if a person simply sits around for their four-year sentence? Well, they would not be in prison for

that long, but they would be hanging around and would then be released into the community at the end of the period. We could say, "Well, as long as that person is in prison, the public are safe", but the risk must be heightened if there is no supervision or support. It has to be heightened; I cannot see how it would not be.

10:45

John Finnie: I know that there are some very dedicated people doing a lot of really good work in the Scottish Prison Service. Setting the proposal in the bill aside, is there an opportunity to enhance what is already in place?

Professor Tata: What do you mean?

John Finnie: If the proposal is, as we are told, about enhancing public protection, could we instead beef up what is already in the system?

Professor Tata: There are two points in that respect. One concerns the good work that is being done within the limits of resources. The work that the SPS does, and the imagination that it has shown, have been great. However, I return to the point that, no matter how good our work with people in prison is, and no matter how much we help and encourage them and so on, it can never be a substitute for managed supervision on release. We cannot replicate the outside world inside.

Peter Johnston: I have to agree with that.

The Convener: There is more to it than risk management—it is about the public wanting to see punishment. I see that you are nodding, Professor Tata. It is also to do with making the sentence the actual sentence that is served. That brings us back to the sentencing council.

You have not mentioned punishment. It may be liberal—I use the term in the nicest possible way—to talk about rehabilitation, but you can understand why many of the public want punishment. They do not give tuppence whether a prison is rehabilitating the person who trashed their house, or the sex offender. They want those people to be punished.

Professor Tata: You are right—you have hit the nail on the head—but that is a sentencing matter. The policy memorandum says that the bill has nothing to do with sentencing and will not affect it. In fact, however, in looking at the bill, one realises that it is a way of trying to change sentencing by suggesting extended sentences and trying to increase the length of time that people serve.

With regard to the public discourse, one has to make the point that supervised release is not about being nice to sex offenders or other prisoners. They are entitled to a certain level of humanity, but supervised release is about public safety. It is hard-headed, and it is tough. Arguing that supervised release for the most dangerous prisoners should just go is not tough at all; it is weak. I would turn the assumption of weakness around.

The Convener: Yes. It is a hard sell, though.

Peter Johnston: Yes, it is a hard sell, but the message should be along the following lines: yes, rehabilitation benefits the offender but, more importantly, if we rehabilitate the offender and they do not reoffend, the benefit to the victim and to society in the round is to know that the offender will not do it again.

As has been said, successful rehabilitation is not about being nice.

The Convener: No—that is not my view. I am just making the point that I can understand why people say, "It's all right for the chap or the woman who gets out of prison—look at all the stuff that's in place to help them, and it's costing us." There is an argument in that respect.

Professor Tata: Absolutely. I appreciate that it is all very well for us to say what we say, but you have to face the points that people raise—

The Convener: Everybody has to face them.

Professor Tata: Indeed, and that is where the sentencing council or a similar body could take the heat out of the situation. We could give the matter to the council to deal with.

The Convener: I am not speaking on behalf of the red-tops, by the way—I just wanted to raise the point.

Jayne Baxter (Mid Scotland and Fife) (Lab): I will move on to another aspect of the bill, which concerns early release for community reintegration. We have talked a great deal this morning about transitions and the need for prisoners to be supported as they move back into community living. The bill allows for the SPS to release sentenced prisoners up to two days early when that would help their reintegration. I am interested to hear your views on what has provoked the need for the provision and whether it will make a difference. Will it add any value? What is it all about?

Professor Tata: I think that I am right in saying that the proposal was not in the earlier incarnation of the bill. Of course, one has to welcome the proposal, in that it represents a tiny chink of light in the context of doing the sort of work that we have been talking about, which is absolutely necessary.

All the evidence that I am aware of says that, for long-term prisoners, the first year or two after release is the most risky time in relation to reoffending. Other people will know a lot more

about the practicalities of getting housing and employment, but it is not just about securing housing, benefits and so on. It is about family and relationships, whether the person meets an old offender acquaintance and is drawn back into that circle, and how they are treated by the community. It is about social relationships, and we cannot deal with that in a day or two, even if the other things could be dealt with in a day or two, which might be a little overoptimistic.

It is interesting that the proposal is in the bill, because it is a tacit recognition that we cannot just release people cold. I noticed that the explanatory notes make the point that supervised release can cut reoffending by up to 20 per cent—I think that that figure comes from Government work. Of course, that supervised release is not for a day or two but for a much longer period. In a way, the provision is a tacit admission that cold release is not sensible, so it is welcome, but it really does not amount to much.

Peter Johnston: The provision is practical and welcome. It deals with a real problem for someone who is unfortunate enough to get out on the wrong day, which is a bit like buying a car made on a Friday—it is never going to work as well. The released person simply cannot get to the people who they need to do things immediately to make the first days of their release from prison bearable. I entirely welcome the provision; it is good common sense.

Professor Tata: That is true, but I come back to the point that, if someone has spent eight, nine or 10 years in prison, a day or two is not much. It is better than nothing, of course, but after such a period of institutionalisation a person will need more support and more monitoring.

The Convener: But the provision will apply to all prisoners, so there is merit in it.

Peter Johnston: Yes.

Professor Tata: Yes. I am not saying that there is no merit in it; I am just saying that we have to put it in context.

The Convener: Thank you. That concludes this part of the meeting. I thank the witnesses very much for their evidence.

10:53

Meeting suspended.

10:54

On resuming—

The Convener: I welcome our second panel of witnesses, who were present in the public gallery for the previous evidence-taking session. Colin McConnell is the chief executive of the Scottish Prison Service; John Watt is the chair of the Parole Board for Scotland; and Phil Thomas is from the Scottish national committee of the Prison Officers Association. Thank you all for coming.

After the evidence that we have just taken, it will be useful to hear from you about the practicalities of rehabilitation and so on in prison, and the role of the Parole Board. We have your written submissions, so we will go straight to questions.

Elaine Murray: In the evidence-taking session that you have just heard and in the one last week, there was a lot of praise for the work that SPS does with offenders while they are in prison. However, one concern is that the bill will mean that high-risk prisoners who do not engage particularly well with rehabilitation in the prison will go straight out into the community without any sort of supervision. Professor Tata said that we cannot replicate the outside world in prison. Is there more that could be done in prison to prepare people for going into the outside world, or do you think that a period of supervision in the community is necessary to rehabilitate high-risk offenders?

Colin McConnell (Scottish Prison Service): A lot of common sense has been spoken. In responding directly, I would say that there are of course serious limitations to what can be done within the context of custody, particularly when it is viewed as a process towards reintegration. However, it has also usefully been said that a lot can be done and is being done. We make no pretence that what happens in prisons is in any way like what happens when someone returns to the community. It is seen as part of an integrated process.

There is a need to look at the issue in the round. It is absolutely necessary that those who pass into our care have on-going contact with the community and some high-value and high-quality preparation for the move back into the community when the sentence is over. However, there is also a challenge to those who deal with custody and those in the community in relation to more in-reach. Regardless of some of the comments that have been made about the bill, there are real opportunities for us to consider further how we on the custody side can integrate more and provide more opportunities for the community to come into the context of custody. In that way, we can make the two elements less distinct and ensure that they are more seamless and integrated.

