OFFICIAL REPORT
AITHISG OIFIGEIL

Criminal Justice Committee

Wednesday 1 February 2023

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 1 February 2023

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CRIMINAL JUSTICE COMMITTEE
4th Meeting 2023, Session 6

CONVENER

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

DEPUTY CONVENER

*Russell Findlay (West Scotland) (Con)

COMMITTEE MEMBERS

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

*attended

THE FOLLOWING ALSO PARTICIPATED:

Keith Brown (Cabinet Secretary for Justice and Veterans)
Philip Lamont (Scottish Government)
Jennifer Stoddart (Scottish Government)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Criminal Justice Committee

Wednesday 1 February 2023

[The Convener opened the meeting at 10:30]

Bail and Release from Custody (Scotland) Bill: Stage 1

The Convener (Audrey Nicoll): A very good morning and welcome to the fourth meeting of the Criminal Justice Committee in 2023. We have apologies from Pauline McNeill and Katy Clark.

Before we begin, I pay tribute to firefighter Barry Martin, who has sadly died following the tragic fire at the Jenners store in Edinburgh. On behalf of all members of the Criminal Justice Committee, I extend our deepest condolences to Barry's family, his friends and all his colleagues in the Scottish Fire and Rescue Service. We know that he will be greatly missed.

Our first item of business is an oral evidence session on the Bail and Release from Custody (Scotland) Bill. We are joined by the Cabinet Secretary for Justice and Veterans and his officials. I welcome the cabinet secretary. His officials are joining us online, and I welcome Jennifer Stoddart, community justice division; Philip Lamont, criminal justice division; Linsay Mackay, criminal justice division; Ruth Swanson, legal directorate; and Jamie MacQueen, legal directorate. They are all with the Scottish Government. I refer members to papers 1 and 2. I intend to allow up to 90 minutes for this session. I invite the cabinet secretary to make a short opening statement, and then we will move to questions.

The Cabinet Secretary for Justice and Veterans (Keith Brown): Thank you very much, convener. I echo your remarks about Barry, the firefighter who has sadly died. The Cabinet recorded its condolences to the family and I think that the First Minister has written to the family. The Minister for Community Safety, who has responsibility for the fire service, has written to the fire service to express the Government's condolences. It demonstrates how much we rely on people in such very difficult circumstances.

The bill's provisions seek to reduce crime and reoffending. That is the best way to keep victims and our wider communities safe. The bill does that by focusing on two critical parts of the justice system: the point at which bail and remand decisions are first made by the court, and release from prison.

Reducing the use of remand is an explicit call that all members of this committee made in the action plan that you agreed and sent to the Scottish Government. If you think back, you will remember that in the debate that we had in the Parliament last year, all parties demanded a reduction in the number of people held on remand. The bill responds to that call for action, which echoes calls from many others and recognises the damaging impact of remand. Remand removes people from their homes, families, jobs and communities. Remember, at that stage, they may be innocent of the crime with which they are charged. We have to remember that they have not been convicted of a crime but only accused of an offence.

From a victim safety perspective, Professor Fergus McNeill described the issue as follows:

> "Imprisonment, whether it is for remand or, in particular, short sentences, is not a magic box that removes or eliminates risk and keeps us safe. Imprisonment is actually more likely to serve as an incubator of risk, so it stores up problems of harm that might come later."—[*Official Report, Criminal Justice Committee*, 11 January 2023; c 23.]

Obviously, those downsides can be incurred even if the person turns out to have been innocent of the crime with which they are charged.

The challenge that we all face is: if the proposals in the bill are not your chosen proposals to reduce remand, what are those proposals? At the heart of the bail reforms in the bill lies an absolute commitment to individual decision making by the court, aligned to public safety, including victim safety, and the recognition that remand should, as much as possible, be a last resort.

The ambitions of protecting public safety and using remand as a last resort can coexist. Indeed, in the evidence that you have heard from Professor McNeill and others, they complement each other. Remand will continue to be needed and the new bail test explicitly recognises that. There are occasions where remand is necessary to protect public safety and victim safety; again, the new bail test allows for that. There are occasions where remand is necessary to protect the integrity of the criminal court process to ensure justice can be delivered; again, the proposed bail test allows for that. Those two examples are situations where remand can and should be used as a last resort.

For people who do not pose a risk to public and victim safety, or who do not threaten the delivery of justice in a case, there has to be a better way to support them in their communities, including supporting them to turn up at court for their trial. The bill and the new bail test are ways in which the Government is responding to that call for action, but should be viewed as part of a wider

programme of work that is already under way. That work includes increased investment in bail assessment and supervision services, the introduction and roll-out of electronically monitored bail and action to reduce the court backlogs, which have reduced by at least 13,000 since last January.

The bill proposes a more prescriptive bail test, which some witnesses mentioned during your evidence sessions. I say up front that it is prescriptive, but it is prescriptive with a purpose; namely, to ensure that remand is used only as a last resort. Where public and victim safety requires remand, or where the delivery of justice in a case requires remand, the bail test allows the court to use remand.

The committee heard a range of views about the proposed removal of section 23D of the Criminal Procedure (Scotland) Act 1995. I have listened to some of those sessions and read the *Official Reports* of them. Section 23D is the current restriction on bail for certain accused persons. The bill proposes to remove section 23D for one simple reason: so that in all cases the same core bail test, with public safety at its heart, applies. You will have heard that there has been support for that simplification measure from those who use bail law. However, I understand why some concerns have been expressed. I have no doubt that that issue will be discussed this morning.

The words "public safety" have been part of bail law since 2007. There was whole-hearted support for that step at the time, including from, I think, Pauline McNeill, who is not here today. Nobody indicated at that time the need for a statutory definition. I am not aware of any cases where the lack of a statutory definition has caused an issue. That is the context of the debate that members have been having.

I will explain a little bit about the Government's approach. The bill does not include a statutory definition of "public safety", but there is a definition, which is the ordinary meaning of the words. In legislation, where the ordinary meaning of words is meant to apply, it is common practice not to include statutory definitions. The Oxford English Dictionary meaning of the word "safety" is:

> "The state of being protected from or guarded against hurt or injury; freedom from danger".

Therefore, offences, the nature of which pose a risk to safety, are those that threaten to cause hurt or injury, or which present a danger.

The word "public" has been held in case law as meaning either the public in general or a section of the public, as the context requires. Therefore, the ordinary-meaning definitions reflect the policy intention of the meaning of the phrase "public safety" in the bill. As such, we have to ask what benefit is to be gained by adding a statutory definition. It is worth pointing out that including a statutory definition is not without risk. There may be unintended consequences if the definition is limited unnecessarily. However, as with all aspects of the bill, I would very much welcome the committee's views on that matter in the stage 1 report. If the committee takes the view that a statutory definition would be beneficial, I would be interested in its thoughts on what a statutory definition should include, and whether, specifically, it needs to be different to the ordinary meaning of the words "public safety".

I now turn briefly to part 2 of the bill, on release from prison. Ensuring that those leaving custody have their basic needs met on release is critical for a safe transition back into the community. It reduces the risk of reoffending, which is, surely, what we are all trying to achieve. It results in less crime—which, again, is something that we all want—and fewer victims, and it provides for safer communities. That is why the bill includes reforms to improve pre-release planning and the throughcare support that is provided to individuals on release from prison. It recognises that a range of universal services have a role to play. I am sure that we all agree that those principles are important.

Lastly, I touch briefly on resources, particularly the role of justice social work, which has been a focus of your deliberations so far. The bill recognises the critical role that justice social work plays in supporting people and keeping our communities safe. We recognise that the enhanced role of justice social workers set out in the bill carries resource implications. Those were set out in the financial memorandum, which was informed by engagement with Social Work Scotland and the Convention of Scottish Local Authorities.

I do not have to tell anyone here, I hope, that the financial landscape is extremely challenging, and we will need to continue to make difficult choices. Despite those challenges, we have continued to protect the community justice budget, such that, in 2023-24, the Scottish Government intends to invest a total of £134 million in community justice services, including £123 million for local authorities. We will continue to engage with Social Work Scotland and COSLA on the future resourcing requirements of the bill.

