OFFICIAL REPORT
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Justice Committee

Tuesday 20 November 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 20 November 2018

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JUSTICE COMMITTEE
30th Meeting 2018, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*John Finnie (Highlands and Islands) (Green)
*Jenny Gilruth (Mid Fife and Glenrothes) (SNP)
*Daniel Johnson (Edinburgh Southern) (Lab)
*Liam Kerr (North East Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Liam McArthur (Orkney Islands) (LD)
*Shona Robison (Dundee City East) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Karen Auchincloss (Scottish Government)
Lesley Bagha (Scottish Government)
Gill Imery (Her Majesty's Inspectorate of Constabulary in Scotland)
Colin McConnell (Scottish Prison Service)
Chief Superintendent Garry McEwan (Police Scotland)
Wendy Sinclair-Gieben (Her Majesty's Inspectorate of Prisons for Scotland)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 20 November 2018

[The Convener opened the meeting at 10:59]

Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill: Stage 1

The Convener (Margaret Mitchell): Good morning, and welcome to the Justice Committee's 30th meeting in 2018.

The first item on the agenda is an evidence session with the Scottish Government bill team for the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill. I refer members to paper 1, which is a note by the clerk, and paper 2, which is a private paper.

I welcome from the Scottish Government Karen Auchincloss, criminal justice division; Lesley Bagha, criminal justice division; and Louise Miller, legal services directorate. I invite Karen Auchincloss to make opening remarks.

Karen Auchincloss (Scottish Government): Good morning, and thank you for the opportunity to make opening remarks on the bill.

The main purpose of the bill is to improve how children, in the first instance, and vulnerable witnesses participate in our criminal justice system, by enabling the much greater use of pre-recorded evidence in advance of trial.

The bill builds on the work of the Scottish Courts and Tribunals Service's evidence and procedure review, which made recommendations on how to improve the treatment of vulnerable witnesses in the Scottish criminal justice system. Those recommendations included proposals on how to protect vulnerable witnesses—focusing on children in the most serious cases—from further traumatisation, by introducing a new rule that they will pre-record their evidence.

The main reform in the bill is to create a new rule for children under 18 who are complainers or witnesses, to ensure that, where they are due to give evidence in the most serious cases, they will have it pre-recorded, unless an exception applies. The new rule applies only to solemn cases; committee members will have noted that the bill makes no provision in relation to summary cases. However, in a summary case it is currently possible to pre-record under the current legislative provisions.

The bill does not extend the new rule to a child who is accused. That was considered, but it was decided that it was not appropriate, given the practical issues. Those issues are expanded on in the policy memorandum. Again, it is important to note that, under the current legislative provisions, the evidence of an accused person can be pre-recorded.

The bill includes a power for the proposed new rule to be extended to adults who are deemed vulnerable witnesses in solemn cases. That will potentially include complainers in sexual offence, human trafficking, stalking and domestic abuse cases. The Scottish Government considers that those categories of witness would benefit from the greater use of pre-recording; the power therefore ensures that the bill's most significant reform can be extended beyond child witnesses in due course.

As committee members will be aware, evidence by commissioner is the special measure that is used to allow for evidence to be pre-recorded in advance of a criminal trial. The benefits of the approach are that the date and time for evidence by commissioner can be scheduled in advance, avoiding uncertainty for vulnerable witnesses, the atmosphere is less formal than that of full court proceedings, and evidence can be recorded directly or via remote videolink from another location. The evidence is then played at the trial without the witness having to be present.

The bill removes legislative barriers that might have a detrimental effect on the greater use of pre-recorded evidence. If appropriate, a commission could happen prior to service of an indictment, although, as committee members will note from the policy memorandum, in the short to medium term it is considered that applications for evidence by commissioner to be taken in advance of the indictment are likely to be rare.

The bill introduces the concept of a "ground rules hearing", to ensure that all parties are prepared and the issues set out in the practice note are considered. It is important to note, however, that the bill provides the flexibility for the ground rules hearing to be conjoined with another hearing, if appropriate.

The bill also makes provision with regard to the role of the commissioner, to ensure that the commissioner has the same powers as a judge to review the arrangements for a vulnerable witness giving evidence and to encourage that the same judge undertakes the ground rules hearing and the commission, where that is reasonably practicable.

Finally, the bill makes provision for a new, simplified intimation process for standard special measures for child and deemed-vulnerable adult witnesses, which, where it applies, will streamline the current process by making it an administrative rather than a judicial process.

John Finnie (Highlands and Islands) (Green): Good morning, and thank you for your opening remarks. Will you outline the special measures that are in place at the moment and how the bill will affect them?

Karen Auchincloss: The bill does not change the special measures as they operate at the moment. Standard special measures are those that witnesses are automatically entitled to, such as a screen, a supporter and a television link. Non-standard special measures are those made on application, such as evidence by commissioner, use of a prior statement—something that has been recorded before, whether or not that is written down—or a joint investigative interview by a police officer and social worker.

The bill does not change how special measures operate at the moment; it creates a new rule that, in certain circumstances, a child who is under 18 would have their evidence pre-recorded by using the special measure of evidence by commissioner.

John Finnie: For the avoidance of doubt, are we definitely talking about children under 18?

Karen Auchincloss: Yes.

Shona Robison (Dundee City East) (SNP): Will you say a bit more about the main benefits of pre-recording evidence? We are aware of the obvious benefits of removing the vulnerable person from a stressful situation, but it would be useful if you could expand on that and on how the bill seeks to encourage the greater use of pre-recorded evidence.

Karen Auchincloss: As I said, the commission would be scheduled, so the witness would know exactly when it would take place, which would take away the uncertainty of timings. The environment is meant to be less formal for a child or a witness who gives evidence.

The bill creates a framework for the greater use of pre-recorded evidence. Behind that is Lady Dorrian's introduction last year of a revised practice note, to encourage greater use, as members are aware. The practice note is quite comprehensive and sets out in great detail what the court and parties should consider before a witness gives evidence, such as the removal of wigs and gowns and the location where the witness gives evidence. For the witness who pre-records in advance of the trial, which could be some months later, that day is the end of the process.

Lesley Bagha (Scottish Government): That currently happens under the new guidance in the High Court practice note. The bill provides for a ground rules hearing, which will have to happen before the commission takes place and can be incorporated into a preliminary hearing. It will mean a lot of focus on making sure that the parties are ready before a child or vulnerable witness gives evidence, which will involve consideration of what kind of questions there will be, whether everything is appropriate and whether breaks will be needed. That added scrutiny and preparation would probably not happen at the moment.

Shona Robison: Karen Auchincloss mentioned the power to expand the scope of the new rule. It would be helpful to hear what timeframe you think is realistic in that regard. What was the reasoning behind having an initial focus and providing for a power to extend the rule? Was it about phasing the approach in, in an orderly fashion, or are there capacity issues?

Karen Auchincloss: The bill's main focus is on children, because we wanted to start somewhere and to target the most vulnerable. That is not to say that other people are not vulnerable. I accept that some stakeholders would like the bill to go a bit further, a bit more quickly. However, a fundamental point is that this is a significant change to how evidence is taken at the moment. It is important to get it right, for the practice note to bed in and for people to get used to the new way of working.

We accept and recognise that other categories of witness would benefit from this special measure on the way in which evidence is taken, but we are keen to get it right from the very beginning. The danger if we expand too quickly is that witnesses will not benefit. We are working with stakeholders on a potential implementation plan in relation to how the bill's various powers could be used. Should we target certain cases for deemed-vulnerable adult witnesses or specific locations? We are very mindful that a lot of people would like the powers to come in quickly, but it is important that we do not rush.

Shona Robison: When will the implementation plan be ready? I presume that broad timeframes will be attached to the plan.

Karen Auchincloss: We are working with stakeholders on potential implementation. When the cabinet secretary comes to give evidence after the new year, he might be able to update the committee.

Lesley Bagha: The one thing that we have learned from our discussions and, indeed, from what is happening in other jurisdictions, is the importance of ensuring that, if there is an ambition, the work is done properly and there is time for monitoring and evaluation. Because these proposals deal with very vulnerable people, we have to get them right. Even though, as Karen Auchincloss said, evidence by commissioner has been around for a number of years, it has been used relatively infrequently, and we cannot say

enough how much of a substantial and significant change these proposals represent. Of course, it depends on the views of the committee and the Parliament, but the proposal is for a legal rule that, in a sense, will be relatively inflexible and could make a massive change.

We therefore have to ensure that we get it right. It is a matter of not just making a legislative change but making sure that all the practical changes that go along with it are made, too. We are in close contact with our counterparts in London, who have been undertaking pilots on the various versions of pre-recording evidence under sections 27 and 28 of the Youth Justice and Criminal Evidence Act 1999. One of the big lessons that we have learned from our counterparts is that things probably take even longer than we think and, to get it right, we need to build time into all the stages to monitor, evaluate and learn from the experience before we roll things out to the next stage.

The Government's current position is that, as has come out in the evidence and procedure review and the work that we have done, the initial focus should be on children, but for any power in future, the issue will have to be carefully evaluated and considered. Ultimately, that is a matter for Parliament and ministers.

Shona Robison: Thank you.

Liam McArthur (Orkney Islands) (LD): Good morning. On your point about the importance of the ground rules hearing, we have discussed how lines of inquiry can be pursued with questioning agreed in advance and how, depending on the answer that a witness gives, the commissioner might need to pursue a line of questioning that was not predictable at the outset. Is the expectation that the guidance notes will cover how that situation should be handled, or is it likely to fall to the discretion of those conducting the commission?