The Convener: Does anyone else want to comment on that?

Phil Thomas (Prison Officers Association Scotland): With regard to what happens inside, the independent living units that we have in some prisons are probably the closest that prisoners are

going to get to learning how to handle having a house and so on. They are a positive development and are seen by our members as doing good, meaningful work in the prisons. They are as close as we can get to the situation in the community. However, I understand the chief executive's point and agree with it.

John Watt (Parole Board for Scotland): From the point of view of the Parole Board, it is extremely useful to have information about how a prisoner has progressed through the system. It is equally or more useful to know how they have behaved when they are on community release from the prison.

Ultimately, whether a prisoner succeeds is down to the prisoner. They can have as much support as they want—the more the better, probably—but it has to come from within them. When they are left to their own devices in the community, that is when they are able to establish best that they can cope with freedom in a way that is not likely to harm others.

Elaine Murray: I expect that you all have considerable experience of offenders who do not engage with programmes and do not address their behaviour. Do you agree that there is a particular danger in those people being released into the community without some form of supervision afterwards?

Colin McConnell: Generally, I would agree that the period at the end of any custodial sentence is highly risky. Professor Tata gave a timescale of one to two years, but my experience is that the first six to 12 weeks after release can be extremely risky, as people try to establish links and support in the community space.

There are things that can be developed and that are under development that I think can run parallel to the current proposals and which would go some way towards enhancing the transition from a period of custody back into the community. My emphasis is on making custody itself less distinct and less disconnected from the community, and you have heard me talk in this forum on many occasions about the way forward. That includes moving our resources—our prison officers—much more into the community to work alongside citizens who are moving from a period of custody back into the community. It also involves working alongside other agencies, be they in the public sector or in the voluntary and not-for-profit sector, to ensure that families and those who have been in a period of custody are connected and supported in the best way.

11:00

There is no doubt that going out unsupported is hugely risky. It probably leads to higher rates of failure than for those who are supported. I entirely take on board John Watt's comments that, ultimately, the desire and drive to succeed and the personal ambition have to come from within the person, but I believe that they have to be connected to other things and to other support, along with a willingness on the part of the community to accept the person back.

Elaine Murray: Professor Tata also raised the possibility of human rights challenges if a prisoner is not able to get on to a sex offenders programme because there are not sufficient places. There could be human rights implications if a person cannot be released because they cannot prove that they have tried to reform their behaviour. Is it a major problem within the Scottish Prison Service that prisoners who want to be on programmes are unable to get on to them because there are not enough places?

Colin McConnell: I do not want to hog the discussion—others may wish to comment—but a wee bit of myth busting has to be done here.

We need to be clear about needs and wants. I understand that fellow citizens coming into our care would wish to get access to programmes or opportunities, which they link to their earliest point of release. My goodness, it would be crazy not to understand that. However, there is also an issue of needs, appropriateness and timing.

The SPS approach probably mirrors the international approach. Through working with individuals and using the appropriate level of assessments, we match our resources—some of which are highly specialised, particularly when we are dealing with people who have been sentenced for sex offences—so as to schedule interventions or programmes at the time when they are most likely to have a beneficial effect. The consequence is that we get challenges and pressure from those in our care who feel that they are being kept waiting longer than they would want to wait to get access to services.

In general, my view—which is being tested in courts all the time—is that, as sensitively as we can, we should prioritise and sensitise the opportunities that best match the needs of the individual. I recognise, however, that we do not always match their wants.

Elaine Murray: So you would not recognise a description of a situation in which prisoners need and are waiting to get on to programmes but have not been able to because there are insufficient resources or insufficient programmes available for them.

Colin McConnell: It is an absolute fact that there are people waiting to get on to programmes—if you wanted to call that a waiting list, that would not be inappropriate. Some of them

may wish to get access to those programmes more quickly than we think is appropriate, and they challenge our approach and our decisions. Within the context of the resources and the highly specialised skills that are necessary and that we have, we try to prioritise those programmes and opportunities as best we judge fits people's needs—but perhaps not their wants.

The Convener: I appreciate the difference between needs and wants. It reminds me of being a girl guide and getting lots of badges on your arm because it looked good. Someone could say, "I've been on all these courses," but it is not necessarily appropriate that a prisoner goes on certain courses just so that they can say, "I have all these courses under my belt." I appreciate that the courses need to be appropriate. However, in evidence last week, Dr Barry said:

"given that only around 25 or 30 per cent of people who go forward for parole actually get it, there is not much incentive there, and prisoners know that it is unlikely, depending on their offence, that they will get parole."—[*Official Report, Justice Committee*, 13 January 2015; c 5.]

That is the first point. We also heard evidence that a lot of people who wanted to go on education courses could not get on them. I would have thought that that is a need—period—so I do not know whether the situation across the prison estate is quite how you portray it, Mr McConnell.

Colin McConnell: If we look at the situation in a monochrome way, I certainly accept that point. However, I do not think that it properly represents the situation in custody. I go back to that distinction between needs and wants. Ideally, we would want to have a rich environment in prison custody, where we could encourage people to grow and to have legitimate ambition and where, along with colleagues in the community, we could help them to prepare for that. However, with a population of 7,500 in custody, there have to be checks and balances. I would be the first to admit that we are not always in the position to meet all the demands and the wants—

The Convener: No, I am talking about needs—keep to needs.

Colin McConnell: I am glad that you went back there, because I—

The Convener: I was always there. I was not for the idea of people just collecting a whole lot of courses so that they could go to the Parole Board and say, "I've done all these things." I appreciate that distinction. However, I would have thought that becoming literate is a need, not a want, but we are being told that there are queues for education courses.

Colin McConnell: There are queues. That brings the situation into sharp relief. I do not want to get into the fundamental principle of what prisons are for. However, people pass into custody who, by and large, have not been able to reach the attainment levels that we would normally expect or aspire to for our citizens. What can be done depends, in the first place, on the length of the sentence and on their willingness and capacity to engage. We have to be realistic. Although we accept that some criticism is absolutely appropriate, with our resources and our relationships with other professional providers, by and large we have in place the appropriate capacity to respond to most of the needs. In particular cases—I do not know who the individuals might be—I accept that we might fall short in some way but, generally, we have the resources and the capacity to address most needs.

Phil Thomas: The organisational review, whose implementation is probably in its infancy, just covering structures so far, focuses on education and meaningful and purposeful activity. Our members are looking forward to the change and to doing something more constructive in line with that. As a trade union looking in, we see that the organisation is never going to achieve the ultimate goal of getting all the professionals in to do everything that is required, but we see that our members are making their best efforts as a uniformed service.

John Watt: There is a developing body of law in relation to availability of courses and I am sure that the SGLD will be able to advise the committee on the significance of that.

The Convener: What does SGLD stand for? The Scottish Government legal—

John Watt: The Scottish Government legal department—or division, or directorate, or whatever.

The Convener: Something like that. Yes.

John Watt: The board occasionally asks to consider cases where a programme is outstanding—where it has been identified but not yet delivered—but the courts recognise that resources are not infinite and that there will be delays.