The Convener: Thank you very much, indeed, cabinet secretary. Some of those issues, particularly your last point on resourcing, will certainly be the subject of members' questions.

Members, in the spirit of having a smooth session, please let us know which official you would like to bring in. That will allow us to press the right button and bring them in quickly.

My initial question touches on why changes should be made to the law on bail at all. That has come up during our evidence sessions. Are there no other options that could be considered that would still meet the objective of reducing the remand population? I note that the policy memorandum refers to the Criminal Justice Committee's report "Judged on Progress", in which we called for a reduction in the overall numbers held on remand and for alternative approaches to be considered. However, I think that it was the judiciary that set out that meaningful change in how custody is used would require specific legislative reform, and that is included in the policy memorandum. I note also that the Scottish Government consultation on the bill indicated that just under two thirds of respondents agreed that judges should refuse bail only where there are public safety grounds for doing so.

If we are seeking to reduce the remand population, can you outline a bit more about how the status of bail that is placed on somebody can be changed or improved so that it is more effective, as a community-based measure, in supporting both the person who is subject to that bail status and the wider public, particularly victims?

Keith Brown: Thanks, convener. As you said, many respondents pointed to the need for legislation. I cannot remember which one, but one of your academic contributors was very clear on that. A member of the judiciary, who was also speaking for the Howard League, mentioned the need for legislation.

You asked how the legislation would improve things, and, if I am correct, your point is about how people can have more faith in bail supervision. The first thing is to get it right with the people who are given bail, so that there is public confidence that the interests of victims and others have been considered. By others we might mean juries, where there might be a threat of jury tampering, intimidation of witnesses and so on. If we can get that right, it must mean that the ability to be more effective on bail management starts off on the right premise.

Beyond that, however, shrieval or judicial confidence in bail supervision has not been there. Over the past year, we have put more money towards improving supervision and we now have 30 local authorities providing bail supervision, with the other two scheduled to come on stream. In addition, the bench may consider electronic monitoring and have confidence in that. Twenty-one local authorities are providing electronic monitoring, and the intention is that that will be rolled out across the board. Of course, there are technological advances and as yet untapped existing potential for that to go further through a much more nuanced use of electronic monitoring, whether it is confined to a particular location or used to monitor whether a person is taking drugs or alcohol that could exacerbate things. Providing resource for that can help matters.

10:45

Going back to the input, if you like—who is on bail—the provisions for justice social work reports that we have proposed in the bill will not only give the court a better basis on which to decide whether to grant bail but will better inform those who undertake the bail supervision about the points of concern and what has to be looked after. I think that those things together will make for more effective bail supervision and will give more confidence to the bench in taking those decisions.

The Convener: Thank you. I know that members will probably ask more questions about the resourcing side of things. I would like to follow up with a practical question about the broader role of criminal justice social work that is outlined in the bill and how it informs court decision making. So far, we have received a lot of witness evidence that indicates support for the proposal. However, there is concern about its practical implications; in particular, resourcing and the time issue that can come into play around that. For example, the judiciary articulated concern about the

"unnecessary detention of individuals while information is gathered".

From that, I assume that there is the potential for somebody to be remanded, albeit for perhaps one day, while information is gathered. That could be a particular challenge in rural areas, for example. Can you outline a wee bit more about how that might be addressed?

Keith Brown: As many witnesses have said, there is no question but that there will be a resource demand, especially on justice social work. The bill's ambitions have to be met by that resource provision being in place. It will take time to make sure that that happens in advance of the bill's commencement. We must minimise any delay. That is the intention and, of course, it is the Government's responsibility, along with others, to make sure that those things are in place.

Let us say, however, that there was a delay in receiving a justice social work report—for a case for which there would not previously have been a report—and that that person could then get bail. That delay of hours—possibly a day—must be compared with the number of days, weeks or months, even, that somebody might be on remand. There is a substantial benefit to be had there. I have given you some of the figures already. We have said that we would put more money in this year—I think that it is an extra £15

million, split into two chunks of £11.8 million and £3.2 million—for the specific purpose of increasing our bail supervision capacity. That is the way in which we intend to meet it, and we are not at all denying that it will present a resource demand.

The Convener: Thank you. There will be more questions on that in due course. Collette, you would like to come in, followed by Fulton.

Collette Stevenson (East Kilbride) (SNP): I will pick up on resources. Professor Fergus McNeill mentioned the justice social work presence in each of the sheriffdoms. We have taken evidence that suggests that it is not always present and that there is a lack of uniformity across sheriff courts. Are you looking at those resources in the bill? How will you tackle that?

Keith Brown: Yes. We are obliged to, in any event, in terms of the financial memorandum that will accompany the bill. In addition to what I have just mentioned, we have provided £53 million, I think, in the current year to try to reduce backlog and make other provisions that will impact in that area to try to make it a more effective service to the courts, should they wish to use it. The fact is that the current provision—just to state the obvious and make the point that you have made—does not require the level of activity or presence from justice social work that will be required by the bill. Necessarily, justice social work will have to be present to a much greater extent. It will have to step up to do those things and make reports as quickly as it is able to do.

On the one hand, justice social work will have to step up, and, on the other, the Government will have to find the resources to make sure that it is able to do that. That is recognised and I mentioned the figures that we put in. I mentioned the fact that the bill will have to be accompanied by the financial memorandum, so we understand that challenge.

Collette Stevenson: On recording the reasons for refusing bail, are you concerned that the parties in a case are not aware of why bail has been refused? What about the resource element of recording? Is the intended purpose of recording to ensure that we can carry out research on bail and remand? It would be great if you could elaborate on that.

Keith Brown: That is an interesting part of the bill, because, as you hinted, what you will get from recording is a seam of really rich information that others can use, which is the court's statement on why bail was not granted. That will lead, over time, to greater refinement of those decisions. Some of the academic witnesses from whom you heard also said that they think that it will be a rich source of information in an area where such information is currently very limited. That, perhaps, is the main benefit. I know that it is another process for the court to go through, but it will be extremely productive. I wonder whether—I will try to get the right official—Philip Lamont wants to comment on that. Yes, he has put his hand up; I have the right person.

Philip Lamont (Scottish Government): Thank you, cabinet secretary. The only thing that I will add is on resources. There will be an impact on the Scottish Courts and Tribunals Service because it will have to adjust its information technology systems so that the information can be recorded, but we think that that will be manageable through phased implementation. As the cabinet secretary said, the aim is to increase the collective understanding of the Scottish Government, the Parliament and others of why remand is used. One of the main challenges that we and, I think, the committee have had in understanding how remand is used is the dearth of data on when it is used. One-off pieces of research have been done in recent years, but, over time, this will develop into a rich source of information. That is the aim of it.

Collette Stevenson: Okay. Thank you.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Good morning to the cabinet secretary and his team. My question, similar to Collette Stevenson's, is about the resourcing of criminal justice social work. You virtually answered the first part of my question in response to Collette, but how do you see it working? Will the Government give direction or guidance to local authorities, or potentially in the future to the national care service, about how the teams could be developed? Just now, every area has a community justice team that deals with community payback orders and so on, and most areas have some sort of court team that is usually pretty small, with Glasgow as something of an exception. Will the court teams get the resources? How can we ensure that the court teams get resources? Is that how you see it working?

Keith Brown: As Philip Lamont said, there will be demand—you are right—for justice social work services to step up. However, there is also demand on the court service, as has been described. I have mentioned the steps that we are taking to improve justice social work and the relatively uneven provision across the country, and we have seen improvements over the past year. Those have been achieved by providing additional resource. We have been involved in discussions on the bill with local authorities and Social Work Scotland. As ever, it will be for local authorities to decide how to deploy the resources that they have, but, at the bottom of this, there will be the statutory requirement for the court to have the services, and we will have to meet that. Our task is

to make sure that we build on the additional resources that we have already provided to make sure that justice social work has the resources to do that across the country. That is the challenge.