Karen Auchincloss: It will probably fall to the discretion of the individual in question and whether they think that they need to bring back a witness. That will certainly be a matter for the court. When we developed the ground rules hearing policy, we took quite a lot from how things operate down south, where the system is quite similar. In fact, I think that writing all the questions down is a prerequisite. We asked people down south whether the situation ever arises where someone discloses something else or says something unexpected, but the feedback was that because parties have fully considered all the issues and looked at the evidence and disclosures that they have, the issue has not tended to come up. However, it could happen.

Lesley Bagha: Questions could be supplied for a ground rules hearing—indeed, the High Court might think it appropriate to do so—but an issue to take into account is the broad content involved and ensuring that questions are asked that the child can understand. I would have thought that if something unexpected were to come up in a commission, the commissioner—who would be a judge or sheriff—would still have the flexibility to say, "I want to pursue this line of questioning."

The one thing that we have been keen to stress with these proposals is that nothing about them stops the legitimate testing of a witness's evidence, which is absolutely key and important in all of this. This is about getting the best evidence in a more controlled environment, but that does not mean that cross-examination will be limited in any way.

Liam McArthur: Presumably the other end of the spectrum is that where a child does not provide an answer, because they either cannot recollect or are uncertain of something, there will be limitations on how far that can be pursued. Will there, at some relatively early point, be an agreement that the answer is what the child provides?

Lesley Bagha: Yes.

Liam McArthur: You have said that the procedure is used at the moment but nothing like to the extent that is anticipated. Even though there will be a phased process, with evaluation taking place before the next phase is rolled out, has the Scottish Courts and Tribunals Service said anything about the financial implications of this expansion? Does it believe that it has the resources at the moment to manage the process through to its conclusion, or will that depend on the evaluation that takes place, subject to the legislation coming in?

Karen Auchincloss: The financial memorandum sets out a range of estimated costs, because at this stage we just do not know how many people will go on to give evidence by commissioner. For children, the costs start off at half a million pounds. If all children are cited, the costs rise to about £3.5 million. If you extend that to adults who are deemed vulnerable witnesses—again, this is very much an estimate, because we do not how many would go on to do this—the costs go up to about £14 million.

Clearly there are significant resource implications for the court service, the Crown Office and the Scottish Legal Aid Board. Although the costs are set out in the financial memorandum, decisions that are taken in the spending review will also come out in due course.

11:15

Liam McArthur: I understand that the equipment, technology and so on that are needed will be an expansion of what is currently used, rather than there being a requirement for different equipment.

Lesley Bagha: That is absolutely correct. It is an important point. The equipment is not used much now, and the Scottish Courts and Tribunals Service has recognised that, if the proposals are agreed to, it will need to upgrade its venues and information technology to ensure that it is ready. You will probably have seen the Scottish Government's recent announcement of funding of £950,000 for facilities in Glasgow to be upgraded to provide vulnerable witness hearing suites and sensory rooms and have state-of-the-art facilities, so that Glasgow can start taking more evidence by commissioner. We are closely involved with the court service in looking at other areas, possibly including mobile equipment. Alongside the legislation, ensuring that the practical infrastructure is in place is an important workstream. The court service is doing a lot on that right now, and I am sure that, when it gives evidence to the committee, it will be able to give you a lot more detail on that work.

The Convener: If members have supplementary questions, I ask them to make those questions absolutely on point to ensure that we do not stray into areas that we want to cover later.

Jenny Gilruth (Mid Fife and Glenrothes) (SNP): I want to ask about the reasons for not applying the proposed rule on pre-recording evidence to the child accused. I think that that is covered by subsections (7) and (8) of proposed new section 271BZA of the Criminal Procedure (Scotland) Act 1995, which provide that an exemption would apply, for example, if

"the giving of all of the child witness's evidence in advance of the hearing would give rise to a significant risk of prejudice to the fairness of the hearing",

or

"it would be in the child witness's best interests to give evidence at the hearing."

Who makes that judgment?

Karen Auchincloss: Sorry, was your first point about the child accused?

Jenny Gilruth: Yes. Obviously, exceptions exist in the legislation as it stands.

Karen Auchincloss: The bill does not extend the new rule to the child accused at all; such children are not within the scope of the bill. The exceptions apply for children under 18 who will be caught by the new rule.

Jenny Gilruth: With regard to those children, then.

Karen Auchincloss: The exceptions are extremely tightly drawn. I would not envisage a situation in which they would be applied, but the provisions give a bit of flexibility in the interests of justice or for circumstances in which there is a significant risk to the fairness of a trial. However, the position will be that, in the vast majority of the cases for which the bill provides, children who are under 18 will give pre-recorded evidence.

Jenny Gilruth: Who makes the overall judgment on the risk to the fairness of the trial? Who does that decision rest with?

Karen Auchincloss: It rests with the court and the judge.

Jenny Gilruth: On the current and expected future use of prior statements, Lesley Bagha alluded to there being more evidence, because there will be more evidence gathering by commissioner. That is already happening; do you expect the same level or an increase?

Lesley Bagha: Pre-recording can happen in several ways. If all the child's evidence were to be given in advance of the trial, that might happen through a prior statement—that is, when just the child or witness's evidence in chief is recorded, which can be done in writing or by video recording. Karen Auchincloss touched on that. In Scotland, there is less use of video recording by the police, but there is one circumstance in which that happens more often: the joint investigative interview, which is led by the police and social work team, who interview the child and record their evidence. As there are child protection issues, the police and social work team look at things from that point of view.

That interview could be introduced as part of the pre-recording of the child's evidence, as a prior statement, although it would not cover the cross-examination or re-examination, which might be done by the process of evidence by commissioner. Alternatively, all the witness's evidence could be gathered by a commissioner. There would be just the one hearing, in which the commissioner could ask various questions and record all the evidence for the trial. There are several different mechanisms for recording evidence in advance.

Jenny Gilruth: Can you update us on the development of the national standards for joint investigative interviews? A recommendation in favour of that approach was made in 2017.

Lesley Bagha: That is right. That was a recommendation by one of the sub-groups from the evidence and procedure review. A lot of work is being done on that at the moment. As you will be aware, there were areas of good practice in

joint investigative interviews, but there were also many areas that the review group felt could be improved, particularly in relation to the IT but also in respect of training and guidance.

A lot of work is under way. My understanding is that it is focusing mainly on the training that will take place for people who conduct such interviews. A revised training programme is being developed and there is an intention to design national standards. All that work is going on in sync, and it is very much in tune with the idea that, if we are to have more pre-recording, we have to get the pre-recorded evidence up to the best possible quality. A lot of work is going on in that regard and will carry on.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Karen Auchincloss mentioned in her opening statement that the policy memorandum outlines the reasons why the bill does not extend to child accused persons. Will you briefly set out those reasons, perhaps as bullet points?

Karen Auchincloss: Obviously, a child accused has a completely different status from a witness—for example, the child already has access to legal representation and has a choice about whether to give evidence. As I said, it is technically possible for an accused person to pre-record evidence, but that has never happened, to our knowledge, so it did not seem to be sensible to apply a rule to a category of person when the special measure is already available but has never been used.

Over the summer, we did more work with a lot of stakeholders. Some of that has just been published online. I think that in it there is recognition that pre-recorded evidence would not really work for an accused person. However, a point came out about the wider support that child accused persons need. We will have to take that and consider it.

Lesley Bagha: A lot of work was done on the matter. In responses to the Government's consultation, many people were in favour of including child accused persons in the bill, but when we spoke to people, we found that that would raise practical issues and could be very prejudicial. Normally, an accused person—including child accused persons—would, on the advice of legal counsel, decide whether to give evidence only once they had heard all the Crown evidence against them. If evidence were to be pre-recorded, that would be done in advance. None of the advantages of pre-recording that we have talked about, such as the person not having to attend the trial, would apply, because an accused person has to be there and listen to the trial in the courtroom, but their case could be prejudiced, which would strike at the heart of the policy, which is about the best interests of the child.

As Karen Auchincloss said, once we actually talked through the issue, a general consensus grew that pre-recording is not the answer.

Rona Mackay: On the point about supporting the child accused, we heard during our visit to the High Court yesterday that there are things that could be done now that are not being done and which would not need to be included in the bill. For example, a child accused does not have to be in court—they can listen to the evidence in a separate room. Obviously, that is a bigger legal question that is not to do with the bill.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Good morning, panel. I first have a supplementary on that supplementary, then I will go back to Jenny Gilruth's question.

Do the rules on child accused persons take cognisance of the Age of Criminal Responsibility (Scotland) Bill, which is with the Equalities and Human Rights Committee?

Karen Auchincloss: Yes. We work closely with other Scottish Government officials, especially when there are connected policy interests, so we have been engaging with the officials who are involved in that bill. As I said, and as Lesley Bagha touched on, although we recognise that pre-recording is probably not the best special measure, a lot of wider support work could be done that would benefit from further consideration.

Fulton MacGregor: From what I have seen, that work seems to fit the ethos of that other bill.

My next question is on joint investigative interviews. I declare an interest as a registered social worker who has been involved in such interviews. You might not have exact statistics, but roughly how often are they currently used as pre-recorded evidence?