John Finnie: Good morning, panel. We have a lengthy written submission from Scottish Women's Aid, which has a lengthy section on post-release supervision of prisoners who are released early into the community. You will understand that that organisation wants reassurance for women, children and young people affected by domestic violence and it wants to have appropriate conditions. The submission makes a clear statement about the existing arrangements, stating:

"Breach of licence conditions must be regarded as a crime punishable in its own right resulting in the imposition of further penalties, and not just solely a recall to custody to serve the unexpired term of the original custodial sentence."

Is that a challenge at the moment? What would the further challenge be if it were made a specific crime?

Colin McConnell: It is probably not appropriate for me to offer a view on that from an SPS perspective. It is a fact that there are those who breach licence conditions and are returned to custody, and we deal with those individuals as they come back into custody and serve the rest of their sentence.

John Finnie: How is that dealt with?

Colin McConnell: Depending on the nature of the individual, a further assessment takes place to help them to understand what factors led to the breach. Then we continue to work with them for the remaining period of their sentence to ensure, as best we can, that they are appropriately prepared for their eventual release.

John Finnie: Mr Watt, what is your view on that?

John Watt: Criminalising breaches would be a matter for legislators, of course, and then it would be for the Crown Office to make a judgment. The Parole Board treats alleged breaches of licence conditions seriously and looks at all the circumstances surrounding a breach. It may be criminal in the sense that it involves an assault, for example, in which case it is for the Crown to decide what to do, but, whatever the Crown does, the board can still look at the case, because the onus of proof is different. For the board it is a balance of probabilities, and for the prosecutor it is beyond reasonable doubt; he needs corroboration and the board does not.

The board will look at the circumstances surrounding the allegation, such as whether the prisoner has returned to alcohol or drug abuse, whether he was mixing in bad company or going somewhere he should not have been. We will look into whether he was doing something that increased his risk level to a point where it was no longer manageable, and recall to custody in those circumstances means that SPS social work will look again at the risk posed and reassess the risk.

A recall to custody may last two years, and that is likely to be longer than a sentence that a sheriff would impose for what he or she might see as a relatively minor breach of the law, but the additional complication is that the board is then faced by what some may see as a dilemma, in the sense that there is a feeling that, if there is not a conviction, the prisoner ought to be rereleased. That is just wrong, because there are so many factors surrounding and leading up to the behaviour that results in the conviction, much of which could be a ground for recall.

I suppose that that could create confusion about what the board ought to be doing—not in the board's mind, but perhaps for the public and the legal profession, who would say, "My client has been acquitted. You must let him out." If we say no, a lawyer might say, "Well, let's put off the hearing until the prosecution is complete," but that could be quite a long way down the line. There is the potential for confusion and delay if you go down the line of criminalising breaches per se, but that is not to say that a crime committed that is a breach of the licence ought not to be pursued. That is the board's position. The rules that are in place just now seem to work pretty well.

Alison McInnes: As a supplementary to that question, do you have discrete data on the rate of reoffending among people who have breached the conditions of their release and are recalled?

John Watt: No. We have lots of statistics and many figures, and I am happy to get those figures for you if you let the board know exactly what you need. All that I can say is that it is clear that those who are released on non-parole licence—at two thirds of the way through their sentence and without an assessment of risk—tend to be recalled in significantly greater numbers than those who are released on parole licence, where there is an assessment of risk.

11:15

Roderick Campbell: Good morning, gentlemen. I am sure that most of you heard the evidence in the previous session, in which I asked about the impact of proposed changes on incentivising prisoners to engage with rehabilitation programmes. What would the bill's provisions do in that respect?

John Watt: My answer to your question is likely to be much shorter than Mr McConnell's. The changes will incentivise some prisoners who at the moment are happy to wait until they get two thirds of the way into their sentence in the knowledge that they will get out. Knowing that they had a significant period to go after that would have to incentivise some, but how many? Who knows?

Colin McConnell: That is probably how it is. Some will be motivated to engage in order to get released early, while others will not. I am more interested in engagement for the purpose of not coming back to prison and in how we as a system and society gear up to help people make that transition.

Phil Thomas: I have nothing to add.

Roderick Campbell: We touched on MAPPA in the previous evidence session. Do you have any views on its role and how it might be enhanced?

John Watt: I know about MAPPA; it is just an umbrella under which various agencies co-operate to try to mitigate the risk that is posed by individuals in the community. Some will be on licence, and some will not. I am not quite sure what the criteria are, but if an individual is released cold at the end of a sentence, they might be drawn into the MAPPA net as potential offenders, not as released prisoners. Their history would be significant, but it would not be connected to the sentence.

The Convener: We will get a note for the committee on this, but I thought that an offender had to be on licence for MAPPA to be in place. I am not sure whether there are other discrete circumstances.

Margaret Mitchell: Good morning, gentlemen. The common theme in evidence from a couple of panels of witnesses seems to be that the bill is fundamentally flawed in its concentration on sentences rather than risk assessments and that focusing on, say, a 10-year sentence or sexual offence sentence is the wrong approach. Do you agree?

Colin McConnell: It is not for me to comment on the Government's proposals.

Margaret Mitchell: If you cannot comment on the policies, I want to take you back to your earlier assertion that some of these community sentences could just as easily be carried out in prison. Mr Johnston said that it was a bit like having a mock trial, not an actual trial, and that it was no substitute for the real thing.

Secondly, I do not know how many years we have been talking about the lack of adequate throughcare in prison, but you have come before us this morning, saying, "I think that we can deliver this in prison." Given past experience, why do you think that? What has changed?

Colin McConnell: I want to make two particular points. First, I certainly did not say that community sentences could be adequately carried out in prison, and I am not aware that the other panel members did so.

On the second point, I am not saying at all that you can replicate the community in prison. Actually, I have said quite the opposite; I agreed with the previous panel members that you cannot create the community in prison. The challenge that we face—and indeed the direction that we are going in—is to connect community and prison in a more integrated and systematic way.

A long-standing challenge that we face, which is not unique to Scotland—

Margaret Mitchell: To what end, though?

The Convener: Please let Mr McConnell answer.

Margaret Mitchell: I do not understand the distinction that you have just made.

Colin McConnell: My explanation is that a long-standing issue is that there has been too much of a disconnect between the period of custody and community.

Some might say from a philosophical basis that that is wholly intended and necessary as a mark of the wrong done and the retribution being had, but the direction of travel generally, and certainly in Scotland, is to integrate more clearly what happens in custody with the resources and connectivity that are required in the community. That is for the benefit not just of the individual in question but of their family and the other social circumstances that affect the individual and his or her community. To be clear, I am not at all trying to make the case that prison can do everything for everyone—it cannot. Prison works best when it is integrated with the resources and the relationships in the community in the context of the individual who is being cared for.

Phil Thomas: As a result of a burning desire among POA members a couple of years ago, along with the Scottish Prison Service and Colin McConnell, an initiative has been set up involving throughcare support officers, with investment from the Scottish Government for 32 additional members of staff. Our members carry out a great professional role in the prisons and we now want to go out into the community to help with the transition. We called it the beyond the walls initiative. The POA and our members recognise that we have a role in that. It is about providing support in the community when people do not have family support. We will have many roles in that, on issues such as housing. People have built up a rapport with officers over the years while they have been in prison. The union recognised that and asked how we could help with the process. Now, our role does not stop at the prison gate—it goes out into the community. The initiative is in its infancy, but we hope that it will be a success and that we can work jointly on it.

