OFFICIAL REPORT
AITHISG OIFIGEIL

Criminal Justice Committee

Wednesday 9 March 2022

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 9 March 2022

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CRIMINAL JUSTICE COMMITTEE
9th Meeting 2022, Session 6

CONVENER

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

DEPUTY CONVENER

*Russell Findlay (West Scotland) (Con)

COMMITTEE MEMBERS

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

*attended

THE FOLLOWING ALSO PARTICIPATED:

Keith Brown (Cabinet Secretary for Justice and Veterans)
Catriona Dalrymple (Scottish Government)
Kenny Donnelly (Crown Office and Procurator Fiscal Service)
David Fraser (Scottish Courts and Tribunals Service)
Jeff Gibbons (Scottish Government)
Jamie MacQueen (Scottish Government)
Allister Purdie (Scottish Prison Service)
Jennifer Stoddart (Scottish Government)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

Committee Room 6

Scottish Parliament

Criminal Justice Committee

Wednesday 9 March 2022

[The Convener opened the meeting at 10:00]

Coronavirus (Recovery and Reform) (Scotland) Bill: Stage 1

The Convener (Audrey Nicoll): Good morning, and welcome to the ninth meeting in 2022 of the Criminal Justice Committee. We have received apologies from Pauline McNeill and Collette Stevenson.

Our first item of business is an evidence session on the justice provisions in the Coronavirus (Recovery and Reform) (Scotland) Bill. I refer members to papers 1 and 2.

I am pleased to welcome our first panel of witnesses. Kenny Donnelly is procurator fiscal for policy and engagement at the Crown Office and Procurator Fiscal Service, and David Fraser is executive director of court operations at the Scottish Courts and Tribunals Service. It is nice to see you both. We appreciate the time that you are taking to join us.

We move directly to questions. We have around an hour and 15 minutes or so. I will start things off.

The written submissions that you have sent in advance to the committee have been helpful to our understanding of the perspectives of your respective organisations on the provisions of the bill, and of the next steps and opportunities to make some of the Covid provisions permanent. Before we get into other members' questions, it might be helpful to have a general update. How are the courts and casework at the Crown Office beginning to adapt, now that restrictions are easing and we are beginning to move to a new normal?

David Fraser (Scottish Courts and Tribunals Service): Since I was last before the committee, we have stayed very much on track and have a high degree of confidence that, by 2026, we should be out of the woods, in terms of backlogs. The reduction in social distancing has certainly helped. In the court environment, we still have 1m social distancing. We are looking to decommission some of our remote jury sites, but that will depend very much on when we move to zero physical distancing and get jurors back into courts without face masks. Decommissioning will not include all the sites, because we still need some for the recovery programme in order to deal with backlogs.

We are on track, but we are not out of the woods yet. We absolutely need to continue with some of the provisions that are in the legislation.

Kenny Donnelly (Crown Office and Procurator Fiscal Service): It is a similar picture for the COPFS. The pandemic has obviously set back the criminal justice system, as it has most things in life. The case load has backed up, and everything at every stage in the process has slowed down. At one stage, the system stopped altogether and, as it has started back up, it has slowed down. As a result, there is at each stage in the process a build-up of work that needs to come through the system.

We are having to look at each of the stages in the process, from the initial receipt of cases and when they get marked, to when they first appear in court and are prepared for service of complaint or indictment, to getting them through court. The problem for us in doing that, which is to alleviate pressure and increase throughput of work, is that the volume of business has increased markedly, and all that business still requires to be worked on and managed. We must update victims, ensure that cases are in a fit state and so on. The sheer volume of work is delaying our ability to address the backlogs. It will be a long project to clear the entire pipeline—not just at the court end—of the backlog of work that has built up.

The Convener: On David Fraser's point on continuing to comply with 1m physical distancing, do you have an idea of when you can remove that requirement? That seems to be a stepping stone towards being able to function at more or less normal capacity.

David Fraser: We are—and, throughout the pandemic, have been—very much guided by Scottish Government guidance. We consistently review all the new guidance that comes out. The removal of face masks will be key, and zero social distancing will be the trigger point for us reopening and getting people, especially jurors, back into buildings. That will be what the new norm will look like after the pandemic.

Kenny Donnelly: We mention in our written submission that the remote jury centre model was innovative and was a fantastic opportunity for us to make at least some progress in disposal of solemn casework. However, it slows things down a little. With that model, there is a day at the start of each trial during which nothing is done other than remote empanelment of the jury; the trial does not really start until everybody turns up on day 2. Although we have made good progress in getting through some business by using the model, removing the requirement for that first day would, I hope, allow us to increase the output of cases at the court end of business.

The Convener: It is helpful to understand that. We can sometimes miss the practical issues in the evidence that we receive.

I have a follow-up question, which is probably for David Fraser. In the letter that we received this week from the SCTS, which was helpful on the issue of virtual summary cause trials, you expressed an intention or desire to establish domestic abuse courts in each sheriffdom in Scotland. However, in the previous submission that you sent to the committee, you argued that use of virtual hearings should be dealt with by individual courts. I imagine that consideration of rural issues, city-based courts and so on would feed into that. Will you expand a little on the decision making or rationale behind how each sheriffdom might put in place virtual court arrangements?

David Fraser: The pilot project group that was led by Sheriff Principal Derek Pyle issued in January a report of which, I am sure, you will be aware. The advantages that I see in moving forward with that in the sheriffdom of Grampian, Highland and Islands is that a single court will be created, an element of specialism will start to be developed and the court will be under the leadership of the sheriff principal. There is still a little bit of work to be done on how, practically, it will be developed and implemented, but once the model is established in G, H and I, it will be up to the other sheriffs principal to consider what their individual sheriffdom needs are, based on the model that is developed. There might be some variation between sheriffdoms, but the key essence and principles of what we are trying to do will remain. Vulnerable witnesses will be supported at a site that is external to the court environment. That is important, given the other areas of work of a court—it is proven that it can be quite traumatic to enter the court environment.

Kenny Donnelly: I agree with what David Fraser said. The model is another option that allows us to manage the work better. The specialism point is a good one. The model also provides another opportunity for victims to give their evidence in cases without necessarily being in the same building as the accused. That is to be welcomed, if it is what victims want. It is an opportunity for us to do things in a different way that might allow some business to proceed in a way that is safer for victims and expedites the disposal of cases. I am very much in favour of that.

The Convener: I have a final quick question before I hand over to Russell Findlay. Back in January—just a couple of months ago—we received an update from, I think, Eric McQueen that the backlog will probably last until about 2025. However, in some of the evidence that has been submitted recently, there has been reference to the year being 2026. Will you clarify that?

David Fraser: Yes—I am painfully aware of that. When Mr McQueen was here, those were the projections at the time. When I last appeared before the committee, I gave the most up-to-date information that I had. As I said, I anticipate that the backlog could last until 2026, but that will depend on what comes our way. It is quite safe to say that that is a realistic estimate.

The Convener: Thank you for that helpful clarification. I will call Russell Findlay next. A number of members are interested in sticking with the issue of conducting court business by electronic means, so I will bring in Russell and then Rona Mackay.

Russell Findlay (West Scotland) (Con): The legislation allows fiscal fines to increase from a £300 limit to a £500 limit. What kind of offences would be brought into that upper limit?

Kenny Donnelly: I am sorry—I do not have the detail of the specific types of offence. In analysing the increase from £300 to £500, we looked at offence types and sentencing in that range in justice of the peace courts. I can get information for you on the specific offences, but I will need to go through the changes that have been made to guidance on a number of different fronts to give you an idea of that.

The majority of justice of the peace courts' business is to do with road traffic offences, so we could not raise the fines within the scheme that operates there because road traffic is reserved, and because of the endorsement and disqualification aspects. It will therefore be other routine matters that go to the justice of the peace court—disorder, low-end violence, vandalism and so on. However, I do not have the details and I do not want to speculate. I can get you the details of the crime types, if that would help.

Russell Findlay: Sure—thank you.

The Deputy First Minister and Cabinet Secretary for Covid Recovery previously told Parliament that rejection of a fiscal fine was treated as a request by the alleged offender to be prosecuted for the offence, yet in July last year, data was released via a freedom of information request that showed that 30 per cent of those who rejected fiscal fines faced no further action. Has that become a bit of a safe bet for criminals or offenders, and a bit of a slap in the face for victims?

Kenny Donnelly: I am not aware of the FOI request, so I would need to enquire about that. That figure sounds too high, however. My understanding is that when fiscal fines are rejected, the normal course is for the case to be prosecuted and that very small numbers of them

are discontinued. I would like to take that away and look at it, then communicate to the committee what the up-to-date figures are.

Russell Findlay: The data showed quite a steady level over two to three years of 30 per cent of such cases not being prosecuted.

Kenny Donnelly: Yes, I appreciate that. I will need to have a look at it. It is not something that I anticipated coming up this morning, so I have not looked into it. I will certainly do so and come back to the committee.

Russell Findlay: Also in respect of fiscal fines, cases of that nature would have ordinarily been heard in justice of the peace courts and would therefore be public. Do the public have any way of seeing what is happening with such cases?

Kenny Donnelly: No, they do not, really. The fiscal fine is an alternative to prosecution. It is a device that is used to make courts more efficient that allows people who do not dispute their cases to accept responsibility and have the matter disposed of at the earliest possible stage. However, that is done through private correspondence, not in a public forum. As far as I am aware, therefore, there is no public information that could be provided to individuals about what we have done. We would ordinarily advise the public that the case has been dealt with by way of an alternative to prosecution rather than give them the specific detail of the disposal.

Russell Findlay: Some of those cases can involve violence and fines of up to £500, so it is a significant level of offending. Is not there a slight risk of the principle of open justice not being adhered to?

10:15

Kenny Donnelly: The fiscal fine is a tool that Parliament provided to us and is one that we properly use to make courts more efficient. The Lord Advocate lays down prosecution policy and the framework within which such fines should be issued. It is down to individual prosecutors' professional judgment as to where and when it is appropriate to issue a fine.

Although the increase from £300 to £500 makes a fiscal fine significant and a greater penalty than would otherwise be the case, the number of cases that are impacted in that range is relatively small; I think that about 4 per cent of JP court disposals were within that range. The fiscal fines that have been issued are 3 per cent of the disposals in that range. We are pretty much matching the disposals that the court would issue, albeit in a different way from doing it in the open court.

Russell Findlay: If the public has no way of finding out what has happened with a disposal, are victims told?

Kenny Donnelly: My understanding is that we tell a victim that the case has been dealt with by an alternative to prosecution. It could be one of a number of things; we do not go into the detail of what the alternative to prosecution is.

Russell Findlay: I presume that victims who are told that might assume, or be led to believe, that the disposal was a fiscal fine, although they would not necessarily know whether it had been rejected and whether no further action was then taken. That level of detail would not be explained.

Kenny Donnelly: If the victim asked us whether the disposal of the case had been that there was no further action, they would be told that no further action had been taken, not that it had been disposed of by an alternative to prosecution. They might assume that the disposal was a fiscal fine, but alternatives to prosecution cover a range of options that are available to the prosecutor. As well as fiscal fines, there are warnings and fiscal work orders, for instance. Diversion from prosecution is another option that would be called an alternative to prosecution. The range of alternatives to prosecution covers a broad church of options that are available based on the prosecutor's professional judgment.

The Convener: I anticipated some questioning on conducting court business by electronic means, so I will bring in Rona Mackay.

Rona Mackay (Strathkelvin and Bearsden) (SNP): I will ask a couple of questions about virtual trials, although my colleagues have more.

I thank you for your helpful letter, Mr Fraser. I have a few questions arising from it. On the Aberdeen domestic abuse pilots, you say that

"at the start of January 2022 a further 10 cases were scheduled for trial of which 2 have proceeded, one was deserted and 3 were converted to a physical trial."

What were the reasons for converting those cases to physical trials?

David Fraser: One of my frustrations is that a case can be converted to a physical trial for any reason at all. The court does not even have to be advised of what the reason is.

Rona Mackay: Who makes the decision to convert?

David Fraser: The sheriff makes the decision, but there is, at the moment, no compulsitor for us to use virtual trials. It happens by the consent of all parties, so if an individual chooses not to take part in it, that is a good enough reason for it to be converted or not to go ahead—notwithstanding the fact that, initially, the case will have been through

a process to establish that it is suitable for virtual trial. If, during that process, someone changes their mind, that is a good enough reason for it not to proceed as a virtual trial and the case will go back into the physical trials.

Rona Mackay: My arithmetic is not great but, of the further 10 cases,

"2 have proceeded, one was deserted and 3 were converted to a physical trial."

That leaves four. What happened to them?

David Fraser: I will need to get back to you on that. I think that those cases will still be in the pipeline.

Rona Mackay: I just want to get a general understanding of how the process works. Did that pilot go according to plan, as it were? Was it successful?

David Fraser: We ran an initial pilot of virtual trials back in 2020. You will be aware that, at that time, there were no trials running at all. The pilot was seen as a vehicle for allowing us to at least get some trials running. We ran the two in Inverness and a further one in Aberdeen. In total, nine trials went ahead as part of that tranche.

The feedback that we got on that pilot from sheriffs, defence and participants was very positive. It achieved what we set out to achieve—we proved the concept. Last year, Sheriff Principal Pyle focused the use of virtual trials on domestic abuse cases. From my position, it is a viable alternative that provides flexibility and a lot of other advantages.

On your question about the other four cases, I do not have that information in front of me, but I will be happy to provide it if that would be helpful.

Rona Mackay: That would be useful—thank you.

I have just one more question; I know that other members have questions. It is about remote attendance by vulnerable witnesses in criminal cases. How does the system that is used now compare with what happened before the pandemic? We heard from Victim Support Scotland and Women's Aid that witnesses find remote attendance a lot less intimidating, because it means that there is no face-to-face contact with alleged perpetrators, and that they are very much in favour of it. What are your thoughts on how the process has changed?

David Fraser: Sticking with what we did in Aberdeen, I note that we worked very closely with Victim Support Scotland to identify external sites so that we had the technological connections and they could be supported at the remote sites. Remote attendance was very much welcomed, as it removed vulnerable witnesses from the environment that we have talked about, in which they could potentially see the accused in the same building.

We have a number of sites dotted across the country that are remote from courts, where vulnerable witnesses have given evidence electronically for a number of years. We developed that concept into the virtual trial model. From what I have seen, it has been welcomed. Mr Donnelly might want to add to that.

Kenny Donnelly: I totally agree with David Fraser's comments. A range of options were available for vulnerable witnesses to give their evidence. They were always consulted about that and the appropriate measures were explained and discussed. There were sometimes evidential challenges, but we would usually try to find a mechanism to allow the witness to give evidence in the best way for them.

An option was previously available for the vulnerable witness to give evidence by remote link using closed-circuit television. As David Fraser said, the virtual model has built on that and made it a much more mainstream and much more accessible and available option for victims. From feedback from victims groups, my understanding is that they are very much in favour of it. We must explore and take forward as best we can any system that supports victims and allows them to engage in the process and give evidence in the best and least traumatic way possible.

Rona Mackay: Do you see that continuing?

Kenny Donnelly: Absolutely. Beyond the bill, I think that we should be looking at it as a future way of delivering business for that crime type and perhaps others.

Rona Mackay: Thank you.

Katy Clark (West Scotland) (Lab): The bill suggests the use of virtual trials as a default. From what you have said and from the information that we have been able to gather, it sounds as though, up to now, only a very small number of cases have gone ahead. It is therefore difficult to take a view, given that those cases might be the ones that are most suitable for virtual trials and everybody is in agreement.

We are having to grapple with the issue of why the holding of a virtual trial should be the default even when that is not agreed to by all parties, which is my understanding of how the provisions in the bill would work. I presume that, at the end of the day, it would be the sheriff who would decide whether it was appropriate for a case to be virtual. That is quite a massive shift.