Lesley Bagha: To be honest, I would be guessing if I were to give you a number, so it is probably better if we write to you with specific information. However, I understand that many more joint investigative interviews happen than are admitted in court. That is partly because their quality is not good enough to meet the test for being accepted in court as a prior statement. Obviously, there would ultimately have to be a court case, so we want to change that situation by improving the quality of those interviews.

Would you like us to find out the numbers—if they exist—and write to the committee on that?

The Convener: Yes, please. That would be helpful.

Daniel Johnson (Edinburgh Southern) (Lab): I want to ask about the nuts and bolts, but before I do that, I have a question about your comment that the bill in some ways formalises existing

practice and seeks to extend it. I will ask another numbers question. How many children currently give evidence through the special measures and how many more will benefit following enactment of the bill?

Karen Auchincloss: The numbers were extremely low, but they have steadily increased since the introduction of the practice note. From April 2018 to August 2018, there were 82 applications for evidence by commissioner in the High Court, of which 71 were for children and 11 were for adults. We must recognise that it is important not just that the numbers go up, but that overall quality and consistency improve across the board.

If the bill is passed in its current form, the maximum number of children involved would be about 759, and about 2,000 adults would be deemed to be vulnerable witnesses. The numbers that would result from the bill are quite significant. It is encouraging to see that the numbers have been steadily increasing since the practice note was issued.

Lesley Bagha: To give that a bit of context, those 82 applications were for a period of just five months, whereas in the previous period of almost a year, from April 2017 to March 2018 when the High Court practice note was introduced, there were 62 applications. The committee can see that there was a substantial increase, although it is as nothing compared to the increase that would occur under the proposals in the bill, which is why they are seen as such a big change. However, even the current increase is quite a big change to get used to and be set up for. The High Court practice note seems to be having a positive effect already.

Daniel Johnson: It is useful to have that context.

You have said that the proposal is just for dealing with solemn cases. Can you explain the rationale for not extending it more broadly to summary and sheriff court cases, which would involve much larger numbers?

Karen Auchincloss: As I said, the bill is a framework to encourage and start greater use of pre-recording of evidence. We have focused on the most serious cases because that is an appropriate place to start. However, if to do so were deemed to be appropriate, the special measures could be used in the sheriff court at summary level. However, as Daniel Johnson suggested, the number of people in sheriff courts at summary level is significantly higher than the number for solemn cases.

Daniel Johnson: Would the Government look to review how the practice might be extended in the future using non-legislative means—or legislative means, if they were required?

Karen Auchincloss: Since the introduction of the practice note, there has been a period of monitoring and review by the court service. Clearly, the Scottish Government has an interest in that. If the bill is passed in its current form, there would be a period of continuous monitoring and evaluation as we commenced the various powers.

The ultimate aim is for the approach to become the norm. However, that will take a bit of time because it is a culture-and-practice thing. The current special measures for evidence by commissioner are already in legislation, so we will not need to introduce further legislation—the facility already exists and people can use it.

Lesley Bagha: It is for Parliament to consider whether it would be appropriate to have a rule that is relatively inflexible or to leave things being dealt with on a case-by-case basis. As my colleague said, it is possible to apply for special measures in summary cases, if that is appropriate.

The current proposal in the bill is that the provision will apply to children under 18 in certain solemn cases, but the bill also proposes quite wide powers to remove the list of offences, which would ultimately mean that such measures would apply to all children under 18 in the High Court and in sheriff court solemn cases—which would be massive—and that they would be extended to all adults who were deemed to be vulnerable witnesses. Even the proposal for the first group is a big change: to go down that road would be huge. We need to manage expectations about how far we can go down it and how quickly.

Daniel Johnson: I turn to ground rules hearings. Given the discussion that we had yesterday with people at the High Court and from your evidence, it is clear that those hearings are critical to establishing how evidence will be taken, and to ensuring that the sensitivities that we all hope would be considered are considered. As we heard from Rona Mackay, some people do not know that they can ask that particular provisions be used or approaches be taken in court.

What safeguards are in place to ensure that those questions are asked, and that we do not just rely on the defence counsel and the prosecution to know to ask the right things or to agree to a particular approach? What would prevent, many years down the line, a particularly aggressive defence counsel, who does not agree to particular lines of questioning or approaches being taken, from taking advantage of that system?

11:30

Karen Auchincloss: The practice note is comprehensive. At its heart is the idea that the vulnerable witness and their needs are put first. The practice note also references what is called

the advocate's gateway, which is used in England and Wales to provide, for advocates, comprehensive training in how to cross-examine children. Whether the practice note is followed is a matter for the judge in each case, but I understand from feedback that I have received that the numbers have started to increase, that people are getting used to taking evidence by commissioner, and that the practice note is being followed and considered.

Daniel Johnson: My final question is about timelines. Even in the speediest of circumstances, it can often take 18 months to two years for a crime to come to trial, and that is for something that is recent, not historical. How much earlier in the process will the proposal enable evidence to be taken, given that we all agree that, by and large, with some caveats, the rough rule of thumb is that the sooner evidence is taken, the better?

Karen Auchincloss: The bill will remove or amend current provisions by allowing a commission to happen prior to the service of the indictment—the current legislation defines commencement of proceedings as being from service of an indictment. The proposal means that a commission could happen after an accused person has appeared on petition—which is, obviously, some time before service of the indictment. That will remove the legislative barrier. It had been highlighted to us that that might be why commissions do not happen earlier.

We set out in the policy memorandum that, in the short-to-medium term, we would not expect a lot of commissions to happen pre-indictment, because it is only at the point at which the indictment is served that the accused knows all the charges that they face. The proposal will remove that requirement and ensure that there is a little bit more flexibility, so that when the provisions start to bed in and people get used to them, there might be cases—it would be done on a case-by-case basis—in which it might be appropriate to have a commission before service of the indictment. That would be a matter for the Crown Office and the defence, because—obviously—the defence still has the right to cross-examine.

Daniel Johnson: In practical terms, what will that mean? Are we talking about a few weeks earlier, a few months earlier or even a year before the trial?

Karen Auchincloss: I can write to the committee with a better indication of the timescales, but my understanding is that somebody could appear on commission and it could be six or eight months later that the indictment is served. We recognise that some cases take far too long between the initial report and their getting to court.

Lesley Bagha: There is a wider context to the matter. Obviously, with the bill, we are looking at pre-recording. However, in the summer, the Cabinet Secretary for Justice announced—I think—£1.1 million of funding to help the court service and the Crown Office to reduce the amount of time that sexual assault cases take to get through the system. In our policy memorandum, we supply a lot of the wider context, too. In a sense, the issue that we are discussing is just one part of what needs to be done; we need also to consider the wider issues.

We are aware of a number of issues. The various parts of the justice directorate and the ministers, with the court service and the Crown Office, are considering how we might address those issues other than through pre-recording.

John Finnie: There have been a number of references to the practice note. Can you say a bit more about it? Is its author Lady Dorrian? What regard does the legislation have to it? Is it a dynamic document—is it evolving?

Lesley Bagha: I sat on the practice note sub-group, which was one of the sub-groups of the evidence and procedure review. I was there as a Government observer, alongside representatives of the legal sector and the third sector. Lady Dorrian chaired the group, which dealt with a number of practical issues that were raised on the back of the initial evidence and procedure review—for example, what might be done to enable greater pre-recording. The court service developed the practice note, but that was done with input on how the process could work from all the sectors.

The practice note is quite lengthy. I believe that the sub-group considered the issue for about a year before Lady Dorrian issued the practice note, which I think was in May 2017.

The High Court can bring in practice notes, which it does regularly. The note could be updated at any time. Right now, the practice note is only for the High Court. It will be for the court service to decide whether it wants to deliver a similar note for sheriff courts. We understand that, at the moment, if there are commissions in the sheriff court, parties take cognisance of the High Court practice note, but the sheriff court does not have its own one.

In respect of the bill, we have picked a few key elements of the ground rules hearing that we think should be in primary legislation. In a sense, it is better to limit what is in primary legislation, compared with what is in the practice note, for the very good reason that the practice note is a fluid document that is easier to amend as lessons are learned.

The court service is currently evaluating the success of the practice note. The committee may be aware that the service very recently issued its first evaluation report, which was about how the guidance for the practice note is working in the High Court, and it received very positive feedback. I think it intends to do a second evaluation report in the next few months, so I am sure that there will be a further update. Lessons that are learned in the evaluation will result in further adaptations—that is for the court service to provide more information on.

John Finnie: Is this something that it is nice to do, or that has to be done, or, because it exists, is followed in any case?

Lesley Bagha: Do you mean the High Court practice note?

John Finnie: Yes.

Lesley Bagha: The High Court practice note is a very important vehicle because it means that all the parties to a case, not just the court and the judiciary, are aware of what is expected of them, and it provides form and guidance. It sounds as if the note is already having a positive influence—the increasing numbers of applications and how prepared they are shows that there is a lot of merit in it. Clearly it is also a "nice" thing to do, but it seems that it is having a very positive influence as well, so it is probably more than that.

John Finnie: Thank you very much.

Liam Kerr (North East Scotland) (Con): Some submissions expressed concerns about the possibility of miscarriages of justice. In her opening remarks, Karen Auchincloss talked about the setting being less formal, but some people might suggest that the process will be taken less seriously. For example, it will not allow a jury to see a contemporaneous cross-examination. How reassured are you that miscarriages of justice will not happen?

Karen Auchincloss: I am very reassured of that. Some people might think that the process is less serious because it is less formal, but at the heart of the process is protection of the most vulnerable people. By using a less formal setting in which they might feel more relaxed, we are likely to get better evidence. In the interests of justice, obtaining the best evidence can only be a good thing.