Margaret Mitchell: I return to short-term prison sentences. Is any of that support available for short-term prisoners, who we have heard pose the greatest risk? The bill is supposed to be about public safety.

Colin McConnell: To pick up on what Phil Thomas said, our ambition is to make that service as widely available as we can, but it will probably have to be targeted on a needs basis. It is fair to say that many people who pass through our custody have caring family relationships and good

contacts with families and communities. Not everyone who passes into our care has a chaotic and disconnected life, but many do. For those people in particular, we are trying to develop a service that reaches out beyond the prison walls and encourages communities to reach back in. That is the way that we work together to get a more integrated service.

Margaret Mitchell: I have a question for Mr Watt on a different issue. It has been suggested that the bill could almost be setting up the Parole Board for failure. Do you have a comment on that?

John Watt: The Parole Board is always happy to account for its decisions. Its sole deciding factor is risk. It is not as though cold release is new to the board. For example, when a prisoner is released on licence at his earliest liberation date, two thirds of the way into his sentence, and is then recalled, we might get to a point when the board has to consider whether to release him, despite the fact that he is a risk, so that he can have some supervision in the community. We might say that the risk is too great and that he will not get out until the end of his sentence, with all that goes with that. The board already makes such decisions on the basis of the evidence that is before it.

I can see where Professor Tata is coming from, but I am pretty sure that the board can cope with that.

Margaret Mitchell: Is the point not more that the public expectation might be greater if the bill is passed? It is supposed to be about public safety and you will make more such decisions, so the focus will be more on you.

John Watt: That is what we are there for. We fulfil a judicial function, in the same way as a sheriff or High Court judge does. They get it right most times and they occasionally get it wrong. We might be more in the public eye, I suppose, but we would need to live with that, and it does not cause me great concern. We will always be in a position in which we can make a perfectly good decision based on the information before us, but then something changes after a prisoner is out and he reoffends. We will never get away from that. We will not get it right 100 per cent of the time and, even when we get it right, it might yet fail in the community. We will have to wait and see how that pans out.

We will have to provide a suitable explanation although I know that it is not easy when the press have an angle and are coming at an issue from a particular direction. The committee will know better than I what that means. Sometimes, that is driven by coverage that is inappropriate or not entirely accurate. I suppose that we must find a way of getting the message across.

The previous witnesses tried to explain that there is always an element of risk when you release somebody and that that risk must be balanced against the management plan that is in place, which is a matter that I do not think has been considered in any great detail. There is the risk—there is always a risk—there is the level of harm that may crystallise if the risk is not properly managed, and there is how you manage the risk. Those three factors are balanced when you decide whether a risk is manageable in the community. I do not know how far you can explain that in a one-minute soundbite. That would be a challenge.

Margaret Mitchell: Does it muddy the water between sentencing and risk assessment?

John Watt: No—it need not. I suppose that Professor Tata's argument is that, if a 12-year sentence is imposed, the judge knows that that in fact means eight years. Were that to change and the bill passed and a 12-year sentence meant a 12-year sentence, everyone would know that because the law would not, I imagine, kick in retrospectively; it would be for sentences that are imposed in the future. Therefore, I do not think that it need muddy the waters. Perhaps some clarification would be required when you are talking to victims and you are having to explain that the sentence was imposed at a time when a 12-year sentence meant an eight-year sentence. That would just be a challenge that you would have to overcome.

The Convener: I will bring in Rod Campbell with a supplementary, after which we will have Alison McInnes—oh, I see that Alison is out now—then Christian Allard. I want no complaints; I am just putting down that marker.

Roderick Campbell: My colleague was talking about throughcare. Will Mr McConnell clarify what the statutory throughcare provisions are?

Colin McConnell: Prisoners serving more than four years are subject to statutory throughcare provision. That throughcare is not for the Prison Service to provide; community resources provide it. However, community and custody resources come together to plan what that service provision might look like. Those serving less than four years do not have statutory throughcare provision, but there is a general expectation that resource will be made available where they want to access it.

The Convener: Jayne Baxter has a question. No, I am sorry, it is Christian Allard now. People are being deleted—metaphorically.

Christian Allard: I will add to John Watt's point about cold release cases happening now. We are talking about the principle of the bill as if it will apply to every prisoner, but the number of prisoners involved is very limited. The bill will affect only very few prisoners, so how will the

service cope? Do we welcome the fact that the bill will target only a few prisoners? What do you think about the Scottish Government wanting to stop early release for other prisoners?

John Watt: The numbers that may be affected by how the bill is framed will be relatively small and will not increase to what might be a problematic level for a number of years—and who knows what the future might hold? If the numbers were to increase, if sentences were to be reduced and more prisoners were drawn into the net, there would be resource implications. What they would be would depend very much on how much more widely the net was thrown.

Colin McConnell: From a custodial point of view, the impact will be scaled depending on what the eventual solution is. By and large, the SPS could be expected to address the issues that that would throw up.

Phil Thomas: From a union perspective, the estimate of 120 could be easily absorbed—we have coped with a lot more than that. Indeed, last week, the SPS chief executive was saying that we are covering 7,500 prisoners. However, if the numbers increased dramatically, we would be having different discussions about whether we had the infrastructure or enough staff. We have processes and policies in place under which we can go to the employer and say, "We need to address these issues," but the union has no immediate concern.

The Convener: Thank you very much for your evidence. I suspend the meeting and ask members to stay put.

11:30

Meeting suspended.

11:37

On resuming—

Serious Crime Bill

The Convener: The next item of business is evidence on a supplementary legislative consent memorandum on the Serious Crime Bill.

I welcome to the meeting the Minister for Community Safety and Legal Affairs, Paul Wheelhouse, and officials Craig McGuffie, who is from the Scottish Government's directorate for legal services, and Jim O'Neill, who is senior legal services manager at the Scottish Prison Service. I also welcome Nigel Don, who is the convener of the Delegated Powers and Law Reform Committee, which I understand considered the LCM at its meeting earlier this morning.

I invite the minister to make a brief opening statement; then before the committee discusses matters, I will invite the convener of the DPLR Committee to tell us what happened at that committee's meeting earlier.

The Minister for Community Safety and Legal Affairs (Paul Wheelhouse): Good morning. I thank the committee for giving me the opportunity to discuss the Government's supplementary legislative consent memorandum in relation to amendments to the United Kingdom Parliament's Serious Crime Bill.

I will begin by addressing the purpose and effect of the amendments to the bill. The bill was introduced in the House of Lords on 6 June 2014. The relevant amendments to the bill were announced by the UK Government during the bill's second reading in the House of Commons on 5 January 2015, and were tabled at Westminster on 8 January. The amendments provide a regulation-making power for the Scottish ministers to make provision to confer on a court the power to order a communications provider to take action to prevent, or to restrict, the use of communications devices by persons who are detained in prisons or in young offenders institutions. Such action could include disconnecting unauthorised handsets and SIM cards that are held and used in prisons.