The purpose of the bill as it has been presented to us, and the reason that we have been given for why it is going through in a far more speedy

process than would normally be the case in the Parliament, is to continue practices that have been taking place during the Covid pandemic. However, the evidence that we are getting is that, in reality, virtual trials have not been taking place in significant numbers, and they have not been the default. There have been only a small number of them. What evidence do we have that the model that is proposed in the bill has been tested?

David Fraser: There are probably two dimensions. On the virtual summary trial model, it is definitely my preference that we go down that route for domestic abuse cases as the default position. There will, of course, be exceptions in which cases may have to be held physically for specific reasons. However, that is quite independent from virtual appearances in general.

Since the pandemic started, we have introduced the remote appearance of witnesses outwith that type of case. In the High Court, professional witnesses—police officers and medical professionals—currently give evidence remotely, and my understanding is that we need the legislation for that to continue. That dimension has significant benefits. Traditionally, we would have pulled in consultants, or colleagues would have asked them to attend.

Katy Clark: I am sorry to interrupt, but I think that you are straying into other issues to do with giving evidence remotely. What we are considering in the bill is a default position that there should be virtual trials for all domestic abuse cases, even where parties do not agree. I appreciate that that is your preference and that there may be reasons for that, but we have not really had that tested in many cases, have we?

David Fraser: We have not. On the reason why it has not been tested and has not taken over, I note that, as you said earlier, it has been warmly welcomed by the third sector and there has been support for going forward with it, but there has not been a volume of cases because there has been no compulsitor for cases to be done virtually. It has been done only where people have consented to it. That is one of the fundamental reasons why we have not had the volumes that we anticipated we would have when we started the process.

Katy Clark: Would it not be more sensible to have a pilot with a significant tranche of cases being dealt with in that way and then to evaluate the outcome of that, rather than making a permanent shift to a position where virtual trials are a default, which would be a significant change in the Scottish legal system?

Kenny Donnelly: I am not sure that it is quite as unusual as you may be thinking. There are parallels with the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019, which introduced the presumption for evidence by commissioner for certain categories of witnesses giving their evidence. The default is a parallel or comparable to the presumption that that legislation gave rise to. The presumption is rebuttable, as is the default. Parties would be allowed to make representations to the sheriff or the judge that the default should be departed from, in the same way that there is a provision in the 2019 act that allows parties to make representations to the court where they think that the presumption in favour of evidence by commissioner is not the right way for evidence to be given.

Ultimately, the court has an overriding interest in ensuring the fairness of the proceedings and the trial, and it will have the capacity to change the default or the presumption, depending on which piece of legislation we are looking at. Currently, that is all available by application. The default position would streamline processes and allow the court to proceed on a particular basis, but with the ability of parties to challenge that and the authority of the court to change it.

I well understand that the approach is quite different, but safeguards are in place and there are parallels to be drawn with existing legislation.

10:30

David Fraser: I agree. I look at the issue from the perspective of the benefits for vulnerable witnesses, and I see entirely removing such witnesses from the court environment as a phenomenal benefit. As Mr Donnelly said, there are parallels with what we have done in the past in relation to presumptions.

The provisions do not mean that physical trials involving domestic abuse will not continue. I am sure that, in a number of cases, there would be specific reasons why it would be better that trials proceed on a physical basis. However, shifting to a presumption that such trials will be held virtually will remove some of the barriers, because there will be the option to opt out without having to go to court and have a detailed explanation of the specific reasons why the trial should be held in that way. We do not have that option at the moment.

The Convener: I want to pick up on a point that you made in response to Rona Mackay's questions. You said that there has been a lot of positive feedback on the Aberdeen virtual trials. However, last week, we took evidence from the Scottish Solicitors Bar Association, which has concerns about the option of virtual trials because they diminish the "solemnity of proceedings". Do you accept that not everyone is in favour of the virtual trial option? Is work being done to allay some of the fears about it?

David Fraser: I absolutely accept that. It is a big change in relation to how we run the organisation and those who interact with it. As with all changes, people are at different stages on the change curve. On all our digital innovations, we continue to work with the Law Society of Scotland, which was a member of the virtual trial group that was led by Sheriff Principal Pyle, which made the recommendations.

I am deviating briefly, but let me make the point that we continue to engage with all the various bar associations in north Strathclyde on the virtual custody model as we roll it out. We are very involved with all those whom the changes affect, but I accept that there are differing levels of excitement about the process that we are going through.

Fulton MacGregor (Coatbridge and Chryston) (SNP): My questions follow on quite well from those that Rona Mackay and Katy Clark asked, so I run the risk of repeating what has been said or of asking the witnesses to repeat themselves.

Like other members round the table, I was involved in the bill that became the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019, which has been mentioned. That was before the pandemic, when we had no idea about the existence of Covid. Scotland was very much on a route—rightly or wrongly; I believe that it was right—to ensure that vulnerable witnesses did not need to go into a court set-up, given the trauma that they could experience. The pandemic then came. As Katy Clark articulated, we all felt that there would be more such trials, so the statistics are perhaps a wee bit surprising, given the opportunities that the pandemic allowed for.

All that said, I note that the bill asks us to allow some of the provisions to continue in order to speed up the process of vulnerable witnesses being able to give their evidence out of court. Will the bill as drafted allow you to continue to take steps, which began with the 2019 act and other processes that were already in place, to ensure that vulnerable witnesses in the most difficult of cases do not need to appear in court?

David Fraser: The bill as drafted and the extensions are, from my perspective, essential for us to continue the work that we have started on. As you rightly say, it feeds back into the general direction that the justice system is going in of supporting vulnerable witnesses and complainers and providing for them the least traumatic environment that is possible. I support the continuation of what we have in place to allow us to continue the journey that we are on.

Kenny Donnelly: I agree. The journey is about providing support to victims and the opportunity for them to give their evidence in the least traumatic way and in a way that makes them feel engaged in the process at the same time. There are already a number of pieces of legislation on vulnerable witnesses that provide options or opportunities for that. The measures in the bill are just another tool in the box to allow the evolution and development of best practice to support vulnerable witnesses in their engagement with the criminal justice process. That is why we are in favour of the bill. It is another opportunity for us to better support victims in giving their evidence in the best possible way.

Fulton MacGregor: I am hearing good levels of support from both of you, but is the bill required? You have both identified that other processes are in place. Is the bill required to make the transition easier and give you more tools in order to get to the point where we want to be?

David Fraser: Under the previous legislation, evidence could be given remotely, but that was considered on an application-by-application basis. That has now been broadened so that, potentially, anyone can give their evidence virtually, as opposed to the very narrow group of individuals who could do so previously. We currently have the ability to go beyond that, and I hope that that will continue.

Earlier, I strayed into the point that the issue is not just about vulnerable witnesses and that it also relates to professional witnesses. Police officers and medical professionals can now give their evidence from their locations, which means that they do not have to spend time commuting to the court, waiting in the court and then potentially having the trial adjourned until a further date. That took valuable time out of their calendars, but they have got it back. Again, we have had positive feedback on that dimension, and we want to keep that approach permanently.

Kenny Donnelly: I agree. This morning, we have properly focused on vulnerable witnesses, but the bill is required for more than that. It also provides us with opportunities for other witnesses to give their evidence remotely, as David Fraser said. In the High Court, we are piloting an approach whereby all police and professional witnesses, as well as expert witnesses, can give their evidence remotely. In practice, that means that, for instance, a general practitioner in a remote area does not have to give up their practice and engage a locum, which can be hard to get and expensive. Instead, they can make a slot in their diary for the time when the court will accommodate them giving their evidence remotely.

The approach means that police officers can be in the office doing other work rather than sitting in a court waiting room. Expert witnesses, who often come from far and wide across the world and

present us with logistical and timing issues in scheduling trials, can give their evidence from wherever they may be, subject to the control of the court.

The bill will allow the court system to work more efficiently, as well as supporting the delivery of public service in other ways.

Fulton MacGregor: Thank you. It was important to get on the record some practical examples of how the bill might impact.

Jamie Greene (West Scotland) (Con): If we work on the assumption that people are innocent until proven guilty, which is a cornerstone of the Scottish legal system, do they not deserve the right to a physical trial if they want one?

Kenny Donnelly: I do not think that any right is absolute. People are entitled to ask for a physical trial, and it is up to the court to determine whether it is in the interests of justice that they get it. People must be able to follow and understand the trial, to properly instruct their counsel or solicitor and to feel that they are engaged in the trial.

The option of doing the trials remotely is another tool that the court has but, as I said earlier, it is open to parties, if they disagree with any presumption, to challenge that and the court then has to make the decision in the interests of justice. It is the same with a range of things, such as the choice of solicitor or counsel and the choice of date; the court has to work in the broader interests of justice and of the public, rather than in the individual interest of the accused.

However, the issue that you raise is an important factor that the court has to take into account in assessing a decision on the appropriate way to proceed.

Jamie Greene: That implies that clearing the backlog is more important than the rights of an individual in Scottish law, and I would dispute that.

Kenny Donnelly: I do not think that that is what I said. The court has to determine what is in the interests of justice and, if the interests of justice are such that disposing of the case with the accused in a remote location is appropriate, fair and allows the accused to engage in the way that I described earlier, the court can make that decision but, if it decides that that is not the case, the court will determine that a physical hearing is required.

Jamie Greene: The big difference is that we are moving from a system of application where, if all parties agree to it, the trial can proceed as a virtual trial. From members' lines of questioning, it sounds as though there has been a relatively low volume of cases, so it is difficult to see what effect the move to virtual trials has had on outcomes, which is the key point.

Katy Clark made the point that it might be prudent to perform a much wider pilot involving a larger volume of virtual trials to see what the outcome of that would be. The bill proposes to make virtual trials the default, which would mean that people would have to apply for a trial not to be virtual, which represents a complete reversal of the current situation. The key point is that what is proposed is not an extension of, but a big change from, what we are currently doing.

David Fraser: Our system is a very traditional one that has worked since the Victorian age without significant reforms to the process of how we do it. I accept that moving from the traditional physical court environment to a new, digital environment is a giant leap. Therefore, you are right that there are a lot of questions with regard to whether the digital or the physical environment influences or changes anything at all.

I can go only on what I have had feedback on, which has come primarily from the sheriffs who were involved in those trials. From their perspective, having done physical and virtual trials, they were satisfied that, whether people were physically in front of them or on the screen, there was no diminution or reduction in their ability to make their decisions. I take the point that, at the moment, it is, to a degree, uncharted territory. We must weigh up the benefits against the drawbacks of making the change.

Jamie Greene: Yes, there is a big difference. Most people would agree with the premise that the ability for witnesses not to be in the same room as the accused has been beneficial in many cases, such as the examples that you listed, including the protection of vulnerable witnesses, especially in domestic abuse cases. However, to be fair, that ability existed before the pandemic.

I want to follow up on a point that the convener made, which you picked up on. You said that, overall, the feedback—admittedly from sheriffs—had been positive, but you also mentioned defence. We have heard quite the opposite. I will quote a point that was made by a representative of the Scottish Solicitors Bar Association, which the convener raised earlier. They said:

> "I can say—on behalf of the vast majority of the profession, I think—that the experience has ... been nothing but a resounding failure."—[*Official Report, Criminal Justice Committee,* 2 March 2022; c 13.]

That is quite a stark comment to make to the Criminal Justice Committee. Do you simply disagree with that assertion or will you agree to disagree with it?

10:45

David Fraser: No, I disagree with it entirely. I do not think that that is the case at all. We have had

phenomenal success. I am not saying that the approach has not been without its teething issues or the odd technical issue, which you would get in any transition. Even our remote jury centres have lost the links on occasion, but that has always been down to factors outwith our control, such as broadband connections, and we have got them back up and running very quickly.

Some of the difficulties that the bar association has had in relation to the information technology can be down to where solicitors are connecting from. For virtual trials, we have always ensured that we have tested the broadband connection, because we found out early on that it really depends on where someone is coming into the court environment from—whether they are on a really good broadband network, a mobile phone or public wi-fi.

We understand why—depending on how someone comes into the environment—it can appear to them to be less than perfect. However, over time, our unit in the SCTS has narrowed down all the different issues that have caused difficulties or connection problems and resolved them. We have made significant progress in ensuring that we have a stable environment. Certainly in the court environment, we have ensured that connections work. Therefore, I absolutely disagree with the comment that you quoted.

Jamie Greene: That is interesting. I guess that the bar association's concerns were not just technical. Although it mentioned technical issues in certain circumstances, the impression that I got was that the issue was more a point of principle—that is, the concept that the solemnity of the court is sacrosanct in the Scottish legal system. Mr Murray said:

> "We are dealing with people's lives and … their liberty."—[*Official Report*, *Criminal Justice Committee*, 2 March 2022; c 14.]

The court environment seems to be a prudent place to deal with people's liberty and serve justice.

I will ask the Crown Office about the numbers, because those are key to getting an idea of the impact. Mr Donnelly, if the bill is passed and we move to virtual trials by default, with exceptions on application, will that apply only to domestic abuse cases? Would you like it to apply only to those cases? Could all cases start in a virtual setting by default but, on the decision of the sheriff or the court, move to physical hearings case by case? What sort of numbers are we talking about with the backlog of cases that we have to get through? Is going to virtual trials by default an appropriate way of reducing the backlog, or are there other, better ways in which we could do that?

Kenny Donnelly: I am not able to give you numbers and would not wish to start guessing. I can certainly take the question away and, with the courts service, consider whether there is data that we can provide to you. However, I will not start picking figures out of the air.

A range of measures is available in the bill to support the reduction of the backlog. Conducting virtual trials by default will allow us a degree of flexibility to get through some of the business in a way that is beneficial for vulnerable victims and that allows specialism in domestic abuse and other types of case, particularly in more remote areas.

We will want to keep our options open as to whether the model is not only applicable to domestic abuse cases but might be beneficial in other areas of the business. I would not want to say that only one aspect of the criminal justice system would benefit from it. Domestic abuse is a crime type that we have identified as a good place to start because of its dynamics, the impact on victims of giving their evidence in a different way and the benefits of reducing the impact on victims of giving evidence.

Virtual trials are a tool that gives us a degree of flexibility in how we best manage the business. There is also a public health aspect of the approach continuing. Although we recognise that we are moving away from it being a public health requirement, reducing the footfall in public spaces is still a welcome benefit of that measure in the bill. We hope that, as we move forward, that need will continue to reduce, but it is another aspect of the bill that will allow the court to manage the volume of business and, therefore, the risks of the number of people who can be in a courtroom at any given time.

Jamie Greene: I appreciate that other members have questions, so I am happy to leave it there, convener.

The Convener: Thank you. We will move on. I am sorry—did you want to come in, David?

David Fraser: If I may, I would like to provide some additional information in response to the question.

The Convener: Of course.

David Fraser: In the summary cases that are still awaiting trial, there are roughly 26,000 non-domestic abuse cases and 6,000 domestic abuse cases. If the legislation was purely for domestic abuse, it would allow us—this was Ms Clark's point—to have a little bit more opportunity to pilot the approach, notwithstanding the fact that it is legislation, because it would affect only 6,000 cases, as opposed to the 33,000 cases that we

have. There is an element of containment if it is purely for domestic abuse cases.

The Convener: Thank you.

On the civil side, my understanding is that almost all civil and tribunal business has been undertaken either online or by phone during the pandemic. Can you update members on whether that is likely to continue and, if so, for how long?

David Fraser: We managed to transfer the civil side to the digital environment much more quickly than the criminal side. We have no delays or backlogs on the civil side.

It is not really for me to say what will happen in the future. At the moment, the Scottish Civil Justice Council is looking at whether procedural hearings or evidence giving could be done digitally, what the breakdown would be and what would be appropriate.

The profession has welcomed the move to having procedural hearings and a lot of other hearings on the civil side digitally. I see that as a step forward, but it is not for the SCTS to set out what the future might look like. I know that the Lord President and the Lord Justice Clerk have views on how they would like to see it progress, and I think that it is a positive step in terms of what we have been able to do, but I am not able to give a specific answer about what lies ahead of us on that front.