Lesley Bagha: The process will still be under judicial scrutiny. We must remember that, often, the witnesses give evidence on very traumatic matters. What we might see as a more informal setting could probably still be very intimidating for such witnesses. As they happen at the moment, commissions are informal in a sense, but there is still legitimate questioning on difficult subjects.

On your point about the jury not seeing the witness give evidence, as part of the Scottish Government's research into commissioning of juries, in—I think—the last year we published an evidence review that relates to how pre-recorded evidence is seen by jurors. The review was particularly interesting in respect of the evidence of child witnesses, in that it did not show—as one might have expected—that such evidence carried less weight or lost anything due to prejudice. The review was positive in that respect. If the committee does not have a link to that evidence report, I can send it.

Liam Kerr: I thought some of the conclusions from that report were very interesting.

In the bill, there is an exception to the rule about pre-recording evidence, which is if it would

"give rise to a significant risk of prejudice to the fairness of the hearing"

and

"that risk significantly outweighs any risk of prejudice to the interests of the child witness".

That is interesting phrasing, because it suggests that any risk of prejudice to the child's interest would outweigh the fairness of the trial.

Lesley Bagha: That is already set out in legislation on other matters relating to special measures, and it is accepted. The right to a fair trial, as set out in article 6 of the European convention on human rights, runs underneath any decision that is taken on the matter.

Liam Kerr: Would the fairness of the trial remain paramount?

Lesley Bagha: Decisions must be compliant with the convention—even the decisions of judges. The wording that we use in the bill is already used in the Criminal Procedure (Scotland) Act 1995. It is not new wording. It can therefore still be seen to provide for a fair trial. The miscarriage of justice point has been raised with us before, so it is an issue to which we are very sensitive.

I cannot speak for other people and what they might personally think about miscarriages of justice, but there might be a fear that we are in some way trying to remove or limit the right to cross-examination, or that we are trying to stop proper testing of evidence. We have tried to make it clear that we are absolutely not doing that. That is not the policy intent—it is about having more focused questioning in more appropriate circumstances. It is not in any way about the defence not being able to put legitimate questions directly to the witness, which is still absolutely the intention.

Liam Kerr: I presume, however, that you accept that the provision will require a cultural shift—or a

shift in mentality—in the adversarial process that we have?

Lesley Bagha: That is right. It is a movement towards saying that our having a more trauma-informed way of approaching children and vulnerable witnesses does not mean that we are removing the accused's right to a fair trial by testing their evidence. Enabling a witness to get their evidence out should not undermine fairness to anybody else. What we are doing is letting them tell their story and then allowing legitimate questions. Whenever such concerns are raised, we always work with the legal sector to try to alleviate them. Our intention is not at all to undermine fairness. It is about providing better circumstances in which vulnerable children and other witnesses can give their evidence, and that it can be properly tested at all times.

Liam Kerr: In its submission, the Faculty of Advocates suggests that it should be a requirement that "sufficient safeguards" are in place to ensure fairness. What do you understand such safeguards to be, and are you comfortable that they are in place?

Lesley Bagha: We would probably have to have someone from the faculty here to say exactly what its concerns are. It has previously said to us—and I am sure that it will say so in its evidence—that it is slightly concerned that the way in which the bill has been drafted might mean that it is possible for just a prior statement to be submitted to the court and for there not to be any form of cross-examination or evidence by commissioner. We are 100 per cent clear that that is not the policy intent. The bill has been drafted in that way just to explain the ways in which pre-recording can happen. If a defence agent ever wanted to cross-examine such a witness, that could happen, but it would have to comply with the European convention on human rights.

What we have tried to allow for in the bill—and where concern has sometimes arisen—is that there is a real possibility that a child's prior statement might be taken and the defence might not have any questions. If that is the case, we do not want a commission to have to be set up and for everybody to be sitting there, only for the defence to say that it has no questions and for the child to be sent away. We have to allow for some circumstances in which the prior statement might be the only evidence. However, if the party that has not called the witness wants to do any questioning, that will still happen.

Liam Kerr: I understand that, but I might pose the question again. If the Faculty of Advocates—a very powerful voice—has said that sufficient safeguards need to be in place, presumably you will have taken time to understand what such safeguards would be and, if you think them legitimate, to build them into the legislation.

Lesley Bagha: Absolutely. We have had a number of meetings with the Faculty of Advocates, and its representatives have been very helpful and supportive in that respect. A key safeguard is that everything that is set up for the ground rules hearing and the commission is always done under judicial scrutiny, so the judge is always there to ensure that a fair trial can take place. That is one of the main safeguards, and we are not removing it in any sense. In the same way, we want to ensure that nothing further goes. We will listen to the faculty's evidence in due course and, if there are further safeguards that we have not thought of, we will absolutely take them on board. As I have said, it has been very constructive in its dealings with us, and we hope that it will carry on being so.

The Convener: Fulton MacGregor has a supplementary question.

Fulton MacGregor: I hear what the Faculty of Advocates has said, and I think that it has been very constructive, but it sounds as though the bill is, in essence, providing a safeguard for the court process by changing the environment in which vulnerable witnesses give evidence. Do you agree with that?

Karen Auchincloss: As I touched on earlier, the hope is that the approach is about somebody being able not just to give evidence but to give their best evidence, and the bill's provisions have always had that in mind. They are not just about getting evidence but about securing the best evidence from the child or the vulnerable witness.

Fulton MacGregor: And thereby safeguarding the court process.

Karen Auchincloss: Yes.

Rona Mackay: What is your opinion of the Barnahus model? Will the bill bring us any closer to that?

Lesley Bagha: The first thing to say is that the bill is absolutely not about Barnahus. I have previously had some involvement with that concept, and the main thing that I would say about it is that it is a general concept.

11:45

It is often talked about as the Barnahus model but, as it has slowly been rolled out in different parts of Europe, each country has adapted it according to its circumstances and what works best there. Before Barnahus was moved to another unit, I had formal dealings with it. I went over to Europe as part of the European Union promise project—I do not know whether you have heard of that—which was an EU-funded

programme that brought together representatives from lots of different countries to find out about Barnahus. Some of them were setting up the model and some were just considering it. Initially, representatives of the courts service and Children 1st went to the meetings; I went to the very last meeting. It struck me that I was the only justice representative there, although perhaps there was a police officer there, too. A lot of people who work in health and child protection went, because a lot of what Barnahus is about is the trauma-informed child focus.

When I was over at that meeting, I spent a bit of time talking to one of the main people responsible for bringing the Barnahus model to Europe. He is a gentleman called Bragi Guðbrandsson. He was the director general of the child protection agency in Iceland, but I think that he has left that job, because he is now a committee member of the United Nations Committee on the Rights of the Child.

I spoke to him because I was looking at Barnahus from a justice point of view. He was clear that Barnahus could work in an adversarial system, although most systems that have set it up are inquisitorial. There would be no problem with Barnahus, but adapting it to an adversarial system would mean that you would not tend to have the one-stop-shop of Barnahus with one forensic model interview. You could still have bits of pre-recording, because Barnahus is much more about wraparound services, forensic medical examination, therapy and advocacy, and about all that happening in one place.

Currently, the Scottish Government is just exploring the Barnahus concept and whether it could be adapted for Scotland. That work is at the exploratory stage now.

The Convener: You have not mentioned the streamlined process for arranging the use of standard special measures. The bill provides for an automatic entitlement and makes the process administrative rather than judicial. Will you talk about that?

Karen Auchincloss: At the moment, if somebody is automatically entitled to standard special measures, they are automatically entitled. However, as the legislation is framed, the applications and notes go to the judge, so this provision is just to free up judicial time and to make it more of an administrative process. Another thing with standard special measures is that people are automatically entitled to them and no other parties can object. The provision will make the process more administrative and less of a judicial rubber-stamping exercise, which will free up time.

The Convener: Is there no concern that, by making it an automatic administrative process without the judge casting their eye over who is before them, someone who needs not just the standard measures but others might slip through the net?

Karen Auchincloss: As it is framed at the moment, the legislation has review provisions so that a court or judge could review it if they thought that the most appropriate special measure had not been applied for. The new rule has review provisions built in as well.

Liam Kerr: My question is on something slightly separate. The SCTS evidence and procedure review referred to research that indicated that the current system of examination and cross-examination is not a good way to obtain accurate evidence from a vulnerable witness. That is referred to several times in our papers, which is interesting. Can you give us a bit more detail on what the evidence said? Is the research scalable to not only other vulnerable witnesses but the whole system as it stands?

Lesley Bagha: Yes. The evidence and procedure review looked at the adversarial system; probably, it was looking at a bigger picture than that. In relation to Mr Finnie's questions about the sub-group on joint investigative interviews and Lady Dorrian, I mentioned that that was, in part, looking at a longer-term vision that could be achieved by potentially moving from that system to having just one forensic interview for a case. I think that it was level 1, so it was only for certain child witnesses. That was very much seen as being a long-term vision.

Obviously, Lady Dorrian and the courts service can speak for themselves, but it is safe to say that that could not be done quickly. In a sense, what is being proposed by the Scottish Government is a first step to getting the whole system used to pre-recording being the norm. That does not happen at the moment.