The unauthorised use of mobile phones in prisons presents a range of serious risks to the security of prisons and the safety of the public. They can be used to plan from behind bars escape or indiscipline, or to conduct serious organised crime, including drug imports and serious violence. The powers in the bill will help to deal with the challenging problem of illicit mobile phone use in prisons. They will support our commitment to tackling serious and organised crime as part of the "Letting Our Communities Flourish" strategy for tackling serious organised

crime, which was published in 2009 on behalf of the serious and organised crime task force. Mobile telephone network operators support the bill and have told us that they welcome a clear legal instrument that compels them to act. The new power will provide that clarity.

The amendments to the bill will allow the Scottish ministers to make provision by regulations that will allow a court to make what will be known as telecommunications restriction orders, or TROs. A TRO will require a communications provider to take the action that is specified in the order for the purpose of preventing or restricting use of communications devices by people who are detained in prisons or in young offenders institutions.

The regulations must address a number of matters in relation to applications for a TRO: rights to make representations in response to an application, the granting of a TRO, the duration, variation and discharge of a TRO, and appeals against decisions that are made on an application for a TRO. Regulations that will be made under the new power may make provision on, among other things, the cost of complying with a TRO and legal expenses of the application process, and they may make exceptions from compliance with the TRO. The regulations may also make incidental, consequential, supplementary or transitional provisions. They will be subject to affirmative procedure.

I will set out the rationale for the LCM. Wireless telegraphy is a reserved matter under paragraph C10 of schedule 5 to the Scotland Act 1998. However, management of prisons is devolved. As the bill confers functions on the Scottish ministers, it is a "relevant Bill", as defined in standing orders. As the UK bill has already been introduced, the LCM route offers a resource-efficient and timely legislative vehicle by which to confer the required powers.

We are committed to minimising the number of phones entering prisons, to finding phones that have got in, to blocking phones that we have yet to find and to removing them from the networks, thus rendering them worthless, and to stopping prisoners using phones to engage in criminal activities from prisons. That will help both the police and prison authorities to maintain the security of our prisons and the safety of our communities.

Parliament has previously considered and agreed an LCM in this policy area with regard to the Prisons (Interference with Wireless Telegraphy) Act 2012, which allowed the Scottish Prison Service to procure and install mobile signal denial technology in two pilot sites—HMP Shotts and HMP Glenochil. The technology was installed and operational by the end of the financial year 2013-14. The amendments that are covered by this LCM will help to bolster the policy that was previously agreed by the Scottish Parliament via the previous LCM.

The Justice Committee considered an LCM for the Serious Crime Bill on 2 December, when I gave evidence. The committee published its report on 10 December 2014, stating that it was content to support that LCM. The Scottish Parliament agreed to the LCM for the bill on 6 January 2015.

We recognise that the legislation is only the first step and that we will need to introduce regulations for Parliament to consider further how we will exercise the powers that have been introduced to the bill by amendment. The evolving technology, the location of the equipment, the type of equipment to be deployed and the opening up of more parts of the wireless spectrum are just some of the factors that need to be kept under consideration. However, the provisions and the ensuing regulations are another important key to tackling illicit mobile phone use in prisons and to keeping up to date our ability to respond.

We will continue to work with colleagues in the National Offender Management Service, Ofcom and the mobile network operators to ensure that the powers are exercised not only effectively but responsibly. I therefore ask the committee to support the legislative consent motion that has been laid before it. I am happy to answer questions.

The Convener: This is just an evidence session, of course; we are not debating a motion.

Nigel Don (Angus North and Mearns) (SNP): Good morning, convener, minister and everyone else. The Delegated Powers and Law Reform Committee considered the bill only this morning. Because of the time constraints that we are working in, we are unable to write to the committee, as we would have done normally, which is why I am here to discuss the issue. I am grateful for the opportunity to do so.

As the minister said, the new clause 11 will enable the Scottish ministers by regulations to confer on Scottish courts a power to make a telecommunications restriction order. The power will enable the Scottish ministers to create offences for breach of a telecommunications restriction order without specifying the maximum penalty that may be imposed for such an offence.

11:45

In principle, the DPLR Committee considers that the delegated powers should not contain unlimited power to set penalties. Indeed, that committee expressed the same view in relation to the Tribunals (Scotland) Bill. My first question to the

minister, therefore, is this: why has no maximum penalty been set as a matter of principle? What that penalty might reasonably be is, of course, a matter of policy, which is for the Justice Committee, but the principle is an issue that concerns the Delegated Powers and Law Reform Committee.

Perhaps I will just give you the full story, minister, and then you can come back to me on the matter. In addition, the LCM states that the new clause 11 will enable the Scottish ministers to make regulations that will confer on the sheriff court discretion, in making telecommunications restriction orders, regarding matters such as accessibility of court documents and proceedings, the holding of meetings in private and matters relating to proof in evidence.

It appears to the Delegated Powers and Law Reform Committee that the power is not drafted in a way that will enable such provision about court proceedings to be made, because the matters do not fall under the list of items in proposed new clause 11(3) and (4) on which regulations may make provisions. It therefore appears to the DPLR Committee that there is a discrepancy between the policy intention as stated in the LCM and the scope of the proposed power that appears in it. Moreover, I note that this kind of provision about court proceedings would normally be made under court rules rather than by ministers, because in general ministers do not have the power to do so.

The Convener: I know that it is quite hard to take all that in, minister. I do not know whether you were listening in to the Delegated Powers and Law Reform Committee's meeting this morning.

Paul Wheelhouse: Indeed we were, convener, and I hope to be able to respond to the two points that Nigel Don has raised.

On the first point, which was about the lack of specification of a maximum penalty, although it would clearly have been preferable for that to have been included in the amendments, the decision to lodge them was taken by the UK Government at a very late stage of the bill's passage. As a result, there has been less opportunity than we—and, I am sure, the UK Government—would have liked to make the provisions perfect.

It is, however, envisaged that breach of a telecommunications restriction order is likely to be prosecuted as contempt of court. Under section 15(2) of the Contempt of Court Act 1981, the current penalty for contempt of court is up to two years' imprisonment, or a fine, or both. However, in the sheriff court, the penalty for contempt of court is, in most cases, up to three months' imprisonment or a fine of up to £2,500 or both. It is worth stressing that it is thought that the need for the court to impose such penalties will be rare, as this legislation is the preferred option of the communication providers and has been taken forward after consultation with them and at their request.

Further amendments will allow the Scottish ministers to make provision by subordinate legislation for enforcement of telecommunications restriction orders, which might include the creation of offences. It would therefore be open to ministers to create a bespoke offence of breaching a TRO and specific penalties for that offence, although the current intention is to rely on contempt of court as a means of enforcing TROs. Alternative means of enforcement, should they be considered necessary, are available to ministers. I hope that that tackles the point that the DPLR Committee has very fairly raised about the lack of specification of a maximum penalty at this stage.

The Convener: Do you wish to respond to that, Mr Don?