As I said, we currently invest a total of £134 million in community justice services, including £123 million to local authorities. We have made a specific investment this year of £3.2 million to support bail assessment and supervision services. That is having an impact, as I said, in more local authorities. I cannot remember what we started from at the beginning of the year, but the service is now available in 30 authorities. Gearing up has already started. We know that it has further to go and that we have to provide the resourcing for it, but that will be detailed in a financial memorandum and will be a result of discussions that we will have with COSLA and Social Work Scotland.

Fulton MacGregor: From my experience, I think that this could work if we had beefed-up, for want of a better word, court social work teams across the country so that they mirrored with bail supervision what community justice teams do with community payback orders. That could be really beneficial across the whole system.

We have also heard quite a lot of evidence, as you will know, from witnesses who are quite supportive of the aims and principles of the bill. The committee's adviser believes that the bill is a good way to bring about the policy memorandum. It is all very positive, but a lot of it—everybody has come back to this—will be about resourcing, and not just the Government giving those resources but about those coming in. If and when the bill is implemented, do you see bail supervision teams being much more robust and being able to do a lot more work with individuals, meaning that the courts will have a lot more faith in them?

Keith Brown: You correctly identify the two sides to the issue. On the one hand, we need to get effective bail supervision services in place. We had an underlying concern that we did not have that level of consistency across the country, so we have put in place measures and resources over the past year to make sure that we do. The other side of it—this is the critical side for some of the intentions behind the bill—is to make sure that the courts have confidence in that supervision. I am not sure that I saw that in the evidence that the committee has heard, but I am happy to acknowledge the fact that there is variability—at least, there has been hitherto—in the confidence that different sheriffs have, depending on where they are in the country, about how effective bail supervision is. If they are confident that bail supervision is there, that has to lead to a more proactive approach from the courts where they say, "We know that this is a real and safe alternative, so it is the route we will go down".

Fulton MacGregor: I have just one more question, if that is all right?

The Convener: I will move things on and then come back to you, Fulton.

Fulton MacGregor: Yes, that is okay.

Russell Findlay (West Scotland) (Con): I echo the convener's words about the tragic loss of the life of firefighter Barry Martin.

I will ask about resources. We heard from your ministerial colleague Kevin Stewart that we will not know until late 2024 whether criminal justice social workers will be part of the national care service. Do you have a view on whether they should be part of it, and do you have a view on the impact that that might have on the bill?

Keith Brown: I do not think that it will have an impact on the bill as it goes through, given the timescale that you mentioned. I understand the many arguments for and against, but one of the crucial arguments for their inclusion in the NCS is the fact that Social Work Scotland believes that it is very important that the entire profession is under the one umbrella. However, there is a difference. I know that it is probably not helpful to give both sides of the argument—and there are a lot of arguments on both sides—but the other side to it is that, compared with the work of other social workers, justice social work is of a different nature with respect to court orders and other things.

It seems to me, in that context, that the right thing to do is to build up a body of evidence, which is what we are doing, to support whatever decision is finally made. At the earlier stages, when the Government was discussing the national care service, I was keen that we should build up the evidence first. The purpose of doing that is to see how effective we can make the inclusion of justice social workers if they are to become part of the NCS. However, if that body of evidence comes back showing that that inclusion is not the most effective way to do it, we are willing to listen. That is the right way to do it. Any decisions should be based on the best possible evidence.

Was there another aspect to your question, which I have forgotten?

11:00

Russell Findlay: No, I think that you have covered it, thank you.

I will go back to the financial elements. We got additional written evidence from South Lanarkshire Council suggesting that, by its calculation, the additional burden on its justice social workers would come in at £700,000 a year. However, the council thinks that that is an underestimate, because the amount is based on dated figures

from the Scottish Courts and Tribunals Service. Given that it is just one of 32 local authorities, you can only imagine that the financial burden could be quite significant across Scotland. Is the financial memorandum realistic? In the light of those concerns, does it need to be revisited?

Keith Brown: We always listen to local authorities. Interestingly—I think that I am right in saying this—the COSLA spokesperson with whom we primarily carry out such discussions is also from South Lanarkshire Council. Of course we listen to local authorities. It will often be the case that we have different views, but we have to evidence those views.

Things should also be seen in the light of the increased investment that has already been made. This year, we have done something that is important but not always easy to achieve. We do not want, at the same time as we encourage some authorities to get off the ground services that they are not providing, to be punishing authorities that are providing those services. We have to help them to improve their services as well. We did that effectively with a split of, I think, £11.8 million and £3.2 million for different purposes.

We have therefore funded those things already—we are not going from a standing start—but we will, of course, continue to have discussions with COSLA and Social Work Scotland. That is part of the general process of finding out what the exact resource requirements will be. I do not think that this committee, or any other committee of the Parliament, gets through many evidence sessions in which the issue of resource does not come up, and matters are often contested. However, we will try to reach an agreement with COSLA in that regard.

Russell Findlay: South Lanarkshire Council makes an interesting suggestion that, given the additional burden on it and its social work department, funding should be transferred from the Scottish Prison Service to local authorities. I do not know whether the council means that the Prison Service would pay for the services that the council would provide, or whether the Government would be required to reduce Scottish Prison Service funding—which, I am sure, Teresa Medhurst would have strong views on—and divert it to local authorities. Do you have any thoughts on that? Is that something that you might explore or support?

Keith Brown: No. We are careful not to make any projections about a reduction in the remand population as a result of the bill, but what might underlie that point is that, if you see a reduction in the prison population, resourcing will be made slightly easier for the Prison Service. Perhaps the council's point is that successful implementation of the bill might lead to savings that might help it get further resources. It is a reasonable observation for the council to make, but, no, we are not looking to cut the prison budget to fund any of this.

Russell Findlay: Thank you.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Good morning, cabinet secretary. I will ask you, as I have asked practically all our witnesses on the bill, about section 23D of the Criminal Procedure (Scotland) Act 1995. You spoke about that in your opening statement. I was having difficulty understanding the support for the removal of that section, but after our session with our adviser earlier this morning, I am much clearer about it. He described section 23D as a kind of red flag that is used as a marker. He also said that if bail was refused under sections 23B and 23C, section 23D would be almost redundant.

I put it to our adviser that the message going out to women's organisations, and to domestic abuse victims in particular, was not a good one and that their perception of the removal of that section would not be good. You spoke about one safety test being applied with the removal of section 23D. Would one safety test apply to the unique nature of domestic abuse, where there is individual risk and not necessarily public risk? I wish to reflect the concerns that there are around the issue.

Keith Brown: I am not sure that I can be more articulate on that point than many of your witnesses have been. You have heard from the Law Society of Scotland, the Faculty of Advocates and even Sheriff Mackie and others who do not believe that that was a good measure. They were not entirely certain why that section was introduced in 2007, and I think that I am right in saying that they believed that, to some extent, it fettered the court when it was trying to make a judgment. You are right, however, to put your finger on that being a potential concern.

Public safety will be at the heart of that test. Although it will be for the courts to decide, virtually anybody who was refused bail under section 23D would likely be refused bail under the new test. That will bring more consistency and specifically includes the concept of victim safety, which is important to your point about victims of domestic abuse being a factor when making a determination on a person's entitlement to bail. It goes further in saying that any assessment of the risks should include physical and psychological harm to the victim.

Removing section 23D of the Criminal Procedure (Scotland) Act 1995 does not remove the protection for victims as a new bail test will be applied in every case, and repeal does not mean that those accused of serious offences who pose a risk to public safety will be admitted to bail under the new test. That is because the offences that

section 23D covers—sexual offences, domestic abuse offences and violent offences—all relate to public safety, which includes complainer safety. As such, I think that accused persons who are remanded under section 23D at present would, in many cases, also be remanded under the proposed new bail test. That bail test also has essential considerations to justify remand on public safety grounds where relevant. That will help to keep the complainer safe from harm.