The Convener: That is helpful. We have a couple of other themes to cover, but first I will bring in Russell Findlay.

Russell Findlay: I have a small question about the SCTS's submission, which talks about virtual trials helping to

"reduce the justice sector's carbon footprint".

Is that something that you have measured?

David Fraser: It is not. It is based purely on the fact that we do not have people coming to and from courts to give evidence. It has not been quantified in any way.

Russell Findlay: Mr Donnelly, in respect of multiple-accused solemn trials, many of those, as the written evidence says, relate to organised crime. Can you quantify the backlog in cases of that nature?

Kenny Donnelly: I do not have the figure with me, but I can get it for you. They are not all organised crime cases. Multiple-accused cases cover a range of business. We have made some progress with that. Initially, when we introduced the jury centre model, we were not able to do cases involving more than two or three accused. We now have a couple of facilities that enable us to do that, so we have started to address some of those cases. However, there are more of them in the stocks than we would like to be the case, because there was a period of time when we could not do any of them at all.

I think that that is a fair summary, although David Fraser may want to add something.

David Fraser: At the very start of the pandemic, we could only do cases involving a single accused or two accused. Most facilities can now handle cases involving up to five accused. We can do cases that involve up to nine accused, and I think that we had one involving 11 accused scheduled, but there was a guilty plea, so we did not have to do that one. We are able to deal with multiple-accused cases now, whereas, in the early stages, we were not.

Russell Findlay: So, roughly, up to nine is the kind of territory that we are talking about.

David Fraser: Yes, but we can go beyond that, using a two-court model. It is just that it impacts on the other business that we can get through when we have to do that.

Kenny Donnelly: I can certainly undertake to do an analysis of the case load at the moment and give you details of the multiple-accused cases and the general crime type, if that would assist.

Russell Findlay: Perhaps you could also quantify any disproportionate delays in respect of multiple-accused cases compared with single-accused cases. It seems likely that there would be such delays.

Kenny Donnelly: That would be quite a nuanced analysis. I will see what I can do.

Russell Findlay: No worries—thank you.

The Convener: We will move swiftly on. Members have questions on time limits in criminal cases.

Jamie Greene: We understand the concept of increasing time limits so that cases do not time out. That is entirely appropriate and it would be difficult to argue against it. However, increasing time limits has a substantial impact on both parties—victims and accused, and, in particular, accused who are held on remand.

Other than not allowing cases to time out, what possible justification is there for extending case time limits? Is that the only suitable reason?

David Fraser: Without doing that, we would face using a mechanism whereby an extension application is made to the court, and it is up to the individual sheriff or judge to decide whether an extension is given. With the vast volume of cases that are in the system, having to do that would take away from resources. You might question how long it takes to do that but, if we are talking

about thousands of cases, it has to be scheduled in, which means that we are not able to hold trials while the judiciary is dealing with it.

That is the biggest dimension from the SCTS's perspective. The extended time limits will allow us to focus on dealing with the backlog and getting cases through the court, as opposed to dealing with an administrative procedure.

Jamie Greene: Is there a better way of doing it? It sounds to me as though the process of having to apply for extensions case by case is quite laborious and time consuming for the courts. A default extension would automatically mean that cases could take longer to come to pass. If the backlog is four years away from being cleared, that is beyond the statutory maximums, even after they have been extended. Many people have given evidence that they are concerned about the nature and length of the extensions; in some cases, people are being held on remand for up to a year, which might be much longer than their sentence might have been. The extension has serious implications, and international norms are being breached. Does anyone have a view on that?

David Fraser: That is probably one for Mr Donnelly.

I absolutely accept that it might take four years from an alleged offence taking place to the final disposal. There are delays once a case is into the court environment; we normally deal with High Court trials within six months, but it now takes 12 months, so there is a six-month extension in our part of the system. Mr Donnelly can speak about the pre-court situation.

Kenny Donnelly: I mentioned earlier—I cannot remember in response to whom—that there are pressures on the system all the way through, and there are backlogs all the way through the system. Everything is taking longer than was previously the case. For each case that comes in, it takes longer to ingather all the materials and get the scientific, forensic, telephony and cybercrime reports. All those aspects are working in a different environment and everything is coming in more slowly than would ordinarily be the case, so the whole process is slow.

In addition, there is the management of the increased workload. In our written evidence, we gave the example of the increase in the overall business of the High Court, which is in the region of 55 per cent. All that work is having to be processed.

Time limits are important, but it is important that we have the right tools to allow us to get through the backlog of work that has grown over the course of the pandemic. Without it, we would be preparing cases and perhaps indicting them in a completely unsatisfactory way. We would be at the mercy of the court to have cases individually called in and continued.

There would be challenges for defence preparation as well, but I cannot speak for defence agents—I am sure that they will speak for themselves.

The challenges in preparation are that we could be indicting cases that are not complete. Because of the time limits, the options are to make an application to court for time to prepare or to go into court with a half-prepared product in the hope that we get more time to finish the product. None of that is satisfactory.

11:00

The real challenge in all this is that the courts are overwhelmed by business. An overwhelming amount of business has not yet reached them, and it will have to come through as we clear the backlogs at the different stages in the process. The danger of not having extended time periods is that the courts will become so busy in the administration of the process and justice, rather than in the delivery of the outcome of the justice process.

The evidence shows that, if we did not have the periods, we would end up having to ask the courts to get similar extensions of time. We would simply take up court, lawyer and clerk time, which would be better utilised in dealing with the disposal of business at trial.

Jamie Greene: How will you decide which cases to prioritise? For example, will cases in which a person is being held on remand versus cases in which a person is not being held on remand but is on licence or on bail be prioritised? Will gender-based sexual violence or domestic abuse cases be prioritised? Will cases of a more serious nature that you think require more immediate disposal be prioritised? The biggest point of view that we get from victims of crime is simply about the lack of communication and not knowing and understanding why cases have been delayed or repeatedly put off, sometimes for a number of years. That is a huge cause of concern for many victims.

Kenny Donnelly: David Fraser will be pleased to hear that I will buck the trend and go first this time.

Prioritisation is difficult. Obviously, priority is given to those who are on remand, because they have been deprived of their liberty. However, that has to be looked at in the context of a range of priorities. Every case in the High Court has a degree of priority, whether it is a sexual offending,

homicide or road traffic fatality case. Not all the people involved will be on remand.

We mentioned in our written submission that, broadly speaking, 67 per cent of High Court business is to do with sexual offences—members will forgive me if I keep using High Court business as an example, but I worked in the High Court until a few weeks ago, so I am most familiar with that. The figure increases the further on we go in the process, because those cases are resolved less often by way of plea negotiation—they are the cases that tend to go to trial more often.

A quick analysis of our work in progress yesterday showed that only 13 per cent of the sexual offence cases are custody cases. The figure for homicide cases is over 50 per cent. The figure for major crimes—which are everything between homicide and sexual crime—is just over 30 per cent; actually, it might even be higher than that.

There is a real difficulty in trying to prioritise everything in a range of priorities. Once a person has been indicted in a case, the court is responsible for scheduling the degree of prioritisation, and there are a number of moving parts. The availability of counsel for the accused can be an issue if the counsel are particularly busy, and the court trying to fix a date that suits their needs can be an issue. The availability of witnesses can also be an issue. I mentioned earlier that the availability of expert witnesses can be a real challenge. There is a whole range of moving parts in trying to schedule business, but those whose liberty has been denied are at the top of the list of priorities.

The Convener: Does Fulton MacGregor want to pick up on anything relating to time limits?

Fulton MacGregor: Yes—just briefly, convener.

I think that we are all a bit worried about the backlog and what it might mean. I hear that from you, and it was really good to hear at the start that you think that we are on track to have the backlog cleared.

I want to ask about other possible solutions or options that you might have in relation to minor offences. How would cases be identified and prioritised if prosecutions of such offences were no longer taken forward?

Given the time period, how will you take into account changes in people's circumstances? I will give two examples. You have said that those on remand are a priority, but somebody could have already been on remand for longer than the maximum disposal. We would imagine that that would be taken into account.

There are also more minor situations in communities in which people are not remanded. Would there be scope to look at situations that have almost resolved themselves? We know that it happens quite a lot that the accused and the victim repair the situation themselves. Are such circumstances taken into account when you prioritise cases?

Kenny Donnelly: You have raised a number of issues, which I will try to deal with quickly.

You mentioned the prioritisation of lower-level crime. Earlier, we discussed fiscal fines. We try to deal with as much of that business as we can through alternatives to prosecution so that the system has capacity. Thereafter, prosecution policy is set by the Lord Advocate. Once that policy is set, we will look at cases on a case-by-case basis. It may sound like a cliché, but it is true that every case is looked at on the basis of its own facts and circumstances—the circumstances of the offence, the offender and the impact on victims. Decisions are then taken on the appropriate forum for the case.

Those policies were adjusted during the pandemic to allow us to make decisions that we hope will support recovery. Those will be kept under review. All cases are kept under review as they go. The dynamic of a case might change or the case might become too old.

Every time a prosecutor looks at a case, a range of options is open to them in determining whether it continues to be in the public interest to continue with that case. We do that innately with every case that we deal with. When we pick up a bundle of papers, the first thing that we think is, "Is it still in the public interest for this to continue?" A number of factors have to be weighed up; the age of the case is not the only consideration. We have to look at the impact on the victim, the seriousness of the offence and the offender's situation.

When it comes to remand, as I think we said in our written submission, a fairly clear indication was given early in the pandemic of what the approach to bail should be. That is a decision for the court. If someone had been in custody for a period that exceeded the length of the sentence that they could be given, it would be open to them to apply to the court to have their bail reviewed. If a period equivalent to the maximum sentence for the crime that the person was charged with had already elapsed, the court would take that into account as a factor in considering whether it was appropriate to continue with remand. Each case is treated individually.

I hope that I picked up all the points that you raised, but I am not sure that I did—I might have missed one. I do not know whether David Fraser has anything to add from a court perspective.

David Fraser: No, I have nothing to add from a court perspective.

Fulton MacGregor: Thank you. You have addressed the issue that I was getting at, which was about the public interest in such cases. If people are spending significant periods of time on remand, their situation can change significantly, particularly in cases involving more minor offences.

There is probably more public interest in continuing with more serious cases, because they can involve psychological and emotional abuse, too. That is not the case in more minor cases. I had in mind the example of youth offending. A kid could have been 16 at the time of an offence. If the case has been going on for a long time, they might be 20, by which time they might have repaired some of the issues with their community. I will not labour the point.

Kenny Donnelly: It is not uncommon for agents who act on behalf of people in such situations to write to the Crown to ask it to reconsider the public interest in the case, to set out the change of circumstances and to ask the Crown to assess whether it is still in the public interest to continue with the case. That has been the case throughout my career, and it continues to be the case.

We instinctively carry out such assessments anyway, but we do not always have detailed information on the evolution of the offender's situation. If and when an agent writes to us, we would certainly look at that and consider the question of viability and whether it was still in the public interest to continue with the case.

The Convener: We will have to bring the session to a close. Members had one or two other questions that they wanted to ask, but time is against us.

I thank Kenny Donnelly and David Fraser for joining us. You have undertaken to provide a number of bits of follow-up information. That is helpful—we appreciate it.

We will take a short break to allow for a changeover of witnesses.

11:10

Meeting suspended.

11:14

On resuming—

The Convener: Welcome back. Our next item of business is our final evidence session on the justice provisions in the Coronavirus (Recovery and Reform) (Scotland) Bill.

I am pleased to welcome to today's meeting Keith Brown, the Cabinet Secretary for Justice and Veterans, who is attending in person along with Scottish Government officials Jeff Gibbons, from the criminal justice division, and Louise Miller, from the legal directorate. Officials attending online are Steven MacGregor, from the Cabinet, Parliament and governance division; Jennifer Stoddart, from the community justice division; and Jo-Anne Tinto, from the legal directorate. We very much appreciate the time that you are taking to join us this morning.

I intend to allow around an hour for questions and answers. As usual, I ask for those to be succinct. I invite the cabinet secretary to make some brief opening remarks.

11:15

The Cabinet Secretary for Justice and Veterans (Keith Brown): Thank you for the opportunity to provide an opening statement on the justice provisions in the bill. I thank all those who engaged in the 12-week consultation process, which has helped to inform the development of the bill, and those who have provided written and oral evidence to the committee.

The majority of the justice provisions detailed in the bill are being progressed on a longer extension basis. That is in the context of the justice recovery programme, the "Justice Vision and Priorities delivery report—key achievements and impact of Covid 19", which was published last month, and against a background of the backlog of cases as a result of the pandemic.

During the pandemic, we have seen significant changes in how the justice system has operated and adapted to changes in working practices as it has responded to public health guidance. Public safety has been the paramount consideration throughout and consequently required a change in how we work. That consideration clearly remains, as does a recognition that public attitudes to travel and general day-to-day activities will have been shaped by people's experiences of the pandemic.

I expect that much of what we will discuss will be firmly rooted in the "Recover, Renew, Transform" programme. The measures in the RRT programme have contributed to recovering a viable justice system, responding flexibly to meet the challenges that Covid-19 presents, while delivering a more effective and efficient justice system now and for the future. That is fundamental to protecting our rights and freedoms and to addressing inequality.

The justice system has responded to, and continues to respond to, the challenges presented by the pandemic and societal changes that we must adapt to. Many of the technological changes that have been introduced, such as virtual custody hearings, the operation of remote jury centres and the electronic transmission of documents, have

proven to be a successful response to the new working environment.

As the committee has heard in its evidence sessions, for some, those changes are seen as temporary measures to address the problems that have been caused by the pandemic and ought to apply only in that context. However, others see an opportunity for transformation that could form part of a new justice system.

In common with the committee, I agree that it is essential that we fully evaluate the impact of the measures—operationally and on court users—before they could be considered a permanent feature. Also, there will be some changes that are only ever temporary and that the Scottish Government has no intention of making permanent. For example, the extended time limits are purely to address the impact of the pandemic on the criminal courts.

Equally, I can provide reassurance that powers that are no longer required will not continue to be used. The bill includes suggested annual milestones at which the provisions can be reassessed. The bill also includes powers for measures to be expired or suspended ahead of the annual milestones. The Government remains committed to expiring or suspending any existing provisions that are no longer necessary.

It is proposed that measures requiring to be extended beyond November 2023 could be extended by regulations, using the affirmative procedure, potentially through to November 2025. That would mean that appropriate parliamentary scrutiny could take place, and would place a clear onus on all justice organisations to evidence how the powers have been used and to make the case for their retention.

In addition, and in an effort to be open and transparent, the policy memorandum to the bill highlights areas where stage 2 amendments might be progressed, noting other areas of activity that might have an impact.

I have listened carefully to the evidence sessions over the past two weeks and, to some extent, the evidence that was heard this morning. It is clear that there are a range of views on how best to respond to the impact of the pandemic on the justice system and to the opportunities and challenges that that raises for us all, but there is no doubt that there is agreement on the impact that the pandemic has had on the justice system.

I take on board all the comments, and trust that, as we consider the provisions and their individual and collective impacts, we can respond and address points of concern carefully and directly as a Parliament. I am happy to take questions, convener.

The Convener: Thank you very much for that information, cabinet secretary. We will move straight to questions. I will open with a question on the early release of prisoners. I know that we have a separate agenda item on risk assessment, but I want to focus on early release in the context of the Covid-19 pandemic.

In my area, the north-east, agencies collaborated very closely on early release. They worked well together, particularly on prisoner release from HMP Grampian. The risk assessment and other processes, especially for throughcare and victim contact, were informed and robust. That said, I know that there is some concern about that aspect of the early release process, albeit that I recognise that the last early releases took place back in 2020.