Nigel Don: I hear what the minister has said. With the greatest of respect to the present Government, regardless of its political hue, my committee is always concerned with looking beyond what the present Government thinks it will do and with ensuring that what we put in legislation is watertight. It is on that basis that my committee will always say that if you are going to create an offence about absolutely anything, the maximum penalty should be on the face of the bill.

That said, I have heard what the minister has said, and I see exactly why one might well want to prosecute breaches as contempt of court. That protocol already exists and is well understood.

The Convener: As I understand it, it might very well be an interim position.

Paul Wheelhouse: Indeed. It is open to ministers to create a specified offence, which might give more comfort to this committee and the Delegated Powers and Law Reform Committee.

Convener, would it be helpful if I addressed the second point that Mr Don raised?

The Convener: Certainly.

Paul Wheelhouse: On the discrepancy between the scope of the power and what the policy memorandum says about the accessibility of court documents and hearings, the early draft provisions contained regulation-making powers in relation to the accessibility of court documents, and to allow court hearings to be heard in private. The early draft LCM provided the general principles of the amendments, as no final provisions had been agreed and received.

The final provisions do not contain any power to allow court hearings to be held in private, as powers to regulate court procedures are already

set out in section 32 of the Sheriff Courts (Scotland) Act 1971 and section 5 of the Court of Session Act 1988. The SPS has no plans to seek that a court exercise the powers in order to hold hearings in private, and it has been open about the deployment of technologies in HMP Shotts and HMP Glenochil and its intention to pilot mobile phone blocking technology.

I hope that that helps, convener.

The Convener: We will move on to questions from members.

John Finnie: Good morning, minister. I have previously been very exercised about this issue for the very particular reason that in the town where I live, which contains the only prison in the region, houses are closer to the prison's perimeter wall than I am to you, and I am very concerned about the intrusion that could happen. I note the pilot projects that have been mentioned, but I do not know whether you are in a position to reassure the committee about the standard of the phone blocking and intervention and the fact that, for example, many people rely on telecare.

Paul Wheelhouse: Such issues are important. As Mr Finnie has pointed out, the two pilot projects are under way. The project at HMP Shotts has been implemented very successfully without any technical difficulties. I will invite my colleague Jim O'Neill to talk about the project at HMP Glenochil, where implementation has proved to be more difficult because of the need to ensure that the equipment does not interfere with external signals. The powers that we are discussing today would allow us potentially to use more mobile technology that would be easier to update as other technologies emerged and as 4G and 5G, for example, develop. The existing regulations do not allow us to deploy the technology to tackle those things, and the regulations that would be developed and the approach that would be taken to implementing the legislation would allow us to have, in a sense, more sophisticated technology that could be targeted at a particular part of a prison instead of our having to cover an entire prison simultaneously.

Jim O'Neill will explain the technical difficulties and challenges that we face in ensuring that the problem that Mr Finnie has fairly raised does not occur in practice.

The Convener: If it is a technical issue, please make sure that I can understand it.

Jim O'Neill (Scottish Prison Service): I will do my best, convener. The issue is fairly technical, so please forgive me if I stray off.

I reassure the committee and Mr Finnie that before the equipment is switched on it is tested by the centre for applied science and technology at the Home Office. That testing, which is part of the memorandum of understanding between Ofcom, the mobile network operators and the Scottish ministers, is very robust and involves a 10,000-point perimeter test of the prison to ensure that there is no interference outwith its perimeter; in other words, we check the perimeter of the prison at 10,000 points to ensure that there is no interference with the properties that are close by.

I want to share with the committee a very brief experience that I think demonstrates the commitment of those involved. During the testing at HMP Shotts, we found some interference creeping over the fence at a particular corner of the prison. It was happening on only one network, and before we tweaked the equipment, we looked at the properties in the area and found only one that was within, or could have been within, the reach of the interference. We visited the person in that property and when we asked them whether they had experienced interference on their mobile phones they told us, "None whatsoever." The quite simple reason was that the network that was slipping over the prison perimeter was not the network that the person was on. From time to time, we find that sort of thing happening because of environmental conditions and what have you, but the interference is subject to a 10,000-point check, and to the satisfaction of the mobile network operators and Ofcom.

The Convener: How would somebody know that their phone was being interfered with? Would they simply not be able to use it?

Jim O'Neill: Yes. They would not be able to use their phone.

The Convener: Would there be no signal?

Jim O'Neill: They would have no signal.

John Finnie: That gives me zero reassurance. The way that somebody would know that their emergency alarm was not working would be if they fell and got no response.

Perhaps we can get more information on the pilot projects. Literally within a stone's throw of the prison in the centre of Inverness, there are hundreds of properties and in many of them will be people who benefit from telecare. I am not a technical person. It may be that the intervention has no impact but I suspect that, given that it uses blocking technology, it has the potential to have an impact.

None of that is to suggest anything other than that I appreciate the significant threat that the possession of mobile phones by prisoners poses. We want to do everything possible to assist in eradicating that challenge to the Prison Service and people outwith the prison walls.

Paul Wheelhouse: I take Mr Finnie's point. To pick up on the points that Jim O'Neill made about the proactive nature of the checks, I stress that it will not be left entirely to chance for us to find out that the equipment is unintentionally interfering with someone's phone. Rather, we will check proactively all the way round the perimeter, ensure that we identify any signals that might interfere with equipment and then find out where they come from. That is the process that was gone through at Shotts.

However, I entirely take the point and understand that members will want reassurance about the interests of their constituents who are around prisons that are juxtaposed with urban settlements. We propose that, as we develop the regulations that will implement the policy, we offer the committee an informal private discussion with technical officials so that members can explore and interrogate the issues in the level of detail that they wish. I believe that that was done previously in relation to the Regulation of Investigatory Powers (Scotland) Act 2000—RIPSA—and human trafficking. That will offer the committee the chance to discuss with officials any technical questions that they have to ensure that they are ironed out in the regulations as they are implemented.

John Finnie: I am grateful, minister. That would be helpful. I appreciate that technology moves quickly and that equipment might come on the market that will make things easier.

I move on to other issues. You mentioned RIPSA. In paragraph 12(c) of the supplementary legislative consent memorandum, we are told that the UK act, the Regulation of Investigatory Powers Act 2000—RIPA—will be used to

"analyse the patterns of usage to establish that the phone is in use within a relevant institution".

There is potential for collateral damage—or collateral interference—there as well, is there not?

Paul Wheelhouse: My understanding is that, if the SPS made a request for a TRO to be implemented that necessitated getting mobile phone communications data from a mobile phone operator, that would be done via Police Scotland using RIPSA rather than RIPA. I appreciate that the drafting of the notes is perhaps not helpful in that respect, but that would be the case with the possible exception of an instance of terrorism. It would be unlikely that the individual in a terrorism case would be housed in Scotland, but there is a chance that they could be, so we will have to examine that and come back to you about under what circumstances, if any, RIPA would apply rather than RIPSA.

John Finnie: It is a perennial interest of mine, as you know, minister.

Paul Wheelhouse: I appreciate that. To some extent, I had anticipated that question from Mr Finnie and asked the questions myself. I believe that the procedures, such as they are, would involve using Police Scotland to seek the data from the mobile phone operator and, assuming that Police Scotland did that, it would be done through RIPSA rather than RIPA. Unfortunately, that is not clear in the documentation that the committee has seen.