Whether we currently have the best system is probably beyond what we can comment on, but a lot of interesting things came out of the evidence and procedure review with regard to getting to the truth and how to find out about it. It was about starting a journey towards a more inquisitorial system, whether or not that is the end point. We are at the very start of the journey in Scotland; we are not used to pre-recording and evidence being taken in advance. It is about starting that and it becoming the norm.

I leave it to the courts service, which has been much more involved, to comment on the research in detail, in case I misrepresent it. It was part of a much more extensive possible vision for the future

for Scotland, rather than something that could happen immediately.

Liam Kerr: But if that is the start of a journey, how do you respond to the suggestion—criticism is perhaps too strong a word for it—that the ability to extend the category of vulnerable witness by regulation only provides Parliament with insufficient scrutiny over that category?

Lesley Bagha: At present, it is proposed that that will be by affirmative procedure, so there is still sufficient scrutiny. It is hard to see in what other way that could be done. If the committee or Parliament were not happy with what is proposed, further evidence could be given. An extension could not just happen in a vacuum; there would have to be broad discussion about it and how it would be done.

One reason why it is good to have the flexibility and still have the parliamentary scrutiny that comes with it being done by affirmative procedure is that, if something is too flexible, there is a much greater risk that something comes in before the system is ready for it to be handled, which could have a detrimental effect on vulnerable witnesses.

There absolutely will be parliamentary scrutiny. If, in future, regulations are brought forward to extend the category to include deemed vulnerable witnesses, parliamentary scrutiny is built in. It would not just be done by a commencement order as that power would have to be put before the Parliament.

The Convener: That concludes our questioning. I thank the witnesses for attending. We suspend briefly to allow a change of witnesses.

11:51

Meeting suspended.

11:56

On resuming—

Management of Offenders (Scotland) Bill: Stage 1

The Convener: Item 2 is an evidence-taking session on the Management of Offenders (Scotland) Bill at stage 1. I refer members to paper 3, which is a note by the clerk, and paper 4, which is a private paper.

I welcome to the meeting Gill Imery, Her Majesty's chief inspector of constabulary in Scotland; Wendy Sinclair-Gieben, Her Majesty's chief inspector of prisons for Scotland; Chief Superintendent Garry McEwan, divisional commander, criminal justice services division, Police Scotland; and Colin McConnell, chief executive, Scottish Prison Service. I thank everyone for their written submissions. As always, the committee has found them particularly valuable in advance of the formal evidence session.

We are not doing too badly for time, so we can allow a bit of latitude. However, I must ask everyone to be as succinct as possible. I also suggest to members that the session might be more effective if they direct questions not to the whole panel but to the person whom they want to address it, if they know exactly who that is.

Liam McArthur will start the questioning.

Liam McArthur: Good morning. As the convener has said, your written submissions were very helpful, but it might also be helpful if, for the record, I start by asking who can be released under home detention curfew and how the balance between public protection and rehabilitation is struck.

Colin McConnell (Scottish Prison Service): As you know, the chief inspector of prisons and the chief inspector of constabulary made a number of recommendations that were considered by the Scottish Government and out of which has developed a further set of restrictions on those in custody who can be considered for home detention curfew. I have the list right here, and I am happy to read it out.

There are statutory exclusions, which include those required to register as sex offenders, those on extended sentences, those who have a supervised release order, those serving a recall under sections 17 or 18 of the Prisoners and Criminal Proceedings (Scotland) Act 1993, those subject to hospital direction and, of course, those awaiting deportation. Over and above that, there is a presumption against the grant of HDC for those whose index offence involved an act of violence,

possession or use of an offensive weapon and possession or use of an article with a blade or sharp point and those with any links to serious and organised crime.

Currently, there is a considerable restriction of and presumption against the grant of HDC, which, since the new measures were introduced, has resulted in almost a 75 per cent reduction in the granting of HDCs. At one time, we may well have been granting somewhere between 25 and 30 HDCs per week, whereas now we are down to around seven per week.

12:00

Liam McArthur: You have described those people who are excluded. What was the previous presumption for HDC? Would someone get to a certain point in their prison term and then automatically apply or be put forward for HDC?

Colin McConnell: There are two facets to that. First, the statutory exclusions always applied. Previously, unless there were particular factors, the expectation was that HDC would be granted—that has been completely turned around and the presumption now is that HDC will not be granted where there are any concerns at all or where there have been previous acts of violence. Secondly, although the presumption against the grant of HDC is guided towards the index offence, decision makers are encouraged to look further into someone's background. The implication of that is that, where there is any recent indication of violence or even where there was an act of violence that is considered to be serious but was some time in the past, it would probably militate against a decision to grant HDC.

Liam McArthur: That is a fairly dramatic fall. It is entirely understandable how we have arrived at that point but, given that the purpose of HDC is to rehabilitate those who are about to leave prison and help them back into the community, that dramatic reduction in the number of people getting HDCs is going to have a knock-on impact on the rehabilitation process. If that is the case, what measures can be taken to address that, given that it is not in anyone's interests for offenders to be released back into the community only to enter into a cycle of reoffending?

Colin McConnell: That is a valid point. At the end of the day, it is the same group of people—the nature of the people we care for in Scottish prisons means that most of their backgrounds are fairly similar. We are seeing something that will be projected in the weeks, months and years ahead. However, we cannot have it all ways. If our concern is the potential for someone to commit a further offence or a heinous act when on any form of licence and if, understandably, our tolerance of that potential is reduced, our position will be to move forward on the current basis.

I have to be clear with the committee. My instruction to governors, through the operations director, is that we should be very careful in how we arrive at the decisions to grant HDC, given what has happened and the level of public and political concern about people being released into the community. We are seeing a clear change in behaviours that will be sustained over time.

Liam McArthur: I will come to the issue of the information that informs those decisions and the training for the people making them but, first, does anyone else want to address the point about rehabilitation and any concerns that might arise from the approach that is now being taken?

Gill Imery (Her Majesty's Inspectorate of Constabulary in Scotland): I am happy to add a comment on the involvement of other agencies in the assessment of an individual's behaviour in the community. We saw that such assessment was missing. Other than the service provider having control of the device to manage the curfew, there was no assessment of the conditions for that individual.

The three guiding principles for the Prison Service that were previously in place for home detention curfew—protecting the public, preventing reoffending, and promoting successful reintegration into the community—were sound. The problem was not the principles themselves but, as the evidence that we found in our review showed, the fact that they were not being followed.

Liam McArthur: The statutory exclusions that Mr McConnell has just talked about take the decisions that need to be taken down to a much smaller level, as well as involving others. It would be helpful to know precisely who is expected to be involved in the decision-making process. What have the training that is provided for such individuals and the information and evidence that they are able to draw on in making such decisions been like until now, and how will they change as a result of the reports that have been produced?

Colin McConnell: The SPS welcomes the reports that have been published. As the committee knows, we have accepted without limitation the recommendations for improvement that have been made.

As I expect the committee knows by now, the prison governor takes the final decision. As before, it remains the case that the eventual decision involves a multiplicity of contributions from both within and outwith the prison environment. The engagement of external contributors is now focused on in greater measure, to ensure that the bases are covered appropriately. At the end of the

day, the approach is about having defensible decision making.

The key advantage that we now have in the Scottish Prison Service is that fewer people are engaged in the decision-making process. Such people are clearly identified and their roles are very specific. Having governors or, in their absence, deputy governors taking such crucial decisions is a strengthening measure, given the recommendations that were made, because they are strategic decision makers and that is all part of their experience and training as they move through the service.

That introduces an opportunity for reflective practice in the Scottish Prison Service. Every month, governors in charge meet the director of operations. Part of that process is reflective practice, through which the decision-making process is continuously reviewed and improved so that we will have the consistency across the service that the chief inspector asked for.

Liam McArthur: But, from what you were saying, such a decision will still be one for a governor or deputy governor and we are not moving to a situation in which a board of individuals would take it.

Colin McConnell: No. Previously, such decisions would have been taken at middle manager level in the service. Now, they are taken by the governor in charge of each prison. Of course, some prisoners may wish to appeal against them, and there is an appeal process. If governors in charge are not available to make such decisions, their deputies do so.

Liam McArthur: You talked about a governor or deputy governor taking on board a multiplicity of views before arriving at such a decision. If anyone were to raise serious concerns about what the governor or deputy governor intended to do, would that be overridden or construed as a potential veto? Is the idea to arrive at some unanimity across the range of stakeholders?

Colin McConnell: To be clear, governors in charge are experienced strategic decision makers—that is the nature of their job—so we trust them to act appropriately within the framework that they have been given. Also, their instructions are clear. I reiterate to the committee that, given where we are now, the presumption is against the grant of HDC. Governors will identify those who will benefit more clearly from HDC, in the absence of clear or critical concerns. As I set out with the statistics that I shared with you, a reduction of towards 75 per cent suggests that, in the short term, those critical decisions are probably being taken more appropriately, given the limitations that are now in place and the fact that governor practice is regularly reviewed.

Liam McArthur: You talked about the other individuals or stakeholders who would be involved. Will additional types of information or evidence be sought as part of the decision-making process?

Colin McConnell: That was part of the overall recommendation. Police colleagues might wish to contribute on that. A considerable amount of work is going on, particularly with Police Scotland, on information sharing and making sure that the information runs through to the decisions that are taken. There is an exchange of information every Monday morning in relation to the data bank of those who are being considered for HDC and that information is subsequently validated. With the information that is coming together from criminal justice social work and Police Scotland and from across the Prison Service, there has been a quantum leap in the data that we hold on each individual who is being considered. Having a strategic decision maker sitting on top of that gives us a far better level of assurance than we previously had.