You said that powers that are no longer required in the criminal justice system will not be used, but do you have any more comments on early release itself? Could those provisions be improved or adapted? Are they required at all?

Keith Brown: It is true that we are looking at only a temporary extension of that particular power for the purposes of the pandemic, but we are also consulting on whether the power of early release should be made permanent in separate legislation. In fact, the United Kingdom Government has the same power embedded in legislation for, it seems to me, contingency planning reasons.

I think that the same argument would apply in this case. If you have to do this in response to something unexpected, you might well not have all the time that you would like for consultation and forward thinking. The early release happened before my time as justice secretary, but I know that there were concerns about whether there was enough time for throughcare to be effective and, indeed, whether victim notification was as effective as it could have been. All that I would say is that we have learned lessons from that and will seek to apply them to any future early releases, even though we have none planned. Even taking our best guess with regard to the pandemic, I have to say that its impact on society does not seem to be anything like it was. For those reasons, this is a contingency power.

On a wider point, mass releases of prisoners have been a feature of systems across the world—I think of the states of Texas and Georgia, for example, and there are other countries, too—but we do not intend to use the measure for any other purpose. The state of California, for example, was told by its Supreme Court to release around a third of its prisoners more or less overnight, because the prisons were at 120 per cent capacity. We are not in that situation; we are simply looking for a temporary extension so that

the power could be used if the pandemic were to justify such a move.

The Convener: Another aspect of early release is public safety. Police Scotland has commented on that being a priority and I do not think that anyone would disagree with that. Does the process for assessing risk with regard to early release have public safety at its heart and, if so, will that continue?

Keith Brown: Again, this was prior to my time in post, but that was evident in the criteria for release. The people in question had to be very close to their release date, for example, and there were certain categories of offender who were not to be included.

I know that attention has been drawn to the reconviction rate, although that is sometimes confused with readmission to custody, which can be a different thing. From memory, the reconviction rate is around 40 per cent. In any case, if we look at the categories of prisoners who were released, we will see that the situation was not at all unusual. For those on short sentences, you could be looking at a 50 per cent or sometimes 60 per cent reconviction rate.

There would, of course, be a public safety assessment. I am sure that I will be corrected if I am wrong, but I think that I am right in saying that the categories of prisoner for whom release was agreed took into account the risk to public safety and that that was agreed by all parties in the Parliament at the time. We would hope to try to achieve that again, if it turned out to be necessary.

The Convener: Thank you very much. It will come as no surprise that we have a number of questions about conducting court business by electronic means.

Russell Findlay: I was going to ask the previous two witnesses this question, but I ran out of time. The Crown Office's written submission says that 850 High Court cases on indictment have yet to be allocated a trial date, and we know that there are tens of thousands of summary cases in the same position. Has any consideration been given to clearing this backlog by opening the courts up at the weekend?

Keith Brown: That was mentioned and discussed, as were all possible means by which we could reduce the backlog. It must be borne in mind that the whole system would need to be ready for that; it would not just be a case of having a courtroom or, if it were applicable, a remote jury centre available. We thought that the stress on the court system generally, given what was being asked of it, could not be sustained for seven days a week. I know that there have been Nightingale courts down south, but we thought that, given the pressures on the system—it might be worth hearing from the officials on some of those pressures—providing £50 million or so this year for 16 additional courts would be the most effective way of reducing the backlog. My officials might want to say more about that.

Jeff Gibbons (Scottish Government): We have been looking at lots of different options to address the backlog. It is key to address the broader question about capacity in the system, resources and the impact on all partners. As the committee has heard during previous evidence sessions, there is mounting pressure in relation to managing the current workload before expanding it further. Those are some of the key issues that have been informing decision making.

Russell Findlay: Were the various stakeholders asked about working at weekends?

Keith Brown: Some of that pre-dates my time as justice secretary. We have had a constant dialogue with all justice partners on the issue. The 16 additional courts involve court service staff, defence lawyers, prosecutorial staff, sheriffs and so on, so there has been a very big increase in their workload. We thought that providing those courts was the most effective way to tackle the backlog, and I still think that. Others might have different ideas, but we think that that is how to tackle the backlog. The decision was made following maximum consultation with justice partners. Such a radical step could not have been taken without discussion and consultation with, and the consent of, justice partners.

Russell Findlay: I will touch on a subject that you have already mentioned. Statistics show that, of the 348 people who were released early, 142 went on to reoffend and 40 per cent of them did so within six months of being released. Do you consider that to be acceptable? If such a step were to be taken again, would the same procedures apply, or has any work been done to attempt to address the risk to the public?

Keith Brown: First, I do not consider any offence to be acceptable. That is probably true of everyone in the justice system. However, it is true to say that, as I mentioned, across different jurisdictions a level of reconviction—between 50 and 60 per cent—is associated particularly with people on short sentences. Jennifer Stoddart might want to come in on that. That is one reason why, in recent years, we have made the change to a presumption against—not a bar on—short sentences. Such sentences are very often ineffective. One of the principles and values that underlies the justice vision that we have just published is that community sentencing is often much more effective. There are lower reconviction rates among those who are given such sentences. We do not find the statistics that you mentioned to

be acceptable. We want to drive the numbers down.

You quite rightly asked what we would do differently, having learned the lessons, in order to reduce reoffending. The community justice system needs to be better prepared, but it was, of course, not without its own impacts from the pandemic, whether they related to staff or the places where people needed to work. If providing more availability in that regard could reduce reconviction rates, that would be one lesson that I would want to learn. We want to ensure that the community justice system is able to rise to that challenge, were we again to release prisoners early—I underline that we have no current plans to do so.

It might be worth hearing from Jennifer Stoddart, because she was there when the decision was made last time.

Jennifer Stoddart (Scottish Government): I echo Mr Brown's points. It was very short-term prisoners—those who were serving sentences of less than 18 months—who were released. When someone is in custody for such a short time, it is difficult to address the underlying causes of their offending. That does not excuse any reoffending that occurred after they were released, but it is certainly part of our wider consideration of how we can reduce the use of imprisonment, particularly short-term imprisonment.

11:30

For any future use of the power, which is absolutely not planned and is not something that we would choose to do, we would work with our community justice partners to offer throughcare support to those individuals as they are released. That engagement took place during the use of the power the first time. The Scottish Prison Service engaged with local authorities, so that support could be offered to those individuals. However, as is the case with normal release for short-term prisoners, they do not have to take up that support.

Russell Findlay: I know that this is all theoretical, but can you just confirm that, if that were to happen, there is no mechanism to force early release prisoners to engage, and that engagement would just be on the basis of good will on their part?

Jennifer Stoddart: It would depend on the cohort of prisoner that was included. Long-term prisoners were not included in this cohort but, if they had been, they would have been required to engage with social work, as they are in relation to normal processes around their release—that engagement is a statutory requirement.

If we were to use the power again to release short-term prisoners, although they would be offered throughcare either from the third sector or from the local authority, under the current legislation they are not required to engage with that throughcare.

The Convener: We will stick with electronic court options. Russell, do you want to ask questions on that?

Russell Findlay: I am okay just now, thank you.

The Convener: In that case, I will bring in Rona Mackay.

Rona Mackay: Good morning. Cabinet secretary, you will be aware that we have heard support for, and concerns about, the greater use of virtual options—there are mixed views on the subject. Some of those concerns are around the fact that it can prevent effective communication between legal representatives and their clients, impede the assessment of the credibility of witnesses and discriminate against people who do not have access to digital technology. What are your thoughts on that? Are those concerns being addressed?

Keith Brown: I think that those issues are relevant, especially if we are looking to make the approach permanent, which might be possible through other legislative processes that are coming forward.

We are considering the issues. I read the evidence that was given to the committee by the Scottish Solicitors Bar Association and others, and I acknowledge some of the concerns that have been raised. I note that, a number of months ago, the Faculty of Advocates raised with us the issue of digital exclusion, which we are looking to address.

That said, on the other side of the argument, you might have heard Rhoda Grant talking yesterday about how beneficial the approach can be in domestic abuse cases and cases in rural areas.

As ever, there are arguments on both sides, and we want to take those into account, along with things that we learn from the pilot projects, before proceeding further.

It is possible that, given its powers, the judiciary could advance the approach in the meantime, through a practice note. However, for the reasons that you mention, I think that its preference would be to have legislation. There are a lot of things to work through in relation to the approach. On the surface, it seems appealing, but some people—especially those who are most closely involved in the process, such as defence representatives—have concerns that we want to address as best we can.

Rona Mackay: Do you see it as a problem that concerns are being expressed by one side of the legal profession as opposed to the other? We have heard quite opposing views. Is it possible to bridge the gap between the views of defence lawyers, with their traditional practices, and people in the court service who think that the approach gives them a useful tool to clear the backlog and address the needs of domestic abuse victims and vulnerable witnesses, which is very much favoured by third sector organisations?

Keith Brown: I might ask Jeff Gibbons to come in on that but, as a layperson, I think that the gap could be bridged, although I am not saying that I have the answers now. Many of the qualms that legal representatives have raised have been about looking somebody in the eye and having that kind of presence. The Faculty of Advocates has said that things such as presence in the courtroom and being able to read somebody's reactions and body language are extremely important. I will say this now without having the expertise, but there might well be digital solutions that will allow us to improve in that respect.

I hope that the gap could be bridged, given some of the benefits. We have heard about vulnerable witnesses, but there is also the issue of people having to travel a long way, as well as the issue that was raised yesterday about domestic abuse. There are potentially huge benefits, but we want to try to take the profession with us. You are absolutely right that, even between the Law Society and the bar associations, there are different points of view. It must be possible to reach agreement, but it will take some work to do that, and we will have to listen to people's concerns.

I ask Jeff Gibbons whether he wants to come in.

Jeff Gibbons: In some ways, we have gone for a longer extension approach because we recognise that there are a variety of views. Sometimes, the views on similar issues are quite contrasting, and they get quite confused. We will bridge the gap by continuing to work with stakeholders to see what a virtual offer might look like that is acceptable to all and that addresses the resource issues and the positives. We will also have to address some of the anecdotal comments that people have made about the issues and quantify those to an extent. We need the evidence base to support us moving forward.

In the civil and criminal contexts, we will take an evidence-based approach to what virtual options might look like in a future justice system. We worked with stakeholders on the long extension approach and got their support for that, and we continue to discuss with them what a virtual justice system in Scotland might look like.

Rona Mackay: We have come very far in the space of two years; huge changes have had to be imposed because of Covid. It will probably take a bit longer to reach consensus so that the virtual approach can proceed. I hope that it can, because it is certainly beneficial to many people.

Jeff Gibbons: Some of the user disagreement has been about one particular report, but that is more about the mechanism to move forward. As you will be aware, the work from the virtual trials group, which was published after the bill was introduced, has had positivity, but a limited number of trials were involved, so the context of the evaluation is limited. That work is also uncosted, so we need to look at the resource issues, which goes back to the points that Mr Findlay made about how using resource in one area affects other areas.

It is about looking at what a future legislative option might be and future proofing it. Technology moves quickly, so we do not want to look at the issue just at this point in time. We want to consider what a virtual offering might look like and how legislation can adapt quickly to that, rather than having to revisit the issue. We are in agreement. I think that the issue is more about how we move forward and the timeframe.

The Convener: I will bring in Jamie Greene. I know that you have questions on the issue of early release, but can we stick with electronic court options for the moment?

Jamie Greene: Thank you, convener. I would be happy to come back in later with other questions.

Cabinet secretary, you mentioned that you had read or listened to a number of our evidence sessions. As other members have alluded to, there is a difference of opinion on the success or otherwise of virtual trials. I want to clarify the difference between the Government's proposals on the on-going ability for people to give evidence virtually—which I think has been found to be helpful and beneficial for witnesses and specialists, as well as for the most vulnerable in specific cases—and trials being done completely virtually. We have heard that very few such trials have been done, so we do not really know what effect they have.

I will pose the same question that I posed to the previous panel. Would it not be more prudent to conduct a much wider pilot of virtual trials before we embed in legislation any permanency to such trials?

Keith Brown: Yes, although it has to be said that that pilot would have to be done by the judiciary—it cannot be done by the Government. The format of court business and how it is run are decisions for the judiciary, although we have

encouraged that. We are lucky that both Sheriff Principal Pyle and the Lord President are keen for innovation to happen. Such a pilot would certainly require their consent and possibly their initiative. However, I agree with you that, if we want to have such trials, we need to have a stronger evidence base.

I have been asked why we have not included that in the bill. The reason is that virtual trials are not strictly speaking about Covid—there might be beneficial impacts with respect to Covid, but there are different purposes. I have seen the Parliament get quite annoyed about emergency or exceptional legislation that it does not consider to be directly related to the pandemic. If there is to be a more permanent change, it must be evidenced. We have to work through some of the differences and work with the judiciary. The Parliament can always decide for itself if it wants to make a fundamental change.

There could be more virtual trials under the direction of the Lord President and others, but, in answer to your question, we should have more of an evidence base before we move forward on the matter.

Jamie Greene: That is helpful. Just to clarify, you are saying that nothing in the Covid legislation that we are talking about today will mean a move to a virtual trial being the default position, which could then be excluded on application for a physical trial. At the moment, all parties must consent and if all parties do not consent, there will be a physical trial. Will the legislation change that in any way?

Keith Brown: I might ask my officials to make sure that I am getting this right, but it could change without the legislation, and discussions are being held about how that might be achieved with the consent of different partners. The legislation that we are talking about will roll over what we have now. The default position is physical courts. Jeff Gibbons will correct me if I am wrong.

Jeff Gibbons: Sheriff Principal Pyle's report was about whether to introduce into the legislation the presumption that we would underpin the practice note that has been supporting the pilot to date. Further consultation is needed because that would have a broader impact and, as I said earlier, we need to look at future proofing the legislation to some degree. The provisions in the bill will not change anything that was there previously, but we have an eye on the ask in Sheriff Principal Pyle's report around a future change in legislation, and we would need to consult on that and bring forward an evidence base to support it.

Jamie Greene: On a technical level, therefore, the provisions are an extension of temporary powers. Is that extension time limited or permanent?

Jeff Gibbons: They are long extension provisions, and 2025 is the stop-gap point.

Jamie Greene: That is helpful. I am all for consultation, as the cabinet secretary knows.

Some of the other issues raised were about the practicalities. We have heard criticism of how some business has been conducted virtually or electronically. The main gripe from the defence sector seems to be about the inability to work one to one with an accused—the inability to sit with them in the same room and counsel them appropriately. Has that concern been taken on board? There seemed to be much disagreement among the members of the earlier panel about how much of a problem that is for solicitors or the bar, who seem to think that the whole thing is just an unmitigated disaster, according to the evidence that has been given to us. On the other hand, other witnesses seem to think that it has been an unmitigated success.

I do not know where the reality sits; it seems to be one witness's word against another. Where does the Government think the reality sits?

Keith Brown: Your starting point was to ask whether we are listening to those concerns and taking them seriously, and we are. That speaks to the point about improvement that I made to Rona Mackay, which was that we should listen and see whether we can achieve agreement.

However, you are absolutely right that, even among defence solicitors, we see the extremes of view that you mentioned. We are not just getting different views from witnesses from different organisations; different points of view are being expressed within, say, the Law Society or the bar associations. We want to listen to see whether we can help with that. If those are the concerns of the people on the front line who are trying to be as effective as possible for their clients, we have to listen and see whether there is a way of overcoming them. If business is all virtual, it is hard to see how we could do that, but there might be exceptions.

The Government is therefore willing to listen to possible remedies, and we have a lot of good people in Government who might be able to help us to find solutions in tandem with our justice partners.

11:45

Jeff Gibbons: We are very aware of the differing views about the success or otherwise of the approach, although some of that is anecdotal and not supported by much evidence. Those concerns are clearly coming through, and the

courts respond accordingly. We understand that they have addressed some of the concerns that have been raised—for example, through adjournments or whatever else is required.