As I said, although this is not directly related to the categories that you referred to, the test goes further in terms of people who might prejudice the process through the intimidation of witnesses, complainers or even potential juries.

I hope that that reassures the member. We are working with different groups to ensure that that reassurance is provided.

Rona Mackay: That is important. It is about getting out the message of reassurance because, at first glance, the perception is that the red flag that I mentioned and the safety net are being removed, but, when you drill down into it, you see that that is not the case. That is helpful. Thank you very much.

The Convener: I will bring in Jamie Greene in a moment. First, I have a question on sentencing in relation to a person who is on bail but is subject to a curfew condition. I am interested in how you would respond to the argument that time spent on bail that is subject to a curfew condition should not be a substitute for time spent in prison as part of a custodial sentence.

Keith Brown: The other side of the points that Rona Mackay rightly made is the rights argument for everybody under the system. Whether we like it or not, everybody has rights. Those are underpinned by the European convention on human rights and other legislation, and this Parliament and its legislation are obliged to follow them.

First of all, on the issue of remand in general, it is important to say that, by putting someone on remand, you are fundamentally affecting someone's rights. To state the obvious point, you are locking someone up when they have not yet been convicted of a crime. That is why we think that that should be done only in the circumstances that we have mentioned. Also, if you put somebody on bail and subject them to electronic monitoring, you are impacting on and curtailing their rights in a number of ways, such as their right to freedom of movement and their right not to be monitored by the state. We need to recognise that. Leaving the courts with the discretion to recognise that is important, and it is done in other jurisdictions, so I am supportive of that being taken into account.

Jamie Greene (West Scotland) (Con): Good morning, cabinet secretary. I would like to ask a few perhaps more philosophical questions about the nature of the proposed legislation. Obviously, the bill comes in two parts. The first deals with the issue of bail and the parameters around the courts' decisions, and the second deals with release from custody.

You said in your opening statement that the intention behind the bill is twofold: to reduce crime and to reduce reoffending. Will you explain which bit of part 1 of the bill around narrowing the conditions for bail and remand will reduce crime and reoffending?

Keith Brown: The quote that I read out at the start from Professor McNeill is useful in this philosophical discussion. He talked about the idea of remanding somebody reducing or eliminating the risk—I forget the exact quote. I think, and he said, that there is an increased risk sometimes. If you imprison somebody, especially in situations where they are then found to be innocent of the crime with which they have been charged, you increase risk. If somebody is put into the prison system—I know that we would all agree that, sometimes, currently, because of the pandemic, that occurs for longer periods than we would otherwise like to see; sometimes, that might be for months—you are increasing risk through that process. It is not recidivism in that case, because they have not committed an offence.

Bear in mind that, these days, since the presumption against short sentences was passed, a far greater proportion of the prison population in Scotland comprises violent and sexual offenders. If people, including those who are then found to be innocent, are being incarcerated with those offenders, there is bound to be a risk attached to that. That is what Professor McNeill was saying. That is one area, at least, where the increased risk comes in.

Jamie Greene: Is what you have just said, by its very nature, vindication that judges and sheriffs are sending people to prison on remand because of the offences that they are in front of the courts for? There is a perception—the Government is stating—that we have a high remand population. As you know, the committee previously criticised the Government for that. Is that because too many people are being sent to remand in the first place, or are they spending too long on remand? Those are two very different things, and they are dealt with very differently. The bill seems to address the latter by implying that too many people are being sent to prison on remand, rather than by addressing, perhaps, the real issue, which is not that there too many people being sent to prison on remand but that they are there for too long.

Keith Brown: The length of time on remand, as I have just conceded, has been exacerbated by the pandemic. That is true of every jurisdiction. The concerns about the high levels of remand in Scotland, however, predate the pandemic. The 2018 report of this committee's predecessor said exactly that, but it has been said many times.

Compared with England and Wales, we have a higher remand population, although theirs is growing fast. There is now a higher prison population in England than we have in Scotland, for the first time in many years. They have seen a huge increase, and their remand population is at a 50-year high, although that is still not as high as the remand population in Scotland.

We are sending more people to remand and we are trying to deal with that. However, we are also dealing with the other point that you rightly make about how long people are spending on remand. I mentioned the reduction in the backlog, although I concede that that is mainly on the summary side rather than on the solemn side. Over the past year, that has been reduced by more than 13,000—it is down from around 44,000 to around 30,000—which is a fantastic achievement. We are tackling the backlog, but we are not blind to the fact that—I have just put this argument to you—being remanded can have a negative effect on risk and being remanded for longer increases that risk. I concede that point and we are trying to deal with it.

Jamie Greene: Okay. Let me set out what I do not understand. The intention behind the bill is to reduce the remand population by sending fewer people to prison in the first place. There has been a debate among the judiciary as to whether the bill will meet its objectives. There seems to be a school of thought that remand hearings will just progress as they currently do, because of the lack of clarity around the changes to public safety issues. The Government, however, seems to think that the bill will lead to a reduction in the numbers.

Back in 2015, the remand prison population in Scotland was just shy of 20 per cent. Over the past seven years, that has increased to nearly 30 per cent, which is probably where it sits at the moment. What has driven that? What, over the past seven years, has resulted in our remand population rocketing? What legislative changes have taken place that we are trying to reverse? Why is legislation needed to address what seems to be quite a short-term spike in the increase in the remand population when, historically, it was there or thereabouts and, in fact, is favourably comparable to England and Wales as far back as 2000?

At the moment, the rate in Scotland still falls considerably short of the rate in many other comparatively small countries with a similar population, such as Denmark, Sweden and Norway, which have remand populations of 30 per cent, 39 per cent and 25 per cent. Those figures are not low either. I am trying to get my head around why the Government is using legislation to address what seems to me to be a very marked but short-term increase.

11:15

Keith Brown: Obviously, it is easier for me to talk about the time when I have had responsibility in this area, but I do not think that it is a short-term increase or that the concern is just a recent one. I have mentioned 2018. I could read out the quotes from various members—

Jamie Greene: I know that you have quotes, but the statistics show that, in 2000, the remand population was 16 per cent; in 2005, it was 17 per cent; five years later, it was 18 per cent; and five years after that, it was 19 per cent. So, the number was creeping up—I admit, by around 1 per cent every five years—but, by 2022, it jumped to nearly 30 per cent. What happened?

Keith Brown: The pandemic is a major factor in that. Obviously, with the court system having to operate on an extremely restricted basis, that very large increase happened, which other jurisdictions have seen as well.

Many of your witnesses have said quite explicitly that they believe, from their expert position, that legislation is required to change things. If you look back into the history of the issue, you will see that there have been a number of attempts to try—almost by persuasion and by respecting the independence of the courts—to achieve the reduction in the number of people on remand for the best of reasons, but that those has not been effective. We believe that legislation is required.

I will not read them out, but I have quotes from individual members of this committee demanding that the remand situation be dealt with. At that time, no distinction was made between legislative and non-legislative measures; members just wanted us to get on and deal with it. I said in my opening statement that, based on the information that we have, we think that legislation is how we should deal with the situation. If there are other suggestions—I have also asked individual stakeholders in the justice system for suggestions on how we can do this—please tell us.

I want to correct a couple of things. We have not said that the primary purpose of the bill is to reduce the numbers in prison. We have not made that statement. I think that there have been some indicative figures of what a reduction might look like by one of our stakeholders, but the purpose is to make sure that only the people who need to be

held in custody are held in custody. That is the primary purpose of the measures, and we think that this legislation is the best way to do that.

Jamie Greene: Is it the Government's view that the wrong people are being remanded in custody? If we look at the statistical data, the nature of offences is really enlightening. What has changed over the period that I mentioned when the remand population has seen a huge spike? The change has been to the offences for which people are held on remand. For example, the figures for those on remand for crimes of violence and for crimes of sexual violence have doubled and crimes committed by people on bail for similar offences have been markedly high. In Scotland, 40 murders and 770 attempted murders or serious assaults were committed by people who were on bail; the numbers of rapes and attempted rapes are high as well.