John Finnie: That might, indeed, be accurate and it is RIPSA rather than RIPA.

We are also told in paragraph 12(f):

"Scope to make provision within the body of an order about the circumstances in which a CP"—

that is, a communications provider—

"or person specified in the order must take steps to re-establish operation of the device—this is designed to deal with the scenario where it becomes clear an error has been made and the wrong phone has been disconnected."

Will you explain a scenario in which the wrong phone could be disconnected?

Paul Wheelhouse: There is a risk that a phone might be incorrectly identified and the signal shut down. We would need to correct that error. No specific examples have been given to me, but I ask Jim O'Neill to give an example; he is more familiar with the use of phones in the prison environment.

The Convener: Not personally.

Paul Wheelhouse: No, from a Scottish Prison Service perspective.

12:00

Jim O'Neill: As the committee is aware, the pilot of this technology is going on at the two sites. So far we have found no evidence and have had no complaints about any phones being affected by the deployment of the technology.

The provisions are important because, in some way, they try to focus on what future technologies might do. Mr Finnie is correct to say that we need to put in place much greater safeguards to ensure that, where properties are in close proximity to a prison, there is no disproportionate interference or effect on mobile phones outwith the prison. The technology is challenging and complex. The powers envisage the possibility of such an effect and therefore provide an avenue of redress. However, the pilot indicates that there is little likelihood of such interference. There is an element of future proofing, so that people may take the technology into prisons that are in close proximity to communities and there is scope for errors.

John Finnie: Indeed, that scope is acknowledged among the LCM's financial implications, which refer to the compensation that could be paid for erroneous disconnections.

To return to RIPA or RIPSA, minister, how would an individual know that they have been the subject of a disconnection under the provisions? They might just think that their phone is faulty. How would they know to follow up this process?

Paul Wheelhouse: That is a good question. We have to bear in mind that any use of a mobile phone in prison is currently illegal; therefore they should perhaps not be expecting normal consumer rights to be observed—

John Finnie: Absolutely, but the scope of the provisions clearly goes beyond prisoners. I would say, for the avoidance of any doubt, that the provisions are salutary punishment for those responsible for breaching prison law. However, the provisions cover the community, and perhaps a community impact assessment would have been helpful.

Paul Wheelhouse: I take Mr Finnie's point. Obviously, there is a risk. This is an important issue that we would need to take forward to ensure that, as we develop the regulations, they are as watertight as possible in that respect.

As I understand it, if a clear-cut observation of a signal is being captured by the grabbing equipment in Shotts—or in Glenochil, if it were to be fully deployed there—and if we are absolutely sure that the signal is coming from within the prison and there is no risk of it being from outside or from someone who is visiting the prison who has their phone on them, the signal can be stopped without going through the process of getting the communications data from a mobile phone operator. A degree of triangulation can be used by going through the route and using RIPSA through Police Scotland to get communications data from the mobile phone operator to double check the pattern of use and whether it is consistent with the phone being used illegally within the prison, to ensure that we are certain that this is a bona fide case in which the phone needs to be shut down.

In many cases, we are not talking about conventional mobile phones. Jim O'Neill has conveniently brought one along: believe it or not, this is a mobile phone, although it looks very much like a Mercedes Benz key fob. That can be secreted on someone who has gone into prison, potentially in a body cavity—hopefully not this particular phone—and as it has a very low amount of metal within it the internal aerial is not particularly strong, it has a weak signal and it would be unlike a smartphone in terms of its ability to capture a network. In the confines of a prison, the limited range of the signal from something like this would probably make it quite easy to pick up, whereas it might be more difficult to isolate a more modern smartphone from other phones.

John Finnie: The LCM uses the phrase "patterns of usage". What concerns me—we would ignore this at our folly, given the wider implications—is that we are talking about potentially widespread surveillance, and it is not clear to me what redress an individual would have if their mobile phone were blocked. I also do not know whether the technology will live up to our expectations. I am not suggesting that it will be a man walking about with an aerial, but the use of RIPA and RIPSA suggests not immediate action but some pre-planning. Indeed, that is the basis of the evidence that is to be provided to the courts—evidence that, I notice, will meet the civil standard of proof, not the criminal standard of proof.

Paul Wheelhouse: There are existing provisions under which it is already an offence to be in possession of and to use a mobile phone in the prison system. If it were possible to identify that someone had a handset on them, they could be prosecuted through the existing procedures. The problem is that people hide these devices in prison and it is difficult to track them down. It is one thing to be able to identify that a signal is being received in a certain area of the prison, but it is another to be able to prove exactly who has the handset and to capture it at the time. The ability to shut down the signal to the phone is very important.

There are two approaches that we can take to the problem. If someone is caught in the act of using the phone, the existing procedures can be used to deal with that because it is an offence. However, we also need the ability to shut down a phone if we know that it is potentially being used. Mobile phones are almost like currency in jail, and if individuals have them that gives them a certain amount of power over their fellow inmates. However, we may not be able to track down the particular individual who is using a mobile.

John Finnie: I assure you, for a third time, that I have no issue with that. I would want that very strongly. However, the public require to be protected from inappropriate surveillance and inappropriate intrusion into their privacy, and that is what we have at the moment through the existing limitations of the blocking mechanisms.

The Convener: I am just wondering about product placement, minister, in case somebody has a zoom lens focused on the phone that you are showing us.

Paul Wheelhouse: There are other automobiles.

Margaret Mitchell: The point has been well made—even by showing us that little handset—that this is a vexing problem. It has been going on for a long time and it seems that the criminals are always one step ahead, with technology helping them through smaller SIM cards that can be passed round and handsets that look like anything but a handset. It is important to bear in mind that such technology allows them to continue the very behaviour for which they were put in prison. Therefore, I very much welcome the LCM as an attempt to reduce and, eventually, eliminate the illicit use of mobile phones in prison. Can you indicate the extent of the problem in the whole prison estate? Is it possible to assess how effective the pilot has been so far?

Paul Wheelhouse: Certainly. I will give you some figures. There remains a challenge because the existing provisions have not fully dealt with the problem. In 2011, 959 mobile telephone handsets were found in Scottish prisons and more than 800 component parts of mobile phones—SIM cards and the like—were found. Phones are sometimes broken up, distributed and then reassembled for the purpose of making a call. In the six-month period to October 2014, after the implementation of the existing regulations relating to the previous measures that the committee oversaw, 135 mobile telephone handsets were found in Scottish prisons along with more than 170 component parts of mobile phones. If those figures are grossed up to annual figures, they show that there has been a substantial reduction in the number of phones and components that are being found.

The existing provisions are having some impact but—Margaret Mitchell is quite right—we need to keep up with and stay ahead of, where we can, the entrepreneurial activity of some prisoners in the custodial setting. With the advent of new mobile phone bandwidths, 4G and potentially, in the future, 5G and other generations of phones, we need to be alive to the innovation that is going into the devices and the more generic phones that are being brought into prisons.