We are not entirely sure about the level of the concerns, to be perfectly frank. That is part of the evidence base. Consideration of the extent to which those concerns came with the early introduction of virtual proceedings and the extent to which they continue is part of the on-going evaluation to make sure that, if people feel disengaged from the process, that is addressed and minimised.

On the flip side, we have had a really positive and evidenced response when we have engaged with disabilities groups, which see the digital adoption by the court service as something that has enabled their greater inclusion in the justice system. Many of them had been pushing for that for a number of years, and they were quite surprised that it finally came round because of Covid-19.

There are evidenced positives but, equally, we are well aware that there are on-going concerns. That is another reason to have an extension before we look to do anything permanent.

Keith Brown: I will add something that might help Mr Greene in relation to that. The Government is not just listening and eager to act to see whether we can get agreement. If additional resources are required to help that process, given the impact that it has, particularly on defence lawyers, we will be willing to look at that as well. We are keen to do this for the reasons that Rona Mackay mentioned, but also, of course, because it will help us in addressing the backlog. We stand ready to support that if we can.

Jamie Greene: You have pre-empted my last question—thank you, cabinet secretary. On resource, which is linked to funding, are you satisfied that the Crown, the defence sector, all the stakeholders that are involved and the SCTS have sufficient people, places and money to clear the backlog by 2026? Given the evidence that we heard from the previous panel, it appears that there are significant pressures in processing all aspects of cases, from people being charged right through to court disposals. At every stage, there are new and additional pressures. What is your level of confidence that the backlog will be cleared in four years, which is already a long time?

Keith Brown: It is worth saying at the start—Mr Greene will understand this, but others who are listening might not—that we are not saying that somebody who has a court case coming up now will have to wait four years for it to be addressed. However, the backlog itself will take four years, in some cases, to be addressed.

I have that confidence based on what the partners that you mentioned, including the Crown Office and the court service, tell me. They have given me the same dates that they have given the committee, and we have analysed them and explored them at some length. Within that, however, there is willingness on everybody's part to look for other innovative ways in which we can address some of the issues that might stand in the way of a quicker throughput of cases.

Going back to Mr Findlay's question, I note that we come up against some hard blocks that we will not be able to overcome. Given the number of people who are involved in the process and are delivering the service, there is only so much that we can do through all the different courts that we have mentioned.

I have that confidence given what I am told by justice partners and the discussions that we have had with them, but I fully expect that we will have to find further innovations along the way to make sure that we achieve it.

Fulton MacGregor: Good morning, cabinet secretary—it is still morning. A couple of months ago, or it might have been more than that, the committee met some vulnerable witnesses who had been through the court system, and we heard the harrowing experiences of witnesses and victims—in some cases, alleged victims—of some of the most harrowing offences, which you will know about. The committee committed to making sure that their experiences, although they were given to us privately, would be fed back when we got the opportunity to do so.

On that basis, I want to go back to an earlier part of our discussion when we talked about the evidence that we heard from defence lawyers last week about needing to see the accuser and interpret body language. We have heard that, if people who had experienced such offences presented as confident and capable, things went against them—or, at least, they felt that they did—and that the same happened if they broke down.

It is worth highlighting that context to indicate why I—and, I know, other members—support a move towards having more remote hearings and ensuring that as many vulnerable witnesses as possible do not have to be present in court. The previous evidence session was really good, as it confirmed that the court system would still have the power to have hearings in person if that was appropriate for all parties.

You probably answered the main part of my question in your opening statement and in your responses to my colleague Jamie Greene, but what I want to know is how much the proposed legislation is actually needed to let us move towards a more remote system that protects

vulnerable witnesses, particularly in the most high-profile domestic abuse cases. Does the Parliament need to pass the bill to help us meet that objective?

Keith Brown: The bill will not move things forward as far as virtual trials are concerned; those things will continue on the current basis and according to the default positions that have already been mentioned. However, as I have said, we will want to look at whether there would be other legislative vehicles for doing that, once we have carried out the consultations and the work with partners.

It is not for me to intrude on how defence representatives prepare very vulnerable witnesses, and I would not dismiss their view that they need to be able to talk directly to their clients. Indeed, I would think that those clients would want to have confidence in their legal representatives, and perhaps a personal meeting would be crucial in that respect. In any case, in the bill, we are seeking to extend the timeframe for doing what we currently do with virtual trials, and any further or permanent extension would come through other means after a due process of consultation. There is therefore no change in that respect, if that is what you are asking about.

Fulton MacGregor: Yes—thanks a lot. I have to say that the previous panel, who were from the Crown Office and Procurator Fiscal Service and the courts, indicated quite strong support for the bill. I do not want to step on Katy Clark's toes here, as I am sure that she will go into this but, when I asked the previous panel about the progress that they had started to make, their answer seemed to be that there had not been as many virtual trials as we had expected throughout the pandemic, but that there was a clear desire to move in that direction. The previous two witnesses felt that the legislation was needed to allow us to do that. I suppose that I am just following up with you the question that I asked them, but I think that you have answered it.

Keith Brown: I should add that, as I have said, we want to examine how we increase the evidence base. I think that Mr Greene asked about pilots and so on, but we would need the support of not just the Crown Office and the courts but the judiciary—and the Lord President in particular—in advance of our introducing any such legislation. If I may say, the Lord President is keen for innovation to happen, especially in relation to digital technology, and I am confident that he would be eager to help in that respect, but he would have to give permission for any further extension of the current basis for virtual trials or any pilot beyond what has been done already. However, you can see from Sheriff Principal Pyle's report that there is an eagerness to examine this matter, and we would certainly be responsive to such a move.

Katy Clark: I have just a short question. On your comment that this is a decision for the judiciary, can you confirm that if the Government felt that virtual trials at summary level were successful and wished the change to be made permanent you would come back with primary legislation?

Keith Brown: Yes, and I think that I have said so already. That would not happen through the bill, which relates to the pandemic, but we are actively involved in that dialogue with the judiciary. There are two routes for doing it, one of which is a practice note from the judiciary. However, that would take things only so far, and I think that it is fair to say that the judiciary's preference would be for primary legislation.

Russell Findlay: In the budget, the Scottish Courts and Tribunals Service received £10 million less than it requested. Is that consistent with dealing with the backlog with the urgency that is required?

Keith Brown: We have had a number of discussions on that. It is probably true to say that different parties across Government and, perhaps, across society have received less than they might have hoped for, but that is the nature of the budget and the cuts that have been made to it. We have now had about 10 years of austerity, which, of course, has led to pressures building up that we have tried to respond to.

We worked closely with the courts service on the budget. I should point out that the Crown Office negotiates its budget separately with the finance secretary, so it is for that organisation to answer any such questions, but I am confident that the budget, despite our constrained means, will be more than sufficient for the service to do as it intends, not least in relation to the backlog.

The Convener: I am watching the time, so we will now move to questions on time limits and then come back to the issue of early release. I call Jamie Greene.

Jamie Greene: Please give me a second, convener—I was expecting to ask questions on early release, but I will do it in that order.

I do not have a huge amount to ask about time limits, but I am sure that the cabinet secretary has already listened to some of the concerns that have been expressed on the issue. In the previous evidence session, I reiterated the need for limits to be extended to ensure that cases do not expire or time out in any way. No one wants that to happen. However, there is concern about the length of time and the possibility that, because of the backlog, the limits might be permanent rather than

temporary. Why might you need a long-term power to extend time limits, given that the proposed limits go way beyond anything ever experienced in the Scottish legal system and, in some cases, beyond international norms, standards and laws?

Keith Brown: That is one of the most serious powers that we are looking to extend. I have not come to that conclusion by myself—we have had strong representations from justice partners that the move is necessary to deal with the pandemic situation that we find ourselves in. Of course, the power contains certain safety valves. For example, anyone who is held on remand for longer than would normally be the case is able to challenge that, as can others.

We do not want to extend the power beyond what is absolutely necessary because, as I would acknowledge, the issue relates to fundamental questions of people's right to liberty. We think that the move is absolutely necessary just now with regard to people on remand, but there are, of course, other time limits, some of which go in the other direction. For example, people can get longer if they are due to appear in court but cannot do so because they have contracted Covid. Given that, according to yesterday's figures, 11,500 people in Scotland contracted Covid, that is not a theoretical possibility.

This is about ensuring that we make the justice system work and that people are safe. In summary, I would say that we recognise that these are substantial and profound powers that we do not want for any longer than is necessary, but we continue to believe, not least because of the representations that we have received from those in the justice system, that they are necessary. I realise that it would be for her to answer this, but the Lord Advocate, who is the person charged with guaranteeing people's rights, believes that the move is necessary, too.

I do not know whether my officials have anything more to say about the issue.

Jeff Gibbons: As was highlighted in the previous evidence session, the measure is more about finding more time to spend on cases rather than on procedural matters. That is a key part of the approach. As the cabinet secretary has outlined, that is why the powers are not being made permanent—we are seeking to extend the powers for as long as they are required to deal with the backlog.

Jamie Greene: So you deem the power to be proportionate. When will it expire? Will it be in 2025, as set out in the sunset clause?

Jeff Gibbons: Yes. All of the provisions are based on that. The annual review will allow us, if you like, to stocktake, assess and evidence what has been delivered and to decide whether the powers are required from that point onwards.

Keith Brown: It will not need the annual review. Even in advance of an annual milestone, it is possible for the Government to decide that the powers are no longer needed and, if the committee thinks that the situation has changed sufficiently, it can request that of the Government.

12:00

Jamie Greene: On 21 March, most, if not all, Covid-related emergency measures will be relaxed in Scotland, so why do ministers need another two and a bit years of powers to extend time limits other than simply as a result of the backlog? The power is not necessarily directly related to health emergencies; it is simply a means to the end of clearing the backlog and ensuring that cases do not time out. That is a fair criticism.

Keith Brown: I do not wholly agree with that. The backlog is a direct consequence of the pandemic. Therefore, we can legitimately try to address it through the powers. I have said before that virtual trials would have a beneficial impact on the backlog but that is not the principal reason for wanting to pursue them. The powers that we are discussing are being taken to address the Covid situation. That includes the backlog. It is legitimate to do that.

Jamie Greene: On early release, exactly how many people have been released earlier than the current statutory automatic early release? What was the nature of their term in prison? I refer to the average length of sentence and the types of offences for which they were in prison. If, as we heard from another witness, they tended to be people serving 18 months or less, I presume that they would have been released at nine months anyway, so how much of their sentences did they serve before they were released early?

Keith Brown: That would vary from prisoner to prisoner but I will ask Jennifer Stoddart whether she can give those figures. I am sure that they have been reported to Parliament previously. I do not know whether she has them to hand.

Jennifer Stoddart: We have used the power once—in May 2020—as you know. That released 348 prisoners. I can quickly go through who that did and did not cover if that is of use to you.

Jamie Greene: Perhaps, for the benefit of time, you could write to the committee in advance of our preparation of the stage 1 report and we can analyse the information. That would be helpful.

To go back to the previous answer on reoffending, I get the impression that there was an expectation that a cohort of the prisoners would reoffend anyway because of the length of their

sentences and the fact that they had not been in prison long enough to be rehabilitated, for want of a better word. If you knew that there were such high rates of reoffending in that cohort of short-term prisoners, why were they released early, cabinet secretary?

Keith Brown: I was not saying that we had an expectation that those people would reoffend. If you look at the incidence of reoffending, you will see that around 40 per cent of those prisoners went back to custody. However, that was not all for reoffending. As I mentioned, sometimes it was for reasons other than reoffending.

My point was that the average reoffending rate for those on short sentences is between 50 and 60 per cent. Therefore, although there was not an expectation that people would reoffend, the reoffending rate of 40 per cent is not surprising. In itself, that is an argument for more effective community justice disposals that allow us to deal with that reoffending. We know from the evidence that we have that such disposals reduce the likelihood of reoffending.

It might have been useful to have a reminder of the categories of prisoners who were released, how close they were to the end of their sentences and how long the sentences were. I think that the sentences were 18 months or less.

It is the case that people who have been released from prison sometimes reoffend. The incidence is higher when those people have been on short sentences. It is legitimate to say that the Prison Service has the time to deal with an offender if they are in prison over a greater period. When those people were sentenced, it would not have been expected that they would be released early. It happened because of the pandemic.

Jamie Greene: That does not answer the question. The question was: if you knew that there was such a high rate of reoffending, why on earth was it considered sensible to release those people even earlier than automatic early release, which is already debatable, at 50 per cent of their sentence?

Keith Brown: If your question is, "Why did you release those prisoners?", the answer is that we did that because of the pandemic. We deemed the consequences of not doing it to be unacceptable, from the point of view of the constraints that it would put on our prisons and prisoners because of Covid, and from the point of view of the public safety of prisoners, prison officers, prison staff and people who visit prisons. That is why we released them.

Jamie Greene: What about the public safety of the public, as opposed to the public safety of prisoners? Was that not taken into account?

Keith Brown: Of course it was taken into account. That is why Parliament debated the measure and agreed to it—I think that it might have done so unanimously; I am not sure.

Covid has meant that Governments and others have had to balance harms. Parliament decided that releasing those prisoners was the better option to take.

Jamie Greene: Why do you need to have the power in future?

Keith Brown: Because the same situation could arise again in relation to Covid. We think that that is justifiable only up to 2025, if we are talking about Covid.

Why we would want to have the power on a permanent basis is a separate question. The same question could be addressed to the UK Government. I would imagine that its response would be that it is not always possible to anticipate whether it might be required to deal with a public health emergency or for some other reason. Different answers could be given as to the need for that.

The reason why we want to have the power in the current circumstances is that we do not yet know what the route path of Covid or its variants will be.

The Convener: We are just about there. Russell Findlay has a final question on this topic, after which we will cover fiscal fines.

Russell Findlay: I want to pick up on the issue of the reoffending of those prisoners who were released early. We know that the rate was about 40 per cent. I think that you said in answer to Jamie Greene that the regular reoffending rate is about 50 to 60 per cent, but Scottish Government figures from 2018-19 show that the reoffending rate within a year was just under 30 per cent. If that is correct, the reoffending rate for those prisoners who were released early is significantly higher than that.

Could you clarify where the 50 to 60 per cent figure comes from? Does it relate to a different cohort? Could you explain the discrepancies?

Keith Brown: Part of the explanation for that might be that the 30 per cent figure applies to all releases from prison. I do not know the detail; I have not seen that. It might be useful to hear from Jennifer Stoddart about whether the 40, 50 and 60 per cent figures, and even the 30 per cent figure, are correct.

Jennifer Stoddart: The 60 per cent figure—it is actually 61 per cent—applies to those prisoners who serve a sentence of three months or less. The 50 per cent figure—it is actually 53 per cent—

applies to those who serve a sentence of three to six months.

To pick up on a point that Mr Findlay and Mr Greene made, public safety was a key consideration when we determined who would be released. That is why there are particular statutory exclusions in the bill, which are for more serious offences. Under the regulations, it was those prisoners who were serving a sentence of 18 months or less and those who were within 90 days of their release who could be released early.

The reason why a sentence of 18 months or less was selected as a criterion is that the longer a sentence a prisoner is serving, the more serious their offending is likely to have been. We also worked closely with victims organisations. As a result of their feedback, anyone who was convicted of a domestic abuse offence or aggravation under the Domestic Abuse (Scotland) Act 2018 or who was the subject of a non-harassment order was also excluded.

Public safety was a key consideration in determining who would be released. As the cabinet secretary said, early release was needed because, at the time, there was particular pressure in the prison system. There was a need to have capacity in the system to enable people to shield and to have single-cell capacity. The decision was not taken lightly. Careful consideration was given to public safety questions.

Russell Findlay: The Scottish Prison Service told us that none of the prisoners who were released early was tested for Covid and that that was done to protect the public from Covid. If the same situation were to arise again, would that change?