From what we can see, we are not sending low-level criminals to prison on remand. In fact, 1 per cent of summary cases end up on remand. It seems that high numbers of cases are being dealt with at the High Court, in those solemn cases where the offences are grave and serious. Is the Government suggesting that people who are currently on remand for those serious offences should be walking the streets? This is what I cannot get my head around.

Keith Brown: First of all, it is not for us to say whether the court system has been wrong in relation to those people who have committed serious offences while on bail. One of your expert witnesses—Philip Lamont might have the exact reference—said that around 21 per cent of prisoners did not need to be on remand.

One of the purposes of the bill is to take into account the gravity of the offence, as well as the likelihood of risk of further offending. Of course, to have a sensible estimation of the recidivism—the offending rate—of those on bail, you have to compare that with what it would be if they had served in custody. The two rates are a very useful comparison.

We think that there is a cohort, although not necessarily in relation to serious crime—as I mentioned in response to Rona Mackay, the vast majority of people who are currently remanded under section 23D are likely, for the same reasons, to be remanded in the future—that need not be put on remand.

It would be useful to hear from Philip on that as well, convener.

Philip Lamont: The cabinet secretary referred to a figure of 21 per cent. I think that that is the number of people on remand who do not then receive a custodial sentence, which, I know, the committee has been looking at. That figure was indicated to the committee by a stakeholder. Ultimately, the focus of the test is to ensure that those who need to be remanded as a last resort are remanded. The focus is on public safety, including victim safety, and prejudice to justice.

On the question of serious offences, clearly, violent offences, sexual offences and serious domestic abuse offences would be caught by that test. The Government has not predicted in the financial memorandum that there will be a particular reduction in the use of remand. It is just that the test will be more focused. As people flow through the system, the court will have to apply that focused test in the future. From that, there could be a more focused use of remand. However, it will be for the court to make that decision in each and every case, based on the cases with which it is dealing.

Keith Brown: On Philip's point, one of the criticisms that was rightly raised last year is that somebody might be on remand for a period that is longer than the sentence that they eventually receive; that somebody who was on remand and kept in custody with other criminals could be found not guilty; and that somebody on remand could receive a non-custodial sentence, meaning that we have kept them in custody for that period even though the crime for which they were convicted was judged by the courts to be deserving of a non-custodial sentence. The measure is to capture that as well.

Jamie Greene: I am happy to put this to Mr Lamont and the cabinet secretary. We heard evidence last week from David Fraser from the Scottish Courts and Tribunals Service. He said:

> "I have managed to determine the number of people who are on remand and awaiting trial in our legal system … In summary cases, only 1 per cent of people are on remand. For sheriff and jury cases, it is 12 per cent, and for High Court cases it is 27 per cent."—[*Official Report, Criminal Justice Committee*, 25 January 2023; c 33.]

That contradicts what I have just heard from Mr Lamont, who said that, by the very nature of those types of offences, those people will likely be held on remand anyway, even under the new rules. Surely that contradicts the purpose of the legislation, because you are trying to reduce the number of people held on remand who you consider do not need to be, but, at the same time, we are saying that people who commit serious offences and who should rightly be held on remand will still be held on remand. The two do not add up. Either those people will still be held on remand or we will be letting them out with bail conditions.

I am a bit confused about the purpose of the legislation. It is clear from the statistics that the lion's share of people held on remand are there through High Court cases, which are normally

quite serious cases that result in a custodial sentence.

Keith Brown: Perhaps the lion's share is not what we are looking to tackle here; it is the other part of it, if you like.

Jamie Greene: In summary cases, it is only 1 per cent. Very few people in summary cases are held on remand, which is where you would think that the bulk of it would be. If that were the case, there absolutely would be a problem, but there does not seem to be a problem.

Keith Brown: That does not necessarily relate to the nature of the crimes of which they are accused. It does to some extent; I realise that.

I am a little bit confused. What is it in the test that is proposed that does not go far enough to capture more of the people about whom you are concerned? I say that because I think that the discussion with the committee is also meant to be a bit of a dialogue. I am happy to be questioned, but we are genuinely looking for other people's ideas about this, so if there is a category of people that we are not going to capture with those proposals, I am happy to hear that.

Since you asked Philip Lamont about a contradiction in his statement, maybe we should hear from him too.

Philip Lamont: It will be for others to judge whether there was a contradiction. I will make one point about summary cases. Obviously, the volume of summary cases is much higher than that of some others, including High Court cases. There are thousands more summary cases a year, so even 1 per cent of summary cases is a significant number of people being held on remand, albeit perhaps for a relatively short period. Therefore, the undue harm that can be caused through a short period in custody, even if it is proportionately quite a small number in absolute numbers, can be significant given the volume of summary cases that go through the courts each year.

Jamie Greene: I could talk all day on this subject, but I appreciate that there are lots of other members who want to ask questions. I am happy to come back in if there is time later.

The Convener: Thank you. Okay.

Russell Findlay: In one of your answers, you spoke about philosophical issues around bail, and this question will be an attempt at a hybrid of a practical and philosophical question.

Victim Support Scotland told us in evidence that it has serious misgivings about the bill, as you will be aware. It effectively says that more bail equals more crime. The Scottish Police Federation told us that

"it's another good day for criminals".

However, the social work/academic lobbyists, to put them into one group, are largely supportive of what is being proposed. One of the contributors from that side of the argument used the phrase "a risk appetite", and that struck me as interesting. The point that they were making was—this is the philosophical part—that the public need almost to be persuaded that the risk in changing the system radically may lead to more crime on the streets and that is just a quid pro quo in terms of the benefits that you would get from not having people on remand.

Given what Jamie Greene just said about some of the serious offending that takes place by those on bail, and the inevitability that that will continue no matter what the system, do you think that the public have the appetite for that risk, and what can you do, as the cabinet secretary, to persuade people about this direction of travel? That is quite philosophical.

Keith Brown: I am just very surprised and delighted to be asked by both the Conservative members to get involved in a philosophical discussion about this, which is a pleasant change.

Russell Findlay: It is highbrow.

Keith Brown: I cannot talk to the interpretation that whichever academic you were referring to put on this. I acknowledge, though—I said this in the chamber recently—that risk is a part of the justice system. It is part of every justice system that I know of. I am happy for anybody to point to me a justice system—whether it is parole boards, courts or other parts of the system—that does not have to balance risks on a regular basis.

I acknowledge the risks that are there, but we are trying to minimise those risks. To go back to an earlier answer that I gave, you can argue that, by reducing the numbers of people who are on remand and do not necessarily need to be on remand, you are also reducing risk. There is an element of the bill that helps to reduce risk. Of course, the part that we have not really got on to so much—part 2—is also designed to substantially reduce risk. The package of proposals that we are making is designed to reduce risk. We are not asking the public to trade risks or to accept a higher level of risk. We are trying to minimise risks.

You started with quotes as if there was a dichotomy between different groups of witnesses. I have a number of quotes from Victim Support Scotland that are supportive. Kate Wallace said:

"It seems to us that one of the main purposes of the bill is that it will potentially strengthen the approach to public, complainer and victim safety."

She also said:

"Given the size of the remand population".—[*Official Report*, *Criminal Justice Committee*, 11 January 2023; c 9, 12.]

You also mentioned the police. I cannot put my hand on them just now, but there are also supportive quotes from the police about what we are doing. It is probably never going to be the case that we will get everyone to agree—that is not going to happen—or that people who do agree with it will agree with every part of it or people who disagree will disagree with every part of it. I accept that, but in the end, the purpose of Government is to show leadership, so we are putting this forward.

At this point, however, it is important to reiterate the point that I made before. Jamie Greene, I think, said in the chamber that we have to wrestle or wrangle with this issue—it might have been Pauline McNeill; forgive me if I am wrong. That is what we are doing. We are not saying that we have a monopoly on wisdom. If people have better ideas on how to do what everybody here says that they want to do, which is to reduce remand, please come forward and say, "This is the way to do it", and we are happy to look at that.