We are realistic, in that other devices will have escaped detection. The Scottish Prison Service takes the issue extremely seriously, but I hope that I have given you a sense of scale regarding what the numbers were before the regulations came into force and what they are now. We need to keep ahead of where the prison community is going in terms of technology.

Margaret Mitchell: I have a practical question. When an issue has been identified and a court order is required to compel the communications provider to take action, how long is that likely to take?

Paul Wheelhouse: Margaret Mitchell is quite right to ask about that. We will need to do some further work in that area. We need to speak to the Scottish Court Service to see what potential there is—particularly if there is concern about a serious crime that might be getting furthered through the use of a phone, or if there is a risk to public safety or to witnesses outside the prison system—to move very quickly. We will need to explore with the Scottish Court Service whether there is potential for expedited procedures to be used to ensure that, when necessary, we can take the first available opportunity to go through court and get that delivered.

I am happy to come back to the committee, in a private setting or through correspondence, to discuss how that might be taken forward.

Margaret Mitchell: That would be helpful.

Gil Paterson: I return to questions relating to the rights of communities living around prisons. Before you action the setting up of the 10,000-point perimeter check, would the public be the priority, or would security and governance be the priority?

Paul Wheelhouse: It goes without saying—Gil Paterson and Mr Finnie are quite right to raise such issues—that we must take the protection of civil liberties extremely seriously and treat that as a very high priority. I would hope that that is a key consideration in implementing the technology.

Under our proposals, the ability to have more mobile technology that can be used within the prison, rather than potentially impacting on people outside the prison, will be helpful to us, and will perhaps minimise the risks of that happening.

I ask Jim O'Neill to explain the processes that we go through to ensure that we protect local communities, and to go beyond the original answer to Mr Finnie.

Jim O'Neill: The minister is correct: the public are the priority. That is the key interest of Ofcom, which is responsible for regulating the wireless network.

Briefly, I return to Mr Finnie's point about telecare and other services. The technology has no impact on those whatever. The technology operates only on the frequencies of mobile phones; it does not operate on or block any other frequencies.

John Finnie: Do you know that that is future proofed? The technologies could develop.

Jim O'Neill: They could. However, Ofcom has oversight of the whole wireless spectrum, and it is aware of who is transmitting on the whole spectrum. Ofcom, as the principal regulator, needs to be satisfied that we are not interfering with parts of the wireless spectrum where we are not authorised to do so. The technology interferes only

with those wireless signals that mobile phones use. That is key when it comes to public protection. Furthermore, the testing is to the satisfaction of the regulator of the wireless spectrum technology and to that of mobile network operators. They have the public interest at the core of their business.

Paul Wheelhouse: I will add something for Mr Paterson's benefit. The directions to prison governors are designed to limit interference outside prison. More importantly and pertinently, with reference to your concerns, Mr Paterson, and indeed yours, Mr Finnie, the technology must be switched off should it be proved that it is disproportionately causing interference outside the prison boundary.

John Finnie: How would you know?

The Convener: Just a minute, John. I know that you are excited about this, and you are quite right, but let the minister continue.

Paul Wheelhouse: As I think that Mr O'Neill has indicated, there is a memorandum of understanding between the Scottish ministers, UK ministers, Ofcom and communications providers, which guarantees that we continue to work constructively with them. The operators have at heart the interests of the wider community using their phones.

Clearly, the Government is also concerned to ensure that we do not impact on people where we can avoid doing so and that the powers are exercised effectively, proportionately and responsibly. It is not something that is done lightly—I want to put that on record—but we are talking about situations in which there may be a serious threat to public safety, so difficult decisions may have to be made. That is why it is important to have the ability to redress the situation should a phone prove to be incorrectly switched off, and to allow compensation for the impact that that has had on an individual.

12:15

Gil Paterson: My next question is about what right an individual has in the process. If this was approved and the scheme was in operation, could an individual make a complaint, have it investigated and get the phone brought back into use? Do people have a right to do that? Is that implicit?

Jim O'Neill: The memorandum of understanding has that right within it now, and any member of the public can raise any concerns with their mobile network operator. The mobile network operators have agreed to work with us to explore whether that is a problem with their technology or with ours. The memorandum of understanding already provides that opportunity for people to raise concerns and make complaints, but we would be equally delighted if they approached us and we would be happy to investigate.

The Convener: In those circumstances, how do you let people know that? People do not always read leaflets that are put through their doors; I presume that you do that if you are implementing the procedure in a community in the vicinity of a prison. How do you engage with people and explain how they can get in contact if something funny happens with their mobile phone? Stuff comes through the door all the time, but people might not read your leaflet because they might think that it is for a furniture sale or something. How do you give people a simple list? They may think that they have run out of money or that somebody has blocked their phone.

Paul Wheelhouse: That is an important point and I will ask Jim O'Neill to explain what we already do. If the committee has any concerns about communication with local communities around prisons, I am happy to look sympathetically at how we engage with people and ensure that they are aware of their rights and know how to go about fixing any problems that arise. As Mr Finnie pointed out, the procedures for contacting a communications provider are set out in paragraph 12(f) of the paper on the legislative consent motion.

The Convener: Yes, but how do you tell people in advance?

Paul Wheelhouse: I certainly agree that that would be a sensible thing to do to ensure that local communities are aware that there might be a problem.

The Convener: I was going to say that you could send them a text, but that is no good to someone if their phone is not working.

Paul Wheelhouse: Jim O'Neill will explain what we currently do and what was done in advance of the problems at Shotts and Glenochil.

Jim O'Neill: That is an important point. The key thing that the SPS did, contrary to the approach that was taken down south, was to make that public. Indeed, the former Cabinet Secretary for Justice visited one of the sites where we were piloting the technology, so information about where the technology was being deployed was already in the public domain. It received some fairly significant coverage in the local press in the area and in the national press. One key way in which we made the public aware that it was happening was to take a different approach to that taken down south by actually publicising the fact that we were deploying the technology.

The Convener: Did you also put something through people's doors? Not everybody gets the local papers.

Jim O'Neill: No, we did not. We said quite openly, "We're going to do this here in this place."

The Convener: People do not all read the papers or watch television. I have a neighbour who does not have a television. Can you not simply go door to door saying, "Here is a note telling you that if problems are happening it may be because of this"?

Paul Wheelhouse: That would be entirely fair. We can come back to the committee on that.

The Convener: It is belt and braces, but it could be useful.

Paul Wheelhouse: I agree that we need to consider what to do if there is a concern. Mr Finnie has identified a prison where there might be a concern of that nature, and it is not unreasonable to let people know how they can go about identifying whether deployment of the technology has had an impact on their signal, and that they should communicate with their service provider, who will know whether that signal has been switched off—it will be specific to a phone and to a SIM card—and can take steps to restore the service to anybody who is not an inmate.

The Convener: There could be no complaint if you did that, because you would be taking reasonable steps.

Paul Wheelhouse: It is important to ensure that people are comfortable with what we are doing.

The Convener: That is fine. Thank you very much. That concludes the evidence session, and I thank the minister and his officials. We shall consider our draft report on the LCM at our next meeting. I thank Nigel Don for coming to explain why we have that committee whose new name I can never remember.

12:20

Meeting continued in private until 12:49.

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