Keith Brown: The prisoner release took place just before I took up office. One of the first things that I had to do on coming into office was to read voluminous tracts on public health and the framework that had to be applied to prisons.

I think that it is true to say that prisons will have learned from that. They have heard that question—it is not the first time that it has been asked—and I am sure that we would want to give the matter further thought. I think that, in some cases, there were good reasons for not testing prisoners, but each time we do something new, we want to learn from previous experience.

The Convener: As members have no more questions, I thank all our witnesses for attending.

We will take a short break to allow for a changeover of witnesses.

12:09

Meeting suspended.

12:14

On resuming—

Subordinate Legislation

Prisons and Young Offenders Institutions (Coronavirus) (Scotland) Amendment Rules 2022 (SSI 2022/73)

The Convener: The next agenda item is consideration of evidence on a negative instrument. I welcome to the meeting Keith Brown, Cabinet Secretary for Justice and Veterans, and Jamie MacQueen, from the Scottish Government legal directorate. Allister Purdie, director of operations, Scottish Prison Service, is attending online. I refer members to papers 3 and 4 and I invite the cabinet secretary to make some brief opening remarks.

12:15

Keith Brown: I will take a bit of time to lay out some of the provisions, in order to make it easier for members to ask questions.

The Prisons and Young Offenders Institutions (Coronavirus) (Scotland) Amendment Rules 2022 Scottish statutory instrument extends for a further six months—to 30 September 2022—the application of certain modifications that were made to the prison rules, in response to the coronavirus pandemic, by the Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2020 (SSI 2020/122).

When I appeared before the committee in September to discuss those powers, I spoke of the need to ensure that the prison service was able to take all necessary measures as we approached another winter during the pandemic.

Of course, neither committee members nor I could have predicted the rapid emergence of the omicron variant only a few months later. That has left no doubt that it remains the case that the Government must ensure that the prison service can deploy precautionary and protective measures as necessary in response to the on-going and unpredictable pandemic.

Therefore, it is essential to extend the flexibility that was afforded by the previous rule amendments, in order to ensure the safety of those who visit, live and work in our prisons. I need not remind the committee that prisons are complex settings, with a significant number of vulnerable people.

While the current rule amendments have been in force, the omicron variant has brought peaks of around 150 cases to the prison estate in January and staff absence rates of 9 per cent. We continue

to see Covid cases across the prison estate and, as of Friday 4 March, last week, there were 126 positive cases among 11 prisons.

Consistent with the current SSI in force, some powers are being extended to 30 September. The first set of powers are those that allow governors to suspend or restrict—if necessary and proportionate—in-person visits, purposeful activity and recreation, in response to local outbreaks.

The second set of powers are those that provide for extended timescales in relation to the isolation of large groups of individuals, so that governors and local national health service partners have the means to comply with Public Health Scotland and Scottish Government advice. That includes isolation of those who are symptomatic or have been in close contact with a person who is symptomatic, those who are identified as close contacts of a person who is symptomatic, or those who are new admissions, where isolation might prevent a Covid-19 risk.

The third set of powers are those that enable governors to extend—from the normal seven days to up to 14 days—the period that a prisoner is on home leave, if prisoners advise that they or someone in their home has coronavirus or has developed symptoms of coronavirus.

Members will be aware that, in advance of laying the SSI, the Scottish Prison Service wrote to stakeholders to seek views on the extension of those powers, and those responses have been published on the SPS website.

I am aware that stakeholders and members have concerns regarding the impact on human rights, and that there have been recent calls for transparency in the reporting of why and how frequently the powers are being used in the estate. As I reiterated in September, those powers are being and will be used only as precautionary measures and as a proportionate and necessary response to localised outbreaks in the prison estate. Decisions on their use will remain subject to multiagency decision making and public health advice and remain subject to independent scrutiny by Her Majesty's chief inspector of prisons for Scotland.

Despite the vulnerability of those in prison to the highly transmissible omicron variant, the powers have not impacted on the vast majority of the prison population since October, and the prison service is providing as full a regime as possible.

In her summary report on the Covid-19 pandemic emergency liaison visit report, which was published in January, the chief inspector of prisons for Scotland commented on the proportionate way in which restrictions have been applied. She said:

"the overwhelming impression was of a calm and orderly atmosphere in prisons, and regimes that were restricted but safe. It was also clear that prisons were working hard to provide more opportunities and reduce restrictions wherever possible".

I am aware that Teresa Medhurst wrote to the committee last week, with a collation of high-level information on use of the current powers from October 2021 to February 2022, and I am sure that members found that helpful. The information set out the proportionate use of the powers in seven prisons for a variety of reasons in response to local outbreaks. As requested, Ms Medhurst has helpfully committed to provide the committee with further high-level updates on the use of the powers.

Lastly, governors are already under a legal duty to act compatibly with human rights legislation in the discharge of their functions and they can use those powers only where it is necessary and proportionate to do so. It is the SPS position that those amendments have a positive impact on the protection of human rights.

With regard to articles 2 and 3 of the Human Rights Act 1998, the rule changes are designed to help the SPS to prevent and reduce the risks of the virus spreading within the estate. Without those measures being available, the article 3 rights of the prison population could be engaged.

The SPS also recognises the potential that utilising the measures could impact on prisoners' article 8 rights. However, its view is that the powers can be and are being applied proportionately, in order to have the least possible impact on prisoners' article 8 rights, and therefore they do not breach those rights.

The draft instrument provides for precautionary powers that are essential to the Scottish Prison Service's continuing response to all unknown eventualities of the pandemic, whether nationally or locally. The emergence of this winter's new variant has shown that we cannot be complacent, given the vulnerability of the prison setting to coronavirus.

On the assurances that have been given that the measures are being applied proportionately, their effect, and the effect of other measures, is demonstrated by the levels of Covid incidence in prisons, which are certainly much lower than many of us feared they could be when the pandemic started.

With that, I am happy to take members' questions.

The Convener: Thanks very much; that is helpful. Before we go round the room, I will kick off questions with a general opening question on the justification for the six-month extension.

Restrictions are being removed in most other areas and things are opening up, albeit in the context that there are still cases—you mentioned earlier the numbers that we have been seeing in the past week or so. The pandemic is still very much with us, but is the proposal to extend the provisions slightly out of sync with what is happening in other areas? Does it reflect the Scottish Government's current guidance on coronavirus and restrictions?

Keith Brown: I might ask Allister Purdie to come in on this. It is certainly true, as I think that I said in the previous evidence session, that we applied additional guidance, beyond the Scottish Government guidance, through Public Health Scotland and others. There was a huge amount of provisions and guidance. That was done in recognition of the particular circumstance of prisons, which are, of necessity, confined spaces. I was not in Government when the pandemic began, but everybody was very fearful of what might happen to prisoners because of that.

Prisons will have their own necessity for taking action, and they might not always be completely aligned with the general population, which is able to take other measures. That is the general rationale for the extension.

The Convener: I have a follow-up question on the process of assessment and decision making that governors and others follow. We know that the decisions on imposing these particular provisions are public-health based. I am interested in the process and how it is informed. Can you give us some of the detail of the risk assessment process?

Keith Brown: It is best to hear from Allister Purdie, who will be familiar with the internal processes in the SPS. For some restrictions, if prisons seek to extend them, that will come back to Government for approval.

Allister Purdie (Scottish Prison Service): Applications for the use of precautionary short-term measures always come through our incident management teams, and our public health colleagues will advise us on them. The decision making starts there, between the local multiagency team and the governor, and the risk assessment is made to try and put a fire break on the outbreak. That will look at what is required to deal with the outbreak in the establishment, and certain measures will be proposed by our public health colleagues to stem that flow and the outbreak.

That is the decision making process. The governor will look at the risks and the proportionate impact, and consider whether the outbreak can be localised to specific areas, such as a wing. They will then make a dynamic risk assessment based on public health advice. They will then touch base with ourselves in the prisons directorate and talk through what the potential restrictions could be and the likely timescales, including when they will take effect from. The decision will then be made by the governor.

The governor is also tuned in to a national coronavirus response group, which has active information and up-to-date evidence from across the country from public health colleagues about the likely impact that the outbreak could have on their establishment. Based on that, they will make their decision. How long the measures will last will then be kept actively under review by the governor and, centrally, SPS, and public health colleagues. As soon as that proportionality is not required, the measures are stopped.

The Convener: That is very helpful. Russell Findlay is next and then we will work our way round the room.

Russell Findlay: The chief inspector of prisons has raised a concern about a lack of communication from the SPS in respect of the use of these powers and the lack of an ability to properly externally monitor the decision making and the implications of what happens. Is that something that can be improved upon? That is a question, first and foremost, for Mr Purdie.

Keith Brown: I will just say first that, in my opening statement, I read out the testimony from the chief inspector and it was extremely positive about the way that the prison service is applying these regulations. Of course it should be the case that she should have the information that she requires. Allister Purdie may want to add to that.

Allister Purdie: We have regular updates with the chief inspector following any outbreak and we are always open to learning. Throughout the pandemic, we have tried to integrate lessons learned into all our practices so that we minimise the impact on our population.

We have open meetings monthly with the chief inspector's team and there are regular daily inspections by the independent prison monitors. We are open to learning about any ways in which we could improve on that.

The Convener: Okay, thank you. Fulton?

Fulton MacGregor: I do not have any specific questions that have not already been addressed by the cabinet secretary. I have a thought, rather than a question. It is obviously not ideal to be in a situation where we are looking to extend these things but I think that we are all in the same boat there. We are living in difficult times and, as was highlighted at the start, the pandemic is still with us, so, in certain areas where people are living closer together, such as prisons, we still need to err on the side of caution.

Jamie Greene: I have some fact-checking questions. First, what is the current prison population in Scotland? I know that it changes daily but what is the latest snapshot?

Also, either as a number or a percentage, what percentage of those inmates currently have Covid? We know the figures for wider society; do we know the figures for the prison population?

Keith Brown: I think that I mentioned the figures on Covid cases, at least from 4 March, in my opening statement. You can check back and confirm that.

I will take a stab at the current prison population; the latest figure that I saw was 7,502 or 7,503, but I am happy to be corrected on that. If I can just look back at my statement, I can tell you the number of inmates who currently have Covid—unless you have that figure to hand?

Jamie Greene: I do not—it is not a rhetorical question; I do not know the answer. I am sorry that I missed the figures you gave earlier.

Keith Brown: Sorry, I meant Allister Purdie—I thought he might have the figure to hand, but it is in my statement—

Allister Purdie: I have the figure, cabinet secretary. It has actually increased since the briefing that you had. It was 126 cases; it is now 159 positive cases, as of yesterday, so the figure has increased again this week.

On the prison population, you are absolutely right—the figure has sat at roughly 7,500 and just over for the past month.

Jamie Greene: I will maybe continue with Mr Purdie, as he has all the figures. My apologies to the cabinet secretary for not jotting down the figure earlier but I am glad to get an updated number.

How does that figure compare to the number of cases in wider society? Can you contain cases more easily in a prison environment or is it more difficult, due to the nature of the estate?

What effect has any relaxation of some of the restrictions that were needed during the temporary Covid measures—such as those around visitation or people being out on licence or temporary release—had on the relativity of the case rate versus the population? Are we seeing a marked proportionate increase in the positivity rate as a result of the relaxation of some of those restrictions?

12:30

Allister Purdie: I will provide some context. Public Health Scotland's advice on prisons is that a stepped-up approach should be taken compared with community restrictions. We have kept in place many of the restrictions and other measures because of the high-risk nature of the environment. For example, measures on distancing, isolation, hygiene and testing have been of a higher standard than those for the general population. We have maintained many of those measures and procedures in an attempt to restrict the virus from spreading when the transient population moves from the community back into custody, because that is a key risk area.

On Jamie Greene's question, significant risks are still posed because of the transient population moving through the criminal justice system back into the community or back into prison. Since March 2020, when there have been variants—omicron, the Kent variant and the variant before that, for example—the peaks and troughs have largely been in line with those for the general public.

Jamie Greene: That is helpful, as was your analysis of the differences.

I have a wider question for the cabinet secretary. As a society, we are—to use the phrase that is used—learning to live with Covid. As you said, there were 11,000 cases yesterday, but we are heading on a path that involves moving away from restrictions and, we hope, life being back to normal in as much as it can be, although Covid will still be around.

That does not seem to be the case in the prison environment, where higher levels of restrictions are being maintained relative to those for wider society. Is that a proportionate use of temporary powers, given that we in society are no longer in a temporary emergency and are simply living with a long-term pandemic, with the virus becoming endemic?

Keith Brown: It is, for the straightforward reason that there are, literally, boundaries that apply to the prison estate that do not apply to wider society. It is true to say that no society had their public estates, whether it was their schools, hospitals or prisons, as they would have wanted them to be, in relation to ventilation and so on, to deal with a pandemic. That is no less true for the Prison Service. Despite the substantial modernisation that has taken place over the past 15 to 20 years, some of the prison estate is still Victorian. The Prison Service cannot get past that constraint. In wider society, we can change our behaviours or change where we go in a way that prisoners and prison officers cannot. That is why there are higher levels of restrictions in prisons. The consequences of one person getting the virus in an enclosed environment such as a prison can be much faster transmission.

I do not know whether Allister Purdie wants to add to what I have said, but that is the main

constraint that I see. That is why, throughout the pandemic, as he said, we have required prisoners to meet a different standard. That approach has been really successful, and I acknowledge the work of the Prison Service and the pressure that staff have been under during the pandemic.

Allister Purdie: We have been trying to balance the four harms. We have been trying to provide people with a meaningful regime involving activity and addressing offending behaviour while allowing people to be as free as possible in a constricted environment, in which households are much bigger than they are in the community, so the spread can be significant. It is about balancing the harms and, as the cabinet secretary said, ensuring that the safety of everybody who lives in, works in or visits the prisons is at the front of our minds.

Jamie Greene: I have a final question. Will there be any improvement in transparency relating to how frequently the powers are used and the impact of those powers as they are used on a case-by-case basis, given that the powers are used in different ways in different establishments? HMIPS and other stakeholders have written to us to express concern about clarity and transparency in how and when the powers were used. If the use of such powers remains a feature, will transparency be improved, particularly for the benefit of the families of those who are in prison?

Keith Brown: That is an entirely reasonable request. It is perhaps a bit distinct from the point that Mr Findlay raised about the chief inspector not having the information that she was looking for. I am happy for what Mr Greene suggests to happen. Obviously, when lockdowns happened very unexpectedly, it was more difficult to achieve that, but there should now be no reason for not having the maximum possible transparency. We are talking about prisoners, but their rights are being affected, so the call for transparency is legitimate. I will certainly do what I can, and I am sure that the SPS will, too, to ensure that we have that.

Katy Clark: You spoke about human rights considerations. I presume that, in particular, you are thinking about article 3 of the European convention on human rights and whether the requirements amount to "inhuman and degrading treatment". Will you outline what you can do in your role to ensure that the Scottish Prison Service and, in particular, governors take proportionate action? How can more resources be put in to deal with the transparency issues that Jamie Greene spoke about, given that the Scottish Prison Service has raised systems issues, and so that there is an awareness in prisons of the importance of human rights considerations?

Keith Brown: I believe that prisoners' rights figure in the minds of not just governors but individual prison officers. You mentioned some of the assurances that we have on that. We have the inspector, who is able to challenge where she believes that prisoners' rights have not been observed. As Jamie Greene has asked for, we have the assurance on transparency to ensure that, when such measures are introduced, that is logged and people know when it is done and why, as well as when the measures finish and the reasons for that.

The Prison Service has done different things to try to mitigate the impact of that. I am sure that Allister Purdie can set this out more effectively than I can—although Jamie MacQueen is the expert on the interplay between different rights—but, for example, in-cell telephony has been a big boon to prisoners. Of course, that is not without its issues, either. That shows that there has been a recognition that such extraordinary measures impact on prisoners' rights, and we have tried to ensure that the impact has been mitigated. There are any number of checks on that. If we can increase the checks by responding to Jamie Greene's point about transparency, we should do so.