Russell Findlay: I understand that Victim Support Scotland produced considered evidence, some of which was supportive of the intent, but it remains that it believes that the outcome will be that more people being bailed equals more people committing crime. Indeed, the Scottish Police Federation's position was different in parts from what Police Scotland had to say about it. It is worth putting those views to you on the record.

11:30

The Convener: Thank you. Fulton MacGregor, do you want to come back in? If not, I will come in with a question.

Fulton MacGregor: What I was going to ask has been more or less covered. The conversation has moved on, so I am happy to leave it, convener.

The Convener: Okay. Cabinet secretary, I have a couple of questions about release planning and throughcare support for prisoners. Sections 9 and 10 of the bill seek to improve release planning and throughcare support. How will the Scottish Government ensure that relevant bodies that are involved in release planning and throughcare will be resourced and that their capacity to implement the proposed changes will be sufficient?

Keith Brown: First of all, there is the legal aspect of it whereby we will name public bodies, which will then have a legal obligation to engage in pre-release planning. I am aware of different practices across the country. In Barlinnie, there is some very good practice in a particular location on the prison estate where different bodies get involved and talk with prisoners in advance of their release. That is quite effective, but I think that it can go further. For example, if somebody who lives in the Western Isles is to be released on a Friday afternoon but that person has an addiction problem and has no house to go to, that seems to be setting somebody up to fail, in my view. The idea is that local authorities and others will be named to make sure that that planning is done before a person is released so that the person can get to where they need to go and will have the support that they need.

I will give you one example. I know that the committee went to see the new routes throughcare mentoring service in Glasgow, but I do not know whether you heard the same example as I was given. One of the chaps there said that he had been released but, by the Friday of that week, he ended up in a pub. He did not have alcohol addiction but had drug addiction, and, because he felt particularly low, that temptation was there. In that case, he was—"saved" is maybe not the right word—hugely helped by the mentoring scheme there, and that prevented that issue going any further. If that support is not there, you can see where things will end up. It has to be joined up so that transport, someone's housing options and social work support, if that is required, are covered. Those things are too hit-and-miss just now. We have to be more co-ordinated in how we do that.

Most local authorities, where they have responsibilities, are resourced to provide those services in any event. It may change some configuration, and, of course, we are always willing to look at resource implications for it. It might be useful to hear from—I hope that I can get a 100 per cent success rate in choosing the correct official—Jennifer Stoddart in answering this point. The idea is to make sure that it is joined up across the country. I think—I hope—that it is uncontentious to say that we have to better prepare people if we are to reduce crime in future. If I have missed anything, Jennifer can perhaps add to it, convener, if that is all right.

Jennifer Stoddart (Scottish Government): I do not have a huge amount to add to what the cabinet secretary said, other than to confirm that that is the intention, particularly in section 9. I know that the chief inspector of prisons, when she gave her evidence, compared it to hospital discharge planning, which is what we were thinking of when we developed the provision. That planning should start at a much earlier point in someone's sentence—earlier than sometimes happens—so that you do not end up in the scenario that the cabinet secretary described where people are released with a list of appointments that is very difficult for them to navigate. Increasingly, because of this provision,

along with other supports that are put in place and the release planning that SPS does, that person should leave with clarity about what their support package needs to look like. Also, where SPS identifies those needs, the person will be able to engage with those universal services at an earlier point.

Keith Brown: May I add a point, convener? This is probably obvious to committee members, but when I went to Perth prison and saw some people in a social space where prisoners could gather—I am not sure that it was a recovery cafe—the point was made to me that being in prison was the least chaotic period of their lives. The scariness involved in trying to cope with going back into society is huge. That is partly what this is about.

I make it absolutely clear that I am not drawing any analogy between veterans and people who have been in prison, but I have been making the argument for a number of years with the Ministry of Defence that, on day 1 of somebody joining the armed forces, they should be given the right to sign up to their local authority's housing scheme so that they can get points for housing for when they eventually need it, even if they are not the slightest bit interested.

Similarly, we still have not cracked getting the MOD to give the health records of individuals who are leaving the armed forces directly to a general practitioner to make sure that the process is seamless and that a GP is informed about what a person has been through when they get to them. At the start of the process but especially towards the end, if people are more likely to have a rounded support package when they go into society, there is less chance of reoffending.

The Convener: Absolutely. I agree with all that, and it brings me nicely to a follow-up question that has been raised in committee and was raised recently when I was on a visit to HMP Grampian. People there spoke about how planning for release should start on the day that somebody enters prison. One scenario that is difficult for prisons, families and stakeholders who support an individual is unplanned or unanticipated release from remand. We are grappling with how we can make the process less volatile and perhaps less unpredictable so that, in those circumstances, something is put in place that supports that individual when their leaving prison is not planned.

Keith Brown: I will come back to Jennifer Stoddart, but you are absolutely right, convener. The problem of unexpected release, say, straight from the dock, which can happen for a number of reasons, has been raised. We are wrestling with that and with how the agencies can gather round to meet the different demand made in that circumstance. It most frequently happens to somebody who may have been on remand for only a short time.

Jennifer Stoddart might want to put some detail around that.

Jennifer Stoddart: The issue that you highlighted, convener, has been raised with us. We asked about it in the consultation to inform the legislation. The reason why it is not in the bill is that the view is that it does not need legislative change; it needs some operational and practice changes. For example, section 9 will apply to remand and sentenced prisoners. We hope that, at least for remand prisoners, there will increasingly be a better understanding of their needs, so that, when they go to court, they can go with a plan and, if they are released, there is an assessment at least of their needs and there can be some engagement with whichever is the most applicable agency. I am not saying that that is a solution—a number of things will need to change—but having better information and earlier planning for individuals when they leave custody has to be a good thing.

We are developing work with the Scottish Prison Service and others on the cohort who, exactly as you described, go to court for a hearing and are released when that is not necessarily expected. We are working on what can be put in place to support those individuals. It is difficult for everybody. Sometimes they are not with SPS for long, and their release is unexpected. There is not an easy solution. It does not necessarily need legislative change, but it needs a better understanding of the processes and information sharing that follow those people.

The Convener: Thanks very much. Do you want to add anything, cabinet secretary?

Keith Brown: I will just say that, if cultural change results from the legislative change, which is to say that the Prison Service becomes aware of the need to plan from the early stages, that can also apply to people on remand. It will have less time to take effect, and we acknowledge that. It is also true that, if you are on remand, you often have access to other services, such as navigators, who will help in the process as well. I acknowledge that that is an issue, and it catches too many people by surprise. We have to be alive to it.

The Convener: Thank you.

Rona Mackay: I want to ask you about emergency release. Restrictions were added to the Coronavirus (Recovery and Reform) (Scotland) Bill during the stage 3 proceedings to restrict the period of early release to no more than 180 days and to prevent the release of prisoners who were serving sentences for domestic abuse offences. Will the Bail and Release from Custody (Scotland) Bill be amended in any way to reflect

that? I wonder why those restrictions are not in the bill.

Keith Brown: That is a fairly good prediction. I think that Mr Findlay proposed an amendment previously. We are looking at how we can proceed at stage 2, as well.

Russell Findlay: The bill will stop the release of prisoners on a Friday or, indeed, on the cusp of a bank holiday period so that they are provided with the support that they need in order not to reoffend or find themselves in dire straits.

There are some pretty tragic cases—not least the 2019 murder of Alan Geddes, which I am sure that you are familiar with. That individual helped a prisoner who had been released from custody with, it seems, no support, and he ended up being murdered by him within 24 hours of that release. His family are happy for me to mention the case. That illustrates the seriousness of the lack of support.

Jennifer Stoddart mentioned the need for operational changes rather than legislative changes. The bill will reduce the days on which people can be released, but would it not be better and more practical to fix the system, allow for Friday releases, and have in place the networks that exist, I presume, on the other days of the week? Rather than shrink the system, would it not be better to strive to have one that functions and protects people?