Chief Superintendent Garry McEwan (Police Scotland): I support everything that has been said. The purpose of home detention curfews is the reintegration of the right people back into communities and the rehabilitation of those people. When a home detention curfew is breached, the role of the police is to understand what the breach is—whether the curfew has been breached or an offence has been committed—and to incarcerate the individual, who will then be recalled to prison. I fully support the premise of HDCs.

The risk assessment and the communication between both organisations are far better than they were previously. As Colin McConnell mentioned, there are weekly discussions via conference calls at an operational level, when regular discussions are had to ensure that details of those who are being released by the Prison Service on a home detention curfew—and those who have breached their curfew or any aspect of it—are communicated to Police Scotland. We can take action very quickly at a local level, with good oversight by local commanders and local area commanders, to make sure that individuals who are unlawfully at large are brought into custody as soon as possible.

Liam McArthur: My colleagues will come on to issues to do with breaches.

I have one final point. Mr McConnell described a dramatic reduction in the use of HDCs and Mr McEwan talked about having an appropriate level of risk management. That suggests that nobody was entirely comfortable with the previous situation. We have arrived at the current position in the most tragic of circumstances, but were concerns raised previously about the extent to

which HDCs were being used across the board for individuals who should not have been granted them?

Colin McConnell: I am not sure that I follow the logic, Mr McArthur. I understand that you may be juxtaposing the current position on a monochrome basis with where we were previously, but the fact is that the approach has changed. As the chief inspector reported, in the particular instance that led to the review, the SPS had complied with the instructions in the guidance as it was at the time. The guidance now is of a different order. We have moved from a presumption in favour of granting HDC to a presumption against. It should not surprise us that, with the restrictions that we have put in place and with potentially more adept decision makers taking those critical decisions, there is a sea change in the level of grant of HDC.

12:15

I do not agree with the monochrome position that what went before was unacceptable. What went before was compliant with the rules and regulations as they were. The rules and regulations that we have now and the import of a presumption against, rather than a presumption in favour, is what leads us to the conclusions—

Liam McArthur: I do not think that I was making a monochrome characterisation. I was simply picking up on the point that you made that there has been a dramatic reduction in HDCs now that the presumption has shifted and on the suggestion that the way in which the approach now manages risk is entirely appropriate. I do not doubt that that is the case. However, the public will question why, given that HDCs were being used to the extent that they were—albeit for rehabilitative purposes and all the rest of it—concerns were not being raised at that stage as to whether that was appropriate, whether the presumption was correct and whether the statutory exclusions were as extensive as they needed to be. Those are entirely legitimate questions for the committee and the wider public to be asking.

Colin McConnell: I agree entirely. I go back to part of Mr McArthur's earlier question, which was what, at the end of the day, HDC is for. As a society, we believe that people who have made mistakes and fallen by the wayside should be tested out in the community. We should find opportunities to retest them and give them the opportunity to survive that and not make mistakes. Fundamentally, that is what lies behind HDC and licensing more generally.

There have been a couple of horrendous experiences involving people in the community who have been on HDC or on licence, which have caused us collectively to reflect and that has led us to the current position.

The Convener: Does Ms Sinclair-Gieben have anything to add?

Wendy Sinclair-Gieben (Her Majesty's Inspectorate of Prisons for Scotland): We were pleased that all the recommendations had been accepted. However, I was particularly pleased about the speed of acceptance. The guidance document is the bible for people who are deciding on HDC and they lean on it. The new guidance document that has already been issued holds all the extra stuff that has been put in—and which, funnily enough, we did not recommend—and goes into detail. All the recommendations that we made are now in the guidance and it is a much clearer, more robust document.

The guidance also ensures more consistent documentation. One of our concerns was consistency of judgment on the day, because it comes down to a judgment that is made by one person. We asked for a second reassurance by someone more senior and that now happens. The guidance is considerably larger and provides the appropriate documentation. Given all that, we should see a consistency of approach.

The exclusions are now much greater. Listening to the debate, I feel that it is the exclusions that are causing the drop in numbers, rather than the poverty of the previous capability.

The Convener: Do you have any thoughts about the impact of the more stringent restrictions on the prison population?

Wendy Sinclair-Gieben: I do. We were speaking about that before. Before the review started, I had concerns that there might be unintended consequences of a rise in the prison population—not just as a result of HDC. One of the recommendations that I made was that there should be an official, independent evaluation of the whole of HDC in which we collect the reconviction statistics and examine whether HDC actually works for reintegration.

My concern is that, if we become risk averse in respect of HDC, we will also become risk averse on parole and moves to the open estate. That will mean that the pressure on prisons—some of which are already struggling—will become huge. I was very worried about that ahead of the review. Colin McConnell and I keep in regular touch because I want to see how the prison population is growing.

As the committee will know, another unintended consequence is that the pressure on the prison population puts pressure on the staff and various other things. For example, the levels of self-harm and violence go up.

It is a very testing time at the moment, because we have distinct evidence that such change in the HDC system has had an impact. I was interested to hear Liam McArthur ask whether that implied that we were not getting it right previously. We need a further review in three or five years' time, which should ask whether we have now got it right and whether it is having the consequences for HDC that we wanted. We need to do a proper evaluation.

The Convener: Liam Kerr has a supplementary question.

Liam Kerr: I will pick up on that point, but my question is on something that Colin McConnell spoke about in response to Liam McArthur's questions: political and public tolerance of the risk of reoffending. What I hear from you is that, since the reviews, and since some tragic incidents have happened, such tolerance has reduced. That begs the question of who made the assessment that we could previously have a higher tolerance of risk to public health. Was it the SPS or was there an instruction about that from the Government?

Colin McConnell: That is an extraordinarily difficult question to answer. I listen to discussions in the Scottish Parliament, and I take into account discourse in the media. I also have one-to-one discussions with parliamentarians, as well as taking general counsel from other professionals across the justice system. It is not a straightforward either/or answer; it is a melange of all those factors.

As chief executive officer of the service, my role is to try to set the tone for what I think sensible decision making in an operational public service should be. At the moment, and given all the discourse that has been going on, my judgment is that there is a lower level of such tolerance, particularly in the public domain. I would be interested to hear from parliamentarians sitting around this table if they do not think that that is the case. I influence the decision makers in my organisation, and my judgment is that we need to be more cautious in our decision making—especially on allowing people access to the community when they have a prison sentence. The guidance and the restrictions that have been agreed and implemented reflect that.

Daniel Johnson: Mr McConnell, what number of crimes, especially serious, violent and sexual crimes, have been committed over the past two to three years—or whichever period for which you have numbers—by people on home detention curfew?

Colin McConnell: I do not have such data immediately to hand. I had thought that the committee might be interested in that, and I asked my team for the data this morning, so we are working up those details. I can say that, other than the cases that are already in the public domain and which have influenced the review, I am not aware of high numbers for serious offending. However, a low level of offending is reflected in the numbers of prisoners whose licences or HDCs have been breached. I do not have the precise numbers, but—I am looking at the convener as I say this—I am happy to write to the committee with them if that would be helpful.

The Convener: That would certainly be very helpful.

Daniel Johnson: The numbers that have been intimated to me are 16 murders and dozens of serious sexual assaults. Do those numbers surprise you?

Colin McConnell: In Scotland?

Daniel Johnson: That is what has been intimated to me.

Colin McConnell: I am entirely unfamiliar with those numbers.

Daniel Johnson: Okay. I will await your clarification. As your previous answer suggested, the key points here are whether the tragic circumstances that brought about the reviews are isolated, and the extent to which there might be a wider problem. Do you agree?

Colin McConnell: With the convener's indulgence, Mr Johnson, may I check that? Are you saying that your information leads you to believe that 16 murders have been committed by people who were on HDC?

Daniel Johnson: That is the number that was raised directly with me by the family of Craig McClelland, who lost his life as a result of such a case.

Colin McConnell: Of course, I will check that number; I am shocked and stunned by it. I am not familiar—

Daniel Johnson: Obviously, you have asked for those numbers. They are important with regard to the point that I have just raised.

Colin McConnell: I am looking at police colleagues.

Chief Superintendent McEwan: I would be very surprised if, since 2006, 16 murders had been committed by people who were out on home detention curfew. I would be extremely surprised if that was accurate, and it will be interesting to get the figures.

Daniel Johnson: Are you confident about the processes that are in place? You said that it is now the governor who takes the final decision. Why was the governor not taking those decisions

previously? Who was taking them? Can you clarify the level of seniority or the number of years of experience of the individual who was taking those decisions? Were they finally signed off by the governor? Given the new guidelines, what will prevent that becoming just a rubber-stamp process?

Colin McConnell: As I said previously, one identified middle manager in the prison took those decisions. Now it has to be the governor in charge who signs those decisions off.

Reflecting on the data that Daniel Johnson has just shared with me, I am a bit stunned by that.

Daniel Johnson: It was referred to me directly, personally and anecdotally. My primary concern is that the McClelland family has a lot of questions and that they are still very angry. I want to ask the questions that they would ask if they were here, because I think that that is important.

Colin McConnell: With regard to the previous decision-making process, the information that has already been shared with Parliament is that 80 per cent of people on HDC completed their licence without issue. There was a level beyond that where there were technical breaches, but there was a comparatively small number—I will get that data for the committee—who went on to commit further offences. However, those offences were generally low level. I am not excusing that or diminishing it—it is just a fact. We know, because it is also a fact, that in recent times, there has been one very serious issue with HDC, which we should all reflect on carefully. We hope that the measures that we have put in place are designed to make the chance of that issue happening again as unlikely as possible.