Those are the reassurances that I would give. It might be worth hearing from Jamie MacQueen, who, like you, I am sure, is the expert on the interplay between the rights that are affected.

Jamie MacQueen (Scottish Government): One thing that I would highlight is the Scottish Government's guidance on the management of Covid in prisons, which is produced with Public Health Scotland and the SPS.

On article 3 and the human rights aspects, there are tensions between prisoners having access to purposeful activities and protecting them from the virus ripping through prisons, or at least behaving in a less controlled way. That balance always has to be in the mind of the decision maker, including governors, because they are bound to act compatibly with the convention.

Katy Clark: What is the cabinet secretary's understanding of how prisons differentiate between different types of prisoners? For example, during Covid, children in prison have been subject to the same measures to combat virus infection as adults have. How do the prisons balance those rights and look at individuals, particularly those who might be more vulnerable?

Keith Brown: I will make a general point before I go on to the specific example of children or the under-18s. As I am sure committee members will know at first hand from visiting prisons, especially from having been to Saughton prison, there is a big balancing act to be done, not just between vulnerable prisoners of different kinds but sometimes between competing serious organised

crime groups. The Prison Service is very good at doing that, although it is not without its tensions and problems. That includes looking after the rights, safety and health of vulnerable prisoners.

The number of under-18s in prison is much smaller now; I think that we are down to approximately 14 from perhaps 200-plus in 2006. However, the fact is that they are put in prison by the courts—that is who decides that they go there rather than to an alternative. It might be best to hear from Allister Purdie on this, but my understanding is that the same restrictions will apply. I would point out, though, that young people are based at Polmont, which is not currently full—far from it—so that might give some latitude.

Allister Purdie: A very small cohort is being held in Polmont, and the capacity at that institution allows us to manage a virus outbreak there more effectively to ensure that we do not impose the additional restrictions and precautionary measures that we would have to in other establishments.

However, as the committee will know, the virus does not discriminate. It has gone through the whole prison population and has impacted on the young people in our custody in Polmont, who are in open conditions most of the time. When we had an outbreak, the virus spread to all 16 or 17 who were there at the time, but the capacity at Polmont allowed us to manage that outbreak effectively.

As the high-level information that Ms Teresa Medhurst provided to the committee in her letter of 3 March has, I hope, outlined, Polmont has not been one of the establishments for young people where the virus has had a significant impact. We are, however, always alert to putting in the same protective measures for young people as we would in any other classification of prison across the estate.

Katy Clark: We have been given information on how the powers have been used since October 2021. As the cabinet secretary knows, the buck stops with him. To what extent is he advised of the steps that have been taken so that he can give political oversight of the situation and, if he has concerns about how the legislation was being implemented, take action or express those concerns?

Keith Brown: We get regular updates that go down to individual prison level. During the worst of the pandemic, they set out the increases in individual prisons and the movement between wings when people had to be isolated. The updates that I get also mention new prisoners coming in and give some background on where the virus is thought to have started and whether it was brought in by someone new coming into the prison. They give details of the number of prisoners who have been vaccinated once, twice or three times, and details about levels of testing. They also give levels of testing among prison staff. They are pretty detailed, regular accounts.

I have asked lots of questions that might have encroached into other systems that the Government has put in place for the general management of the pandemic, but apart from asking for more information, I cannot think of any time that I have had to intervene to impose a political steer on things.

Katy Clark: Sure. So when the powers are used in a particular establishment, you are informed.

Keith Brown: I am not informed of every single use of every single power, but if, for example, a wing has to be closed down or people have to be isolated in that way, or if there is a move towards double shifting, which means more purposeful activity is taking place, I am advised of those things.

Katy Clark: Thank you.

The Convener: Before Rona Mackay asks the committee's final questions, cabinet secretary, I just want to pick up on what you said about self-isolation and some of the measures that are required in response to that. According to Scottish Prison Service statistics from a couple of days ago, 1,040 prisoners are self-isolating. In the context of the overall prison population, that figure seems quite high. Does that present additional challenges for the day-to-day running of prisons? Perhaps Mr Purdie will pick that up.

Keith Brown: Yes, Allister Purdie might be best placed to answer that. However, the number, which Allister will be able to confirm or otherwise, includes quite a high level of remand prisoners, for reasons that we are all aware of, as well as people moving in and out of prison. The Prison Service is more susceptible to and not at all immune from the wider increase in the figures that we have seen in the past week or so.

12:45

Allister Purdie: The number for those who are isolating is correct. It is simply a result of households being larger and precautionary measures being taken to make sure that any close contacts who are either symptomatic or asymptomatic are isolated for as short a time as possible so that we can keep households safe. That can cause problems, because it clearly restricts the activity of some individuals in the prison on that day or for a number of days until we can make sure that they are safe, the virus has been cleared and the area is as safe as it can be. With the numbers that we are talking about, self-isolating causes operational difficulties.

Our public health guidance for prisons places a burden on us. Our approach to isolation is different from that in the community, simply because prisons are high-risk residential areas, and we have to protect people's rights to health, safety and humane treatment under the human rights articles that we talked about earlier. We do have high isolation numbers just now.

The Convener: That is helpful, Mr Purdie. Rona Mackay has some final questions.

Rona Mackay: My questions were very much along the same lines as those that Katy Clark asked on purposeful activity and exercise, and the cabinet secretary has answered most of them. However, I note that the briefing from Teresa Medhurst shows the differences between the prison estates, and they seem to relate to staff and staff absences. Perhaps Mr Purdie can confirm that on the record. Secondly, has any thought been given to drafting in retired prison officers to cover situations temporarily so that more activity can be done?

Allister Purdie: As you will see from the outline high-level information, acute numbers of staff were off at peak times, including during omicron. We transferred staff from other establishments that were not experiencing outbreaks, but the risk of that approach is that we might well be exporting the virus from one establishment back into the family home or the community. We did that kind of transfer on several occasions, and we continue to use it as one of our contingencies so that we can keep establishments functioning and do not have to take precautionary measures and set aside the purposeful activity or the visits that are so important to the rehabilitative programme for the people who are in our custody and their families.

Rona Mackay: That is fine. Thank you.

The Convener: That brings this agenda item to a close, and I thank the witnesses for attending. We will have a short break to allow for a changeover of officials.

12:47

Meeting suspended.

12:50

On resuming—

Risk Assessment in the Justice System

The Convener: The next item of business is consideration of the service and case management system that is used by social work and prison staff to assess risk management in the justice system. I thank the Cabinet Secretary for Justice and Veterans for remaining for this agenda item, and I welcome to the meeting Cat Dalrymple, who is deputy director for community justice at the Scottish Government. I refer members to paper 5.

In light of the time that is available, we will move straight to questions.

Russell Findlay: Cabinet secretary, I understand that one of your responsibilities is to consider first grant of temporary release applications for people who are serving life sentences. My question is a two-pronged one. First, how many of those have you had to consider in your tenure? Secondly, how many of those were based on an incorrect risk assessment?

Keith Brown: I think that I mentioned in response to a similar question from Mr Findlay after my statement last week that I hoped to be able to give him a reassuring response. I have not granted any first grant of temporary release, but it is also true that that function has been carried out for a number of years now by the justice portfolio minister—in this case, that is the Minister for Community Safety. A reconciliation of the Scottish Prison Service system and the identified affected cases has been carried out, and eight cases in which first grant of temporary release have been granted were found. All of those have been looked at again, and I can confirm that no immediate or concerning public protection risks were highlighted. However, those eight cases will be further reviewed by the risk review group, which I mentioned in the statement last week, to provide further assurance.

Russell Findlay: Thank you. I presume that some prisoners will believe that they might have suffered a detriment by being kept in prison for longer than the risk assessment might have suggested that they should be. Are you anticipating any form of legal challenge from prisoners, given how litigious they can sometimes be?

Keith Brown: If there were to be a legal challenge, it would be for others to take that decision. From my point of view and the point of view of the justice portfolio, the important thing is to ensure that we can identify whether that has been the case. That is why we are carrying out the

risk review process that I have previously mentioned. It is quite a lengthy, detailed and technical process with different layers, but it will be very thorough. I do not know whether it is possible to hear from Cat Dalrymple about how that will be carried out.

I should mention an issue that might well come up. Last week, I mentioned that we had 285 open cases. We were concerned and, as of yesterday, we have been able to check every single one of those cases. Not one is giving rise to any public protection issues for us.

On other cases in which people might feel that they have been wrongly assessed, my understanding is that, with the different layers of checks that are carried out in the risk review process, that is unlikely to be the case. However, it might be a good idea to hear about that from Cat Dalrymple.

Catriona Dalrymple (Scottish Government): I will start with the first grant of temporary release. I think that a briefing paper was provided to members yesterday that provides significant detail about the approach that is taken to such decisions. I hope that it explains to members that applications for a first grant of temporary release are holistic decisions for the whole risk management team. It considers a wide range of factors and available assessments, including the outcome of a level of service case management inventory, or LS/CMI. It gives an indication across the whole risk management approach of the manageability of the risk within the community.

As the cabinet secretary has indicated, 285 live cases were identified in relation to the risk score and level issue. All those have now been checked—the last two were confirmed this morning. Social workers have been absolutely amazing in coming back and checking all those cases, and they are confident that there are no live, immediate or concerning public protection risks in those cases.

On wider assurance in relation to the first grant of temporary release cases, those cases will be looked at, because they are part of the 1,317 cases that are being passed on to the risk review group, which will be chaired by the Risk Management Authority. That group met for the first time yesterday, and it is agreeing terms of reference. A number of organisations—11 different types of organisations from throughout the justice sector, I think—are represented on it, and they will assess any wider impact in any of those cases.

If you think about the numbers, we are talking about 1 per cent in the whole system. That figure of 1,317 is a good sample size. When those cases are considered, I suspect that any impact will inform any future lessons and work that would need to be undertaken.

Russell Findlay: Thank you. I will not hog the questions; I am sure that everyone else wants to come in.

Jamie Greene: I thank the Government for its briefing, albeit it was not easy trying to digest 18 pages overnight, given the technicalities of the problem.

I want to get my head around the bigger picture. During last week's statement, we did not have a lot of time to go into detail, due to pressures on chamber time. This is a great setting in which to do that. Is 1,317 the maximum number of cases that have had a wrong risk assessment as a result of information technology glitches, or could there be more cases and you need to do further work to find that out and how far back the problem goes?

Catriona Dalrymple: We have been liaising with our IT provider on the second issue that the cabinet secretary highlighted. On the first issue, we know that those cases are the ones that are affected, and we have provided a high level of assurance around the open cases.

The initial advice from the IT provider has confirmed the second issue, which is about the risk scoring of alcohol or drug use, and it has indicated that that is likely to overlap with the initial issue. Work is on-going in that regard. That suggests that a very small number of cases will be affected, as the error appears to retain information following a score being revisited.

To address that, we are working with the risk review group and professionals in the system to identify what additional level of assurance we are able to provide on the existing cases in the system. That needs to be a balanced and proportionate approach because there is no suggestion that a significant number of cases are affected by the issue. We already have a high level of assurance on the cases that have been confirmed as being affected.

We are working with the professionals to work out what is the best way in which to provide that level of assurance with the existing cases in the system. We are taking advice from experts from the Risk Management Authority on what that will look like.

In relation to the on-going case management of individuals in the community, there are a number of different points at which a social worker will provide assurance around the LS/CMI assessment.

On the fact that a known issue has been identified in the system, we have been told by all the professionals that, at any point when a decision is coming up about an individual, such as

a court decision, in relation to preparing a parole dossier or by the Prison Service around progression, they will assure that individual's LS/CMI assessment and have confidence in that assessment. Although no decision is based on that assessment alone, it is part of the holistic approach. Then—

Jamie Greene: Sorry—I appreciate that there is a technical answer to a simple question, but the problem is that I have not heard the answer yet. I want this to be absolutely clear. There are 1,317 cases, of which 1,032 are closed and the rest are open. Is there the potential for other cases to be affected by the IT glitch?

My second question is linked to the first. If the issue goes back prior to the IT centralisation project—the cabinet secretary said in his statement that that might have brought the issue to light in the first place—surely that means that, for a number of years, the system was getting it wrong. What work is being done to identify how many other cases there might be in which risk was incorrectly identified? What do you think the scale of that might be? Are we talking about tens, hundreds or thousands of cases? How many prisoners have been released in the past 10 years? I suspect that that is a substantial number. Does the Government know how many people might have been wrongly risk assessed prior to release? I do not want to know just about current cases but about those going back 10 years.

13:00

Catriona Dalrymple: At this stage, there is no suggestion that a significant number of cases is affected. An end-to-end assurance process of that system, going through every different functionality part, requires to be done. I do not want to get too technical, but risk assessment is technical—the 18-page briefing paper probably demonstrates that.

The first part of the LS/CMI is a kind of screening tool that is used predominantly for court social work reports. That does not necessarily have a calculated risk score; there are eight questions, six of which are yes/no questions. There are a significant number of those on the system that we know, from the identified issue, are extremely unlikely to be affected. We cannot see how they could be affected at this stage.

Thereafter, once an individual is being managed and is on a community payback order, they are likely to go on to the more detailed LS/CMI assessment, which is where the risk score is tallied up and comes out with a risk level. That is only part of the detailed assessment. The secondary part is considered, structured, professional judgment, which is applied in relation to a number of different questions about that individual's criminogenic needs, their pattern of offending and all their wider information. That professional judgment is applied within the secondary aspect of the risk assessment, so it is not just a score and a level. If that professional considers it necessary, they do the third part of the LS/CMI, which is a risk of serious harm assessment. We need to assure—through the IT—every part of each of the three different stages, and the on-going review of those types of cases will be user-led.

Jamie Greene: I will need to check the *Official Report*, but I think that the language that you used is that there is an expectation that the issue will not affect a large number of cases. However, the answer is that we do not know whether 1,300 is the absolute number of affected cases, or whether more people have previously been released because the system incorrectly scored them. We could find them if we delve into historical archives and look on a case-by-case basis, but that is a tremendous amount of work. When will we know exactly? When will that piece of work be finished, so that we have a much bigger picture?

Catriona Dalrymple: To be clear, two pieces of work need to be on-going. The first is a piece of work under those 1,317 cases from the risk review group, and that will inform any future assurance that is required. There are a number of different outcomes from that group. The holistic nature of risk assessment—of which LS/CMI is one part—is likely to inform any future assurances with regard to other old cases in the system. We will take our advice from the experts; if they assess the cases and are confident that there has been no impact, that might provide a high level of assurance. It is not for me to sit here and say what would be appropriate, because I am not an expert on risk management. We need to make sure that we take proper advice on that.

We also have the wider review of open cases in the system, and that is very much about working with the IT provider, the professionals and the Risk Management Authority to identify what will provide that level of assurance and public confidence in those existing cases. I suspect that it is not likely that every case will be reviewed because, as an individual is being managed, there are automatic, built-in review points. Obviously, when a decision point comes up, we expect a professional to have a look at the LS/CMI and make sure that it is assured and accurate. Thereafter—as I understand it, from the professional social workers who I have spoken to—individuals are ordinarily reviewed every three months. Therefore, within three months, I like to think that a lot of the individuals among the open cases will have had their case reviewed.

Jamie Greene: The language that is being used is around live or known public protection issues, but is the cabinet secretary confident that no one has been released earlier than they should have been? If anyone has been released earlier than they would have been under normal circumstances—were it not for the IT glitch—did any of those people, at any point in the past, pose a public protection issue? Outwith normal reoffending rates, which we talked about earlier, did any of those people go on to reoffend or end up back in the system? I guess that we are looking for a little bit more comfort that those who were released inadvertently did not go on to reoffend.