Keith Brown: I do not want to go into the details of the particular case that you mentioned, but I think that the murder took place in a kitchen. If it is the one that I am thinking of, it was a horrendous case, and I offer my condolences again to the family concerned.

If somebody thinks that the Friday release change is not the appropriate way in which to go and their idea is to provide seven-days-a-week or 24-hour services, they should by all means lodge an amendment. They would have to quantify the cost of that, which would not be nugatory—it would be substantial. There would also be real questions for the people who would have to provide those services overnight or seven days a week. We do not directly control some of those services. They are provided by the third sector.

I think that the proposed route is better. It responds to demand. Many times over the years, there have not been Friday releases, so that we could better enable support services to be available to people who were being released. That is the route that we have chosen. However, I am happy to consider any amendments that members lodge.

Jamie Greene: I am pleased to be having an interaction with the cabinet secretary rather than there being just questions and answers. This is a discussion, and I hope that it is a constructive one.

Issues have arisen as we have got to understand how the system currently works. We have spoken about the parameters that the bill will change, including changes to public safety testing, and we have talked at length about remand periods, which might be another way of addressing the issue.

The third aspect that has struck me is the use of opposing bail by the Crown. It seems that, although the final decision is made by a sheriff or judge, the deputes in remand hearing courts on the day are pretty busy—to say the least—dealing with dozens of cases. They probably spend very little time looking at each individual case, especially those in Monday courts involving people who have been held on remand over the weekend.

Is there any feeling in the Government that there is overuse of opposing bail by the Crown? It is clear that, if the Crown were to oppose fewer bails as cases came through remand hearings, that would alter the numbers quite substantially.

If that is not the case, what more could be done on the day through empowering deputes to make more instant decisions, rather than there being centralised decision making from above, that would clearly and inevitably lead to fewer people being held on remand?

It seems to me that the sheriffs listen to what the Crown says and take its views on board. If bail is not opposed, it will probably be granted. There are probably very few cases in which the sheriff will go straight over the Crown's head and say, "No, you should have opposed bail on this condition." What are your thoughts on that? That struck me as an issue that we have not gone into much detail on.

11:45

Keith Brown: Philip Lamont's contribution on that will be useful. That is an area that it is more than tricky for the Government to get involved in. I think that you are asking about how there would be such interaction, short of there being legislative measures. It is very tricky for the Government to get involved in that, given the independent nature of the Crown Office.

As Jamie Greene said, the committee has heard evidence from some people who have said that legislation is a legitimate way to deal with the matter. That is the role of legislators. However, it is not our role to get involved in the influencing, if not the directing, of the independent service.

It is not my position that the opposing of bail is overused. However, I think that the committee received evidence from members of the judiciary or the legal community who felt that they are

currently constrained when it comes to refusing bail.

I do not know whether Philip Lamont wants to add to what I have said.

Philip Lamont: I will reflect on what the Crown Office representative said to the committee last week. That representative said that the position that the Crown adopts on bail is shaped by the legal framework, so if the legal framework changes, it will have to change its approach. Kenny Donnelly explicitly said that, in the future,

"there will be certain instances in which it will not be open to us"—

that is, the Crown—

"to oppose bail."—[*Official Report, Criminal Justice Committee*, 25 January 2023; c 37-8.]

That is because the legal test changes. The legal test applies to the court, but the Crown has to consider it, because it can no longer oppose bail if the legal test does not support it. That is a way in which legislative change, which impacts directly on the court, can feed through the system and influence the Crown Office but not threaten its independence because, ultimately, it has to operate within the law that is set by Parliament.

That is one of the reasons why we think that legislation is part of the answer. It is not the only answer, but that is why legislative change is important. It helps to filter things down, not just to the courts but through the system to others who are involved in the decision making.

Jamie Greene: That is interesting. The cabinet secretary said that it is not for the Government to interfere overly with decisions that are made by the Crown but, if we make legislative change, that will alter its behaviour and decision making.

Keith Brown: The point that I have tried to make is that the public will know exactly what the legislators have done and what discretions have been afforded to the Crown. Things would be less transparent if they were the result of a back-room discussion between us. We, as legislators, have stuck to our legitimate role of providing the framework, and the Crown sticks to its role and independently comes to its own conclusions while having regard to what the legislators have put in place. The approach is more transparent. People will know where the influence is. That is why we have chosen that route.

Jamie Greene: Mr Lamont mentioned Kenny Donnelly, who raised a particular concern that I do not think has been properly addressed in the bill—I hope that that is done as the bill moves forward. That concern relates to section 23C of the 1995 act. Mr Donnelly talked about removing

"from a summary court the ability to oppose bail for people who simply have a record of not attending or about whom there is information that they will not attend."—[*Official Report, Criminal Justice Committee*, 25 January 2023; c 27.]

That would not necessarily fulfil the public safety criteria, based on the ordinary meaning definition that you have described.

How do we counter that? How can we ensure that courts have the ability to remand people where there is a significant risk of their not appearing at or attending future hearings? We know all the implications that come with that—the financial and human costs and, of course, the implications for court time, which is precious. It seems that people feel that their hands may be tied in that respect.

Keith Brown: There is another aspect of the test that covers the administration of justice. Philip Lamont or someone else can give the details of that.

That is a legitimate concern, but what we are saying is that the safety test will dominate in that area. When we talk about the administration of justice—we can get the exact words; I could not put my finger on those right away—we are also potentially talking about things such as jury tampering or the intimidation of witnesses. It is also about continued and wilful non-appearance at court.

If there is a worry that somebody might not appear in court and they are remanded for that reason, which is the greater harm that is caused? Somebody could be remanded for quite a lengthy period. You have just said that those things can get delayed for all sorts of reasons. Somebody who does not present a safety risk to the public could be kept in jail at the taxpayer's expense simply to avoid the possibility of non-appearance.

The obligation on us is to ensure that we get better at making sure that people appear in court when they are meant to do so. I understand the risk. I speak as somebody who represents an area that had a very particular problem—one of the worst in Scotland—with that. The police took particular action to try to remedy it. We have to do more on that.

On the point about the test, maybe Philip Lamont could fill out the text that I have been unable to bring to mind.

Philip Lamont: To confirm, what is proposed in the bill is that, where someone is appearing in a summary case and not in front of a jury—at the less serious end of the system—the ground in section 23C relating to failure to appear will not be available to the court in the first instance unless the person has been accused of a failure to—[*Inaudible*.]—so, in effect, it is to reflect that, at that

level of the system, we do not think that remand in the first instance is appropriate where there is no public safety risk. Public safety will still be available. The administration of justice test will not apply.

That reflects the feedback that we received in the Scottish Government consultation. Initially, there was no proposal for a new bail test to include an acknowledgement of the administration of justice—[*Inaudible*.]—test. What we have proposed in the bill is a direct response to that. For solemn cases—High Court cases and sheriff and jury cases—that test will be available but, in summary cases, as long as a person is not appearing on a failure-to-appear-related offence and they have not already failed to appear, that will not be an option for the court, and bail must be granted. That is where support in the community must be available through the steps that we have discussed to help to ensure, as much as possible, that the person attends.

Jamie Greene: Okay. So that test could still apply in solemn cases, and it would be grounds for remand but, at summary level, it would not. There is the removal of that ability. We know that there are people out there who are repeat offenders at summary level who regularly do not appear and are taking the proverbial, with the system. There now seems to be no way to hold them on remand as a result of that behaviour. That is unfortunate.

Keith Brown: What Philip Lamont said is that, even at summary level, where non-appearance is part of the case against a person, that can be taken into account—unless I am getting that wrong.

Jamie Greene: Yes—at summary level. However, that is not my interpretation of what I heard. Perhaps you can write to us. I am sure that we will talk about the issue again.

Keith Brown: I think that what Philip Lamont said was that, if part of the case against a person is related to non-appearance, it can be taken into account at summary level. However, we will write with clarification on that.

Jamie Greene: Okay. Bail-related offences are rocketing. Five years ago, they were 18 per cent; they are now sitting at 26 per cent. There is a real problem with bail-related offences, which will, I presume, only get worse if more people are on bail.