Mr Johnson and Mr McArthur raised similar questions. We have now put in place different decision-making processes because of what happened, but, given the instructions that we previously had in place, it is not right or appropriate to try and criticise those previous decision makers. As the chief inspector has said—

Daniel Johnson: Mr McConnell, with all due respect, I will quote directly from the HMIPS report:

"Whilst an assessment process clearly existed, it may not be regarded by some to meet the definition of 'robust'"—

I am skipping a sentence—

"This situation led to different criteria, interpretation or timescales being adopted in different establishments."

Those are pretty critical comments to put in a report. Although I agree that adopting new criteria and assessment processes does not necessarily infer anything about the previous processes, those sentences in that report do, and they question the robustness of the processes.

As Gill Imery pointed out, if one of the fundamental criteria is keeping the public safe, then questioning the robustness of the processes is of serious concern. How do you respond to that?

12:30

Colin McConnell: I am grateful for that clarification, because the chief inspector said that, in the specific case that was being referred to, the decision makers had followed the process. That is quite insightful. The chief inspector might wish to comment on this, but, in general, the rules that were in place were being followed, by and large.

We welcome the report, the recommendation and the move from a situation where the presumption was to grant HDC to one where the presumption is not to grant HDC, because, by necessity, that demands a far tighter set of requirements. We have put those in place and that is what the chief inspector is saying.

Daniel Johnson: Finally, the situation regarding home detention curfew is in many ways comparable to the decision on remand and whether to grant bail that is taken at the beginning of the criminal justice process. Are the decision by a sheriff or judge whether to bail a person and any concerns that they might have had about public safety taken into consideration in the decision process for HDC now, or have they been in the past? If not, would that information be valuable as part of your considerations?

Colin McConnell: That is an interesting proposition. We do not take that into account because the person that we have before us—the person for whom we are making decisions—is someone who has been convicted and sentenced to a period of custody. That aspect of the judicial process has already been followed through and we then apply an administrative or executive process. I understand the point that you are making, Mr Johnson. I would be happy to reflect on that with my justice policy colleagues.

John Finnie: I have a question for Mr McConnell—I am afraid that you are getting all the questions.

Everyone accepts that public safety is paramount, so let us park that for a moment. I commend the rehabilitative work that the Scottish Prison Service does. It is absolutely vital and that is what it should all be about.

I want to ask about a particular category of prisoner. A sizeable percentage of the prison population are people with drug or alcohol addiction issues. I would not want us to be in a

situation where there is no realisation that lapsing is part of those illnesses. What regard is there for those circumstances in decisions around home detention curfew?

Colin McConnell: We would hope that someone who is granted HDC would continue with any therapeutic process that they were following in custody. However, we cannot insist on that and ultimately it is a matter of choice. It is linked to the provision of other services in the community, because, in the main, HDC is only granted to people who are serving less than four years, which means that there is no statutory provision for them in the community, although there is voluntary provision, which they can decide to access or not. As we engage with people moving through the process and going through the transition back to the community, all of us—agencies based in the community as well as those of us who are based in the custodial environment—try to encourage people to engage as productively as possible with all the services that may help them to resettle appropriately.

John Finnie: Would it be established whether there is a service available for someone to engage with?

Colin McConnell: Most certainly.

John Finnie: That is reassuring.

Wendy Sinclair-Gieben: That is one of the things that has changed in the guidance. Previously, licence conditions would be attached with no guarantee that criminal justice social work would be able to monitor or support those conditions. Now, there has to be a written acceptance and agreement in place before HDC can be granted. There is a shift in that direction.

The Convener: That is reassuring.

Shona Robison: We have touched on the presumption against release on HDC. I want to focus on the numbers in light of that. The fall in the number of HDCs that are granted is already quite dramatic—75 per cent was cited. Does the panel anticipate that the extension of presumption against release on HDC to offences involving violence, possession of a weapon or links to serious organised crime will lead to a further fall?

I was particularly interested in Wendy Sinclair-Gieben's comment about the need for an independent evaluation, maybe three to five years down the line from the introduction of HDC. Would that focus on the quite dramatic changes that have happened? Colin McConnell said he would be particularly interested in whether they have had an impact on the prison population, but there would also presumably be interest in the outcomes for those who have been granted HDC. It would be interesting to hear more about that and, first of all, the numbers and whether there will be another drop.

Colin McConnell: That is a hard question to answer. As I have already said to the committee, the population is not going to change that much, in terms of the back stories that people bring with them. In most cases, we are seeing the outworking of the back stories of people who make their way into custody. Depending on how far back we think that it is reasonable to consider those back stories, we can say that most people who head our way will have engaged in violence in some way. Will the numbers stay the same? I think that they will stabilise over time. I doubt whether we will see them shift up the way. We have moved between a position of having somewhere between 25 and 30 grants per week to having somewhere around seven. Do I see that going up to 10, 12 or 15? Probably not. I think that it will be at the lower end, over time, because, generally speaking, the population that is in custody has a back story. For most people, that will involve some level of violence.

Shona Robison: How much discretion will there be on whether an offence involves violence? As you said, that could cover many offenders. So that I can understand the process of the presumption against release, can you tell me whether, in the guidance, that will ultimately come down to the judgment of the governor? How clear is that guidance?

Colin McConnell: Again, that is a really important and strategic issue for the justice system. Let us be clear about this: my guidance to governors is to be cautious and to take a broad look at someone's offending history. If there is any indication that anybody has used a weapon or an implement against another person or any indication of meaningful or serious violence, no matter how far back that was, my encouragement to governors is to be cautious. The presumption would be that I would be reluctant to grant someone with such a back story HDC, and that is the guidance that I am giving to my governors now. Over time, if we have a mature discussion about that in the light of experience, a different consideration might well emerge. However, that will be based on experience and mature discussion. It may be that my approach and SPS's approach is viewed as being currently far too narrow and too conservative—with a small C—and that perhaps a more informed and mature view will emerge over time. However, at the moment, our approach is reasonable, and probably necessary, in order for us to establish some confidence in the HDC decision-making process.

Shona Robison: What about the evaluation that Wendy Sinclair-Gieben suggested?

Wendy Sinclair-Gieben: I think that there need to be two evaluations. One is required because HDC has been in place for a number of years and we now need to evaluate how effective HDC was before the changes, in order to inform our decisions as to how to move forward.

We do not even collect the reconviction rates, and we should. We also need to look at reintegration. I am not sure how we would research that, but it would be very interesting to compare how the reconviction rates stack up against those for people who have just been released from prison and people on community orders. That is an important point.

Anecdotally, many prisoners say to us that HDC was a wake-up call. They got out of prison and could rethink their lives. On HDC, they had time in which to change their lives and start again. That is anecdotal experience, and we need to back it up with proper research.

The second part is that we should have a second evaluation after the current system has been in place—how many years it should be in place is something that needs to be decided. We will have the first evaluation and the reconviction statistics, and the second evaluation will tell us whether it is being useful as a reintegration tool or whether reducing HDC has seen a rise in the reconviction rates. The two evaluations are critical before we can decide whether the previous and current systems have been good, bad or indifferent.

Shona Robison: That is helpful.

Fulton MacGregor: Mr McConnell will be glad to know that my line of questioning is more on compliance than enforcement, so it is probably aimed at Garry McEwan in the first instance. What arrangements are in place for non-compliance? Can you take us through the police process when somebody breaches the curfew?

Chief Superintendent McEwan: When the prison governor initially decides that a person will be released back into the community on a home detention curfew, the police are sent a notification, which now comes to a single point of contact. I call it “the single point of success”, because one of the key issues that was identified previously was that there were multiple points of failure. In the old world, notification went to a number of different email addresses, because of the previous force arrangements. Those emails sometimes reached the source and sometimes they did not.

We get the notification and the individual is then released into the community and, rightly, allowed to go about their business. The person wears a tag that is monitored by the supplier—G4S, in Scotland—which is alerted if the individual breaches the curfew. There are four key breaches: removing or tampering with the device; leaving the house during the time when the curfew states that the individual must stay indoors—for example, from 10 o’clock every night until 8 o’clock the following morning; commission of another offence; and the more general breach, which is failure to keep the peace.

When a person breaches the conditions, G4S notifies the governor of the prison from which the person was released, and the governor then decides whether to inform the police that the individual is now unlawfully at large. I sounded hesitant for a moment there, because on some occasions the governor might not do that, but might instead get back to G4S to check whether the tag is faulty or whatever.

The individual is not declared to be unlawfully at large on all occasions, but when they are we get a revocation of licence, which is formal documentation from the Scottish Prison Service. We disseminate that to the area where we believe the person resides and local police officers will attempt to arrest the person as part of the revocation of licence. He or she is then taken back to the jail at the earliest opportunity. That is the general process that is now in place between us and the Scottish Prison Service.

Fulton MacGregor: How quickly would you put officers out to search for an individual after getting that documentation from the SPS?

Chief Superintendent McEwan: We hope that that would happen within 24 hours. We get seven days’ notice of when a person is to be released on home detention curfew, and when they breach the home detention curfew we are likely to get formal notification of that from the SPS within 24 hours.

12:45

Fulton MacGregor: You touched on your role in monitoring a person’s release. I assume that it is dependent on the situation and the offences, but can you explain more about that and how often it takes place?