Keith Brown: I think that it is right that we wait for the further processes that Cat Dalrymple mentioned to be gone through before we can be absolutely definitive, but if it is comfort that is being sought, I would just highlight two things. First, the fact that not one of the 285 cases in question has given rise to public protection concerns in the eyes of the experts who have looked at them is a good indicator of where we are at. Again, that is not definitive, and I am not trying to pretend that it is.

Secondly, in the light of some of the publicity that flowed from last week's statement, I point out—and I cannot remember whether this is in our briefing or another that I have seen—LS/CMI is almost a general triaging tool. For someone who is, say, a sexual offender or who is seen as high risk to the public, because of violence, other tools as well as LS/CMI will be involved. That should provide you with reassurance.

I know that there was no time to take my opening statement, convener, but perhaps I can make a couple of other points that I highlighted in it, because I sought to address some of the questions that members, quite rightly, asked me last week in the chamber. Pauline McNeill and, I think, Jamie Greene asked about the technical nature of the update. I hope that members will see from the briefing that has been provided and from what Cat Dalrymple has said how technical the issue is, although I should say that I specifically asked for the language in the briefing for members to be as plain as possible, because it is sometimes quite difficult to understand the different aspects.

Moreover, in response to Stephen Kerr's question last week about when all of this first came to light, I said that it was 24 January. However, the first person to see it was apparently an SPS individual on 13 January. I might have said that, too, but I certainly mentioned the 24 January date. That was when Government officials became involved and started running tests in parallel with the system. As I said last week, I was advised of the matter the previous Friday and then came to Parliament.

With regard to how quickly we came to Parliament, I would highlight a case down south that related to 400,000 prisoner or offender records, and there was no statement to the Parliament down there until after the event. I was keen to ensure that we did not do the same thing, and we therefore came to the Scottish Parliament as soon as possible. Coming back to Jamie Greene's question, I point out that one consequence of that decision is that we do not have all the answers, because we are still working through this. We are providing as much assurance as we can—indeed, I think that the assurance that the 285 live cases have not raised any cause for public concern is pretty substantial.

There are probably one or two other questions that were asked last week that I have tried to deal with if not in the briefing then in the opening statement that I would have made. I hope that that gives some reassurance, too.

The Convener: I apologise, cabinet secretary—I was just very aware of the time, which is why we went straight to questions. I am sure that members will have further questions to ask.

Is that you, Jamie?

Jamie Greene: I am keen to let others in, convener. If anything jumps out at me, I will jump in again.

The Convener: In that case, I call Katy Clark.

Katy Clark: I want to pick up the point that was made about other systems. Have you been able to work out the profile of the cases that we are talking about, particularly some of the more serious offences? How many sexual offenders are involved, for example? Given the huge workload that is involved in reviewing the cases, how have you prioritised them? Have you been able to prioritise some of the cases that would cause the public most concern? Perhaps you can outline your approach in layperson's language.

Keith Brown: I will respond first, as I believe that you asked a similar question in the chamber last week, and what I said in my statement should provide you with some reassurance.

You have asked about the offences that are involved, particularly whether they are sexual ones. I am grateful for the question, but I have to point out that LS/CMI is not an offence-based system and does not record the offence involved. As I have explained, it is a kind of generic triage system; although that might seem strange, that is entirely consistent with the risk assessment approach. As our briefing paper sets out, it is a general tool that looks at general factors, including potential offending, but part of the judgment applied relates to a different part of the assessment that looks at the nature of offending

and provides structured consideration of that issue. I know that we have said this a number of times, but it is important to get across the fact that every risk assessment has different elements.

That element of the system does not have a score. For example, individuals convicted of a sexual offence will have bespoke risk assessments carried out. Those will likely focus not only on general offending but on risk of harm, which are particular to that type of offending. So, there are other processes that cover that.

You asked about what has priority. So far, we have concentrated on—this has been our priority—the 285 live cases. Moving on—

Katy Clark: Sure. That is why I asked whether you were able to use other systems that you have in place to pick out the types of cases that might be of greatest concern. I wondered whether that has been incorporated into the work that is currently going on, so that the cases that were dealt with first were those involving the most serious offenders or offenders who have committed the types of offences that people would be most likely to be concerned about. Are you able to do that with the systems that are available to you?

Catriona Dalrymple: I would make an assumption that the professionals in the system know the type of offending that is associated with the individual that they are managing. That is why we are working with the professionals to identify what level of assurance and type of review we do for any other open cases in the system. We will work with them and the Risk Management Authority to identify what those priorities should be. One of the messages that we have been getting from our social work colleagues is that they want clarity about what we are asking them to do. We will ensure that we provide such clarity.

Katy Clark: Is it the case, therefore, that cases involving serious sexual offenders or individuals who have been involved in serious violence would be the kind that professionals would be asked to deal with first?

Catriona Dalrymple: That certainly could be the case, but I think that the point that the cabinet secretary made is that looking at an index offence does not necessarily help you to understand the risk that an individual presents. You could have someone on a relatively low-tariff offence that creates a greater risk, and you could have the reverse.

Before coming to work in the Scottish Government, I spent 20 years as a procurator fiscal, and I remember that, in one case that I prosecuted on indictment, if you looked at the index offence, you could have assumed that there were five breaches of the peace, but the offence was clearly of a sinister nature. That case ended up being referred to the High Court, where assessors who were accredited by the Risk Management Authority produced a detailed risk assessment for an order for lifelong restriction to be considered. That demonstrates that the index offence is not necessarily linked. However, I understand the issue of public concern, and we can feed in that assurance level when the professionals tell us that that should be prioritised.

Katy Clark: You are asking professionals to look at their current and former case loads and make a judgment about any individuals that they have concerns about, and for those cases to be prioritised.

Catriona Dalrymple: We are certainly working with the professionals, but we have not asked them to do that yet, because we are working with them to identify the parameters, so that we can provide clarity on that.

Katy Clark: You have not actually asked professionals to do that yet.

Catriona Dalrymple: We met them on Monday to try to work out what the parameters of the review should be, and we will then take advice from the Risk Management Authority to ensure that it is content with our proposals.

Katy Clark: Concerns were first brought to people's attention on 13 February, although I appreciate that the full extent of the problem might not have been apparent at that point. However, as yet, we have not got to the point at which cases are being looked at by those who deal with this work. Is that right?

Catriona Dalrymple: The priority has been the 285 live cases. Since we identified the cases, the professionals have been providing that assurance. The last two cases were reviewed overnight, and confirmation on those was provided this morning.

Keith Brown: As I have said, the priority was the 285 live cases, which have now been completed. That is the priority that we set for those involved.

I should say that it was 13 January when concerns first came to light, and further tests were done by Government on 24 January, leading up to 25 February.

On the previous point, about the types of offences, those 285 live cases would have been subject to the LS/CMI, which is why we made them a priority. However, I again mention that the ones that involved sexual offences or serious violence would have been subject to a different tool that manages that high level of risk. What Cat Dalrymple is now talking about is going further and considering previous cases to ensure that we are satisfied with the rest of the system, too.

Katy Clark: For the cases that have been looked at, have you asked for a breakdown of the offences that are involved in that cohort?

Keith Brown: I will let Cat Dalrymple come in, but our priority was to make sure that there were no public protection issues. As has been mentioned, the index case for which somebody was first convicted sometimes does not give the full information.

I do not know whether Cat wants to add to—

13:15

Katy Clark: I appreciate that somebody might be a dangerous individual but might not have been convicted of any serious offences. However, many of that cohort would have had convictions. Did you ask for that information?

Catriona Dalrymple: I do not recall that that information was asked for. The initial reassurance was sought as soon as the issue was identified, and the priority was checking that there were no concerning or immediate public protection risks.

The Convener: I am watching the clock—

Jamie Greene: Sorry, convener, but I have a brief question.

The Convener: Very quickly.

Fulton MacGregor: Convener, I have a question as well.

The Convener: Apologies—I did not realise that you were waiting to come in, Fulton.

Fulton MacGregor: I will let Jamie Greene go first.

Jamie Greene: It is a supplementary question on a technical point. Am I correct in thinking that, if someone has been released, there is no recall to prison?

I also want to know whether there is anyone who is currently due for automatic early release rather than assessment-based release but who may have been incorrectly risk assessed. If so, will there be a moratorium on their automatic early release if there is the potential that they have been wrongly risk assessed by the IT system?

Catriona Dalrymple: I think that you are talking about release from prison. Long-term prisoners who have sentences of more than four years are released after a Parole Board decision. That is set out in the briefing pack that we provided for the committee. Shorter-term prisoners who are serving sentences of under four years will be released at the statutory point in their sentence. As was highlighted earlier, there are statutory provisions on what throughcare they are obliged to take.

Jamie Greene: Would such people be released anyway due to the policy on release, even if they have been wrongly assessed? That is the crux of my question.

Keith Brown: In relation to short-term prisoners, the release date will have been set as part of their sentencing in the first place. In relation to longer-term prisoners, it will be a decision for the Parole Board, which will have all the different experts to provide the risk assessment at that time.

Perhaps I can provide further reassurance. Everybody has now been made aware of the issue, so all current assessments are being looked at in the light of that. In any event, that will quickly be overtaken by the three-month assessment to which offenders in that situation will be subject. Therefore, even if we had discovered something, the process is starting to bite whereby such matters will be taken into account in future assessments.

Cat Dalrymple, as a former procurator fiscal, will correct me if I am wrong but, with short-term prisoners, the original sentence is handed down by the court, and we do not have the ability to change that.

The Convener: I apologise again to Fulton MacGregor, who I will bring in now.

Fulton MacGregor: I apologise, too, convener. When I indicated earlier, I was not sure whether you thought that I wanted to come in or did not want to come in. It was also my fault.

I draw members' attention to my entry in the register of interests, which shows that, before I became an MSP in 2016, this is exactly the sort of work that I did. I am well aware of the LS/CMI system, having used it several times a week or, more likely, several times a day. I did the initial training in 2012, when the system changed. For what it is worth, I think that it is a very good system. Therefore, I might be able to ask some helpful questions on it.

Cabinet secretary, you have spoken a wee bit about this, but do you accept that it is not just the LS/CMI system that is used and that there are a range of risk assessment tools? Perhaps to put members at ease, I point out that you would not just use the LS/CMI system and say, "Computer says yes." Has that point been made to you when you have been speaking to people?

Keith Brown: Yes. Last week, during the statement, I read out the different categories of professionals who consider cases. As you will know better than any of us, Mr MacGregor, a whole list of experts examine risk management, and the LS/CMI is one tool in which to do that.

Katy Clark queried whether we have asked for a breakdown of the offences. We have not. We could do that—and I will look into that—but the simple fact is that the individual social workers and other professionals involved know exactly what the offences are. They are the ones who apply professional judgment. The fact that they do that, with other experts to help them, is the most valuable part of the system.

I have made the point a number of times—although it seems to be lost sometimes—that it is important to realise that the LS/CMI is one part of the system and that other tools are used in addition to it when it comes to sexual and high-risk offending.

Fulton MacGregor: Have all the cases that you identified and have been working through been subject to the professional override that you talked about in the chamber last week? I will come back to that issue. Was the level of risk lowered from what the LS/CMI said in all of those cases? Do you have that information?

Catriona Dalrymple: Are you asking about the clinical override?

Fulton MacGregor: Yes.

Catriona Dalrymple: We have confirmed that the risk level has changed in both directions in those cases. The clinical override had already been applied in a number of those cases but not in all of them.

Fulton MacGregor: That is the point that I hoped to make. I felt that, last week, some of the questions implied that the situation was about the clinical override bringing down the risk to that in the LS/CMI. However, it is as likely, if not more likely, that, if the LS/CMI indicates low risk but professional judgment suggests higher risk, a higher risk is put in. Do you accept that point, cabinet secretary?

Keith Brown: Last week, I gave the example of the issue that we have with the alcohol assessment, whereby the lower score that might be justified by somebody moving away from alcohol addiction might not have been captured.

The professional override—I say this as a layperson and I am sure that Cat Dalrymple will correct me if I am wrong—has now been applied again to 285 cases. The experts involved have looked at those 285 live cases and said that there are no public protection issues arising from them. As others have urged us to do, we now need to go back and look at previous cases. If 285 out of 285 cases have come back with no issues, that is a pretty good indicator of things. However, we accept that we must look at previous cases is in the interests of public reassurance.

Catriona Dalrymple: One of the strengths of the literature on the LS/CMI tool in comparison to all the other risk assessment tools that are available is that professional judgment and the override facility are available.

Fulton MacGregor: I agree that the override function is an important part of the LS/CMI. Do the cabinet secretary and his officials accept that the process for using the override is robust? I do not want anybody to think that it is a case of an individual social worker or other worker applying an override and that is it. In most cases, the matter needs to go through several levels of management. The higher-up management will have a higher level of experience. You will have seen from the forms that are completed that a narrative around the justification for the decision in either direction is needed. Will the cabinet secretary join me in offering that reassurance?

Keith Brown: I was aware of some of that but not as aware as you are of the detail. The system provides further reassurance. As you say, it is not the case that something is taken from one computer system and drives the whole process. Professional judgment should not be rushed past. It is an important part of the system, if not the most important part. As you say, that does not involve just one professional. The decision is checked again by others to ensure that there is nothing that should be questioned. It is a robust system.

Obviously, we regret the two issues that we have had with the IT system. We must and will learn from that. There will be an on-going process with the providers to ensure that we try to cover that in future and make the risk assessment system as robust as we can. It is and has been robust. The two issues with the IT system have given us concerns, which we have addressed, and I have said that I will come back to Parliament. However, we want to have the most robust system possible.

One feature of the Scottish justice system is that it has more people on remand and in prison than is the case in many other systems. Given that, we could be accused of being risk averse. However, we must have in place a proper system. We should be accountable for anything that has not worked as it should and for ensuring that we get things remedied as quickly as possible. That is what we are trying to do.

Fulton MacGregor: I hope that I have been able to use my experience on the matter to ask the cabinet secretary some questions that would be helpful in reassuring the public. I will now ask my most challenging question.

I return to the issue of training. There have been question marks over people's confidence in using the override and their professional judgment. That

is why it has that level of management experience around it that I mentioned. Having spoken to former colleagues, I am aware that it is likely that people's confidence has been impacted by what has happened. What steps is the Government likely to take to support people in the profession to bounce back from the situation, feel confident and not end up having more work to do as they try to make risk assessment decisions? Are there funding and resource issues to consider, too? There will be a confidence issue now.

Keith Brown: I briefly touched on the point about funding last week. We have made it clear that we are willing to respond to any request for financial support that derives from a need for more people and resources to look at the matter.

There are a number of levels to rebuilding people's confidence. One relates to the IT system itself. We will engage with IT people and others to ensure that the system is as it should be. Beyond that, as a number of members have suggested, we need to go back to closed cases and ensure that the system operated as it should have done despite the IT issues. Those two things should help to provide confidence.

We are also taking the opportunity to see whether we can make further improvements to the system. We should do that at any point but this seems the right point at which to do that.

Rona Mackay: I have a brief comment rather than a question. Having listened to the evidence and read the briefing note, I feel reassured. My initial instinct was that the decisions are largely based on the judgments of a series of professionals and were not so much about a computer. That is what I felt from the start and it has been confirmed, so I am reassured.

The Convener: In the spirit of timekeeping, we will bring the matter to a close. I apologise once again for my sloppy convenership in forgetting to bring you in, Fulton, and for not allowing you to make your opening statement, cabinet secretary. You are, of course, welcome to make any additional final comments now or share information with the committee in due course. Finally, I ask for reassurance that the committee will be kept updated on the on-going review.

Keith Brown: I am happy to give that assurance. It is an on-going process, as you said, convener, so it might be worth providing more than one update as we go through it. However, we will make sure that the committee is kept informed.

The Convener: That is perfect. Thank you, cabinet secretary, and Ms Dalrymple.

I bring the public part of the meeting to a close. We now move into private.

13:29

Meeting continued in private until 13:51.

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