Anyway, let us move on.

The Convener: We are just under 10 minutes away from the end of our scheduled time with you, cabinet secretary. I have a question on the release of long-term prisoners on a reintegration licence, which section 7 provides for. It provides for that in two situations: before and after the Parole Board has recommended release on parole. In relation to the second of those situations, we took evidence from John Watt, chair of the Parole Board for Scotland, who advised us that it would need a power to reverse its parole decision if an offender failed to comply with the conditions of release on a reintegration licence. Is there a plan to amend the bill to provide for that power?

Keith Brown: There is no plan to amend the bill, because the issue that has been raised by the chair of the Parole Board is not a result of the bill. He has raised it, and it is a concern for him—I do not deny that—but it is not an effect of the bill. That is the existing situation. We are willing to be and are engaged in discussions with the chair and, I think, the Parole Board—I am happy to confirm that—on the issue. It opens up other issues, which is why it is probably not suitable to be dealt with in the bill, but it is a live issue that we have been and are discussing with the chair.

The Convener: Thank you. Do members have any other questions?

Fulton MacGregor: I have a quick question on information for victim support organisations. We have heard concerns about information being shared without the consent of the victim, which falls under section 11 of the bill. Will you talk about that, cabinet secretary?

Keith Brown: The concerns expressed, if I am right, are about the idea that victims should consent to any information being shared. As I am sure that you would agree, there is no track record of victims' organisations acting against the interests of victims. It is a bit more complex than it first appears, but we are willing to have further discussions on it. It might be useful to hear from Jennifer Stoddart. We will not set ourselves against it just for the sake of it, and our view is probably understood by the victims' organisations. We are in a continuing dialogue. Perhaps Jennifer wants to add to that.

Jennifer Stoddart: The situation is exactly that. In the bill, consent is implied. In the evidence that the committee has received from victim support organisations and in the engagement that we have had with them, they say that they would prefer that to be explicit in the legislation. We are actively looking at that and at how it might end up in the bill. As the cabinet secretary has said, there is no indication that it does not happen in practice, but there is a clear preference from the VSOs that it be explicit.

Jamie Greene: In last week's evidence session, the chair of the Parole Board for Scotland made a specific call on the Government, which I am sure that the cabinet secretary's advisers will have noted. He said that there might be some benefit in an "independent judicial body" deciding whether it

would be appropriate for the Parole Board to make decisions on temporary release. That probably falls into a conversation about the powers of ministers in relation to those of the Parole Board. Has the Government taken cognisance of that evidence, and does it plan to address it in the bill?

Keith Brown: Once again, it would be useful to hear from Jennifer Stoddart. You have probably gathered from contributions that I have made today, including the previous one and the one on Rona Mackay's point about exclusions from emergency release, that there are areas on which we are listening to people. It is the way to do this. Through the bill, we are genuinely trying to find solutions that we all agree on. We are still involved in the discussion, but for the reason that you mentioned, directing the Parole Board is a very tricky area for us to get involved in, given its independent powers. Perhaps Jennifer wants to add to that with specific reference to the evidence that has been mentioned.

Jennifer Stoddart: Yes, there are a couple of points to make. As the committee is aware, the Parole Board has a role under section 7, which is why you heard from Mr Watt. When the Prison Service—Scottish ministers—is deciding whether to release an individual on a reintegration licence, it must, in advance of the Parole Board's consideration of their release, consult the board. That reflects the Parole Board's expertise in the decision-making space. It is also important to recognise the Prison Service's expertise in that area. Transferring responsibility for making those decisions from the Prison Service, which makes them on a dynamic basis, to a different body would be a significant shift, and it is not currently in the bill. The bill recognises the important role that the Parole Board plays and will play in helping to inform those decisions.

Keith Brown: If you think about the emergency release powers that were used two years ago, you will recall the caveat that prison governors would essentially have a veto for an individual prisoner whom they did not think it was right to release. It is about recognising, as Jennifer mentioned, the Prison Service's expertise. There is closer experience in the Prison Service than anywhere else, in fact, so it is important to keep that expertise.

12:00

Jamie Greene: Can we clarify that, though? It is a matter of law. This came up as an anecdote last week. If the Parole Board takes a view that someone can be released and that person commits an offence during the short timeframe before release, which is quite possible—they might get into some sort of infraction or break the rules in prison—what happens? The Parole Board seems to think that it has no further powers to stop release happening, even though there is a further incident after the decision is made. Will governors have a veto on such decisions or will ministers have a veto? It is unclear where the power lies in that scenario.

Keith Brown: If I am getting this right, I think that, if somebody is released on temporary licence and they breach that licence, they can be recalled for that reason. If they commit an offence, that is a breach of their licence conditions. It is the same if someone is paroled: they are paroled on licence and, if they breach their parole requirements, they can be subject to a recall at that stage. That power is there in law. I am not sure that it has to be exercised by either the Parole Board or the Prison Service; it is a consequence of them breaching their licence.

Given that we are talking about a point of law, perhaps Jennifer wants to add to that.

Jennifer Stoddart: I think that the point that Mr Watt was making, and that Mr Greene has highlighted, is that, when the Parole Board has already recommended release, and that decision has been taken in advance of the person's parole qualifying date and there is a bit of time before that date, the Parole Board can direct that person to be released on reintegration licence, as a way of better supporting their reintegration. If they do not comply with the terms of the licence, as Mr Watt described, the Parole Board does not have the ability to reverse the parole decision. That provision is not made by this bill; it is an existing situation. We are engaging with the Parole Board to see what can be done on that. It is a legal point, as you say, and not an operational matter. We are actively considering that with the Parole Board.

Keith Brown: To return to the first question that was asked about the issue, it is not an effect of the bill.

Russell Findlay: My final question is about bail. One of the inevitable consequences—indeed, the intended consequence—of the bill is that there will be more people on bail and, therefore, greater reliance on supervised bail, using measures such as electronic monitoring. We heard evidence from academics who take the view that two days under such conditions should have a direct trade-off, in effect, for any future sentencing, with a ratio of two days under such conditions to one day in custody. Do you agree with that? Does the bill factor that in in any way, or is it not part of it?

Keith Brown: It does not do so in the detail that you mentioned, but yes—the principle is that, when sentencing, courts should be able to take into account not only time served but a diminution of rights. I tried to answer this point earlier. If someone has been subject to electronic

monitoring, that is a diminution of their rights, and it should be taken into account by the court in sentencing.

Russell Findlay: Will the bill state that? Will it prescribe it or will it be entirely discretionary?

Keith Brown: It is not stated in that level of detail, but the principle is there.

Perhaps Philip Lamont will add to that.

Philip Lamont: Ultimately, a bit of discretion will sit with the court. The court will be able to decide how much of that time should be accounted for, for the purposes of time served. If someone is on electronic monitoring bail for six months, for example, the court will have a decision to make as to whether the full six months, some of it or none of it should be accounted for. If someone were to breach the terms of bail, the court would probably not give them any allowance. However, if they are well behaved and there are no compliance issues, the court may count the six months on EM bail. There is a formula that says that six months is converted into three months—two days to one. That would count for the purposes of the custodial sentence. That is based broadly on a similar scheme that has operated for many years in England and Wales. The principles of the scheme are based on legislation in England and Wales, although there are some differences in the detail.

Russell Findlay: Is that any different from how judicial discretion in such decisions operates just now?

Philip Lamont: Yes. At the moment, the law does not permit the court to take those things into account—there is case law that says that the court cannot do so. The provision in the bill is needed to give discretion to the court. The court will use that discretion to work out how much of the bail period should be accounted for. Then, to ensure consistency, the formula in the bill—two days for one—will kick in. Therefore, there is a bit of discretion and a bit of prescriptiveness.

The Convener: That has taken us a little bit over our time. I thank the cabinet secretary and all his officials for joining us. That completes our public agenda items. We move into private session.

12:05

Meeting continued in private until 12:58.

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