Chief Superintendent McEwan: That is the role of G4S—it is the authority responsible for on-going monitoring. It has oversight and ownership of the devices, so G4S would probably be alerted to a breach before the police.

Fulton MacGregor: I am sorry. I did not make this clear: I was not referring to monitoring of the devices, but to police involvement in social work visits.

Chief Superintendent McEwan: We do not have a statutory role in visits, but we might well make unannounced visits as part of our routine policing, especially if there is intelligence to suggest that the person might be getting back into

bad relationships, drugs, low-level shoplifting or whatever. In such cases, it is for local officers to make efforts to contact the person and, if required, to make referrals through the vulnerable persons database—perhaps to criminal justice social work. If an individual appears to be on the brink of reoffending but has not committed an offence, we have a key role in supporting that individual or, at least, in referring them for support.

Fulton MacGregor: Could that role be tightened up a wee bit to make visits a requirement? That is where I was going with my question. In such situations in my previous employment, police visits were established locally, as you suggest. They work really well, but given that the local police or other agencies might be able to pick up when a breach is likely, information could be going out from you as well as coming in from the SPS to you.

Chief Superintendent McEwan: The police have a role, but I caution against making that role obligatory. Such an individual has served their time: they are out and are a free citizen, albeit that they are under a home detention curfew. We therefore need to be careful about the role and responsibility of the police, and to recognise that criminal justice social work and other third party and voluntary organisations provide the support.

However, local officers are tuned into local intelligence, and local relationship building and unannounced visits happen regularly across the country, when there are opportunities for them.

Fulton MacGregor: Thank you. That was a useful question.

Where do home detention curfews sit in the priority list—that is maybe a crude term—compared with restriction of liberty orders and community payback orders? What priority is attached to the response when curfews are breached?

Chief Superintendent McEwan: A home detention curfew breach—the person being unlawfully at large—is now considered to be in category A in policing terms; therefore, it is as high risk as current outstanding warrants. We would seek to have the individual incarcerated and brought back into custody within 21 days of their being unlawfully at large.

However, as I said at a previous Justice Committee meeting about electronic monitoring, the current guidance is very restrictive in that we do not have the power to enter and search premises. We could go and check an address for a Garry McEwan, but we have no power of entry. By contrast, when a police officer has an apprehension warrant in his or her possession, they can force entry to any house and search it for an individual. As I said at that previous meeting, there is a gap in terms of the legislation and that power.

There is another gap that I probably did not articulate in the best way, previously. I have tried to explain the process between G4S, the governor and the police. However, a police officer might come across an individual at 3 o'clock in the morning—I call it "the 3 o'clock in the morning"—when G4S is not aware that the individual has breached their curfew. In my mind, they present great risk because they have breached their curfew and are out doing whatever they are doing, but the police have no power of arrest in that situation. We can note details, but if the person is committing no other offence, we have to allow them to go on their way. That is a real vulnerability

At the previous evidence session that I attended, I mentioned that the police should be afforded the power to arrest an individual who is not officially accused; we could take the individual into custody and the governor and others would be notified very soon after that. At the moment, we note the details, allow the individual to go on their way and, as soon as possible, notify the governor that the individual has breached the curfew.

Fulton MacGregor: Would it be useful to include a power of arrest in the bill?

Chief Superintendent McEwan: That would be very useful. I encourage the committee to support the inclusion of a power of arrest of people who are found, in real time, to have breached their home detention curfew and, in addition, the inclusion of powers of entry and search.

Fulton MacGregor: Thank you. For the record, convener, I would like to clarify that I was referring earlier to good answers that we have received to questions—I was not praising my own questions. Someone may have picked up on that.

Daniel Johnson: One of the key issues relates to individuals who are on home detention curfews and who either reside in other jurisdictions or move abroad. If someone has an address in England, what is the procedure for ensuring that they do not breach the curfew, and what happens if they do breach it?

Chief Superintendent McEwan: That is currently done through the single point of success that I referred to. The SPS notifies Police Scotland and we put the information on the police national computer and the criminal history system. Those national systems can notify officers anywhere in the country of the details of such an individual. The SPS receives a notification. The information is on those IT systems, and we notify the relevant police force in England and Wales that the individual is unlawfully at large, and pass the paperwork from the SPS to that force. It is then its

responsibility to prioritise incarceration of the individual.

Daniel Johnson: Would the police be relying on English law? Is it correct that being unlawfully at large is an offence in England but not in Scotland?

Chief Superintendent McEwan: No. Where the custody originates in Scotland, Scottish legislation would apply.

Colin McConnell: I am not a lawyer, but I would have thought that Scottish legislation would apply.

Daniel Johnson: I will ask a blunt question regarding the McClelland case. Why did it take 69 days from the point of breach and notification of it, to the point when police knocked on the door? Was it because you did not update the SPS with the current email address? That seems to be one of the implications of your previous answer.

Chief Superintendent McEwan: No—that was not meant to be implied. You are talking about the tragic killing of Craig McClelland. HMICS carried out a review of the processes and found that they were followed correctly, including notification of Police Scotland by the Scottish Prison Service and updating of the national computer system. I was referring to the previous situation when I mentioned issues with emails. That did not happen in the tragic case of Craig McClelland and the release of Mr Wright. The HMICS commented that the processes were followed as they should have been.

Daniel Johnson: Why did it take 69 days?

Gill Imery: I will clarify: as far as the notification process is concerned, Chief Superintendent McEwan is correct. It was followed in that particular instance and the notification was made well within 24 hours. The HMICS review was clear, however, that what happened afterwards was not acceptable, and that there was insufficient evidence to demonstrate that a professional level of inquiry had been made in order to apprehend James Wright and return him to prison.

Daniel Johnson: Would changing the category to category A be sufficient to ensure the correct level of response in the future? What would you like to happen?

Gill Imery: It was a category A incident. The period was 14 days, under the previous standard operating procedures. There is an explanation in the report of the difference between a home detention curfew breach, a revocation licence and a warrant. Even for a high-priority warrant, the period allowed would be 21 days. Regardless, Police Scotland did not manage to meet the deadline. The deadline has not changed, and there was nothing wrong with the standard operating procedures that existed—it was just that they were not followed.

Daniel Johnson: That is quite a serious allegation.

Gill Imery: Yes.

Liam Kerr: I want to go back to the line of questioning that Fulton MacGregor pursued. Chief Superintendent McEwan—if I may, I will summarise briefly and reflect back what you said. If the police suspect a breach of home detention curfew, there is no power of arrest at that point. If the SPS revokes a licence, you can arrest the person, but you cannot enter premises to do a search. I believe that the facility exists in England and Wales to do such things. You said to Mr MacGregor that you believe that the bill should allow you to arrest the person on suspicion of a breach. Can we extrapolate from that that you believe that you need an offence of being unlawfully at large and/or the ability to enter and search premises for people who have had a licence revoked?

Chief Superintendent McEwan: There are probably three aspects to that. The first is a power of forced entry and search, and I think that that would absolutely be advantageous. The second is a power of arrest in the 3 o'clock in the morning scenario, where the police are the first organisation to find the individual, before the formal process. I think that the police would benefit from a power of arrest at that point.

The third aspect is an additional charge of breaching the revocation licence. I would also support that. I am probably stepping into other territory here, but when somebody breaks out of prison, that is an offence. As things stand, when a person breaches their home detention curfew, they are simply taken back to prison, where they serve the remainder of their sentence. There is no punishment and no deterrent to discourage the individual from breaching the curfew. The curfew could be subject to review in three or five years, but its being an offence would be an additional deterrent to prevent individuals from breaching home detention curfews.

Liam Kerr: That is very helpful. Thank you.

The Convener: Finally, I have a question about communication, which both inspectors have mentioned. A scenario in which there would be a legitimate reason for a breach is where the person has been rushed to hospital and is not where they are supposed to be for that reason. Is there a problem with getting that information from hospitals because of data protection legislation? When we visited the Wise Group, it suggested that that is an issue. Have you come across that? More generally, how could communication, which is a theme that runs through so many reports on the police and other organisations, be improved?

Gill Imery: HMICS has not come across that scenario. Chief Superintendent McEwan mentioned a number of reasons why an individual might technically not be complying with their tag, but would not necessarily be in breach by committing another crime or being unlawfully at large.

More widely, communication was absolutely a feature of the review that HMICS carried out. Chief Superintendent McEwan mentioned the single point of contact that has been established. We have not had an opportunity to test that yet, but as the committee will be aware, we will revisit the home detention curfew process in six months, when we will be able to assess the difference that the single point of contact has made to the two-way communication between Police Scotland and the Scottish Prison Service.

The Convener: I will also pose the question to Wendy Sinclair-Gieben, given her comments on recall and the need for more communication. I think that you have said that more communication is needed between the SPS and the police, but perhaps we should add the NHS to that.

13:00

Wendy Sinclair-Gieben: For me, communication is one of the key points in the report. By the way, please just call me "Sinclair", as the second half of my name is much too difficult. [*Laughter.*]

We made recommendations on a number of areas of communication. One that interested me is to do with when a person has breached their licence or is expecting revocation. We do not inform them, but we should be sending them a letter. I know that a number of people have ended up breaching their licence because of a technical system failure; they are dutifully at home in bed, but there is a technical system failure. I do not have statistics on that to hand, however.

However, communication is key: one of the key points that we made is about communication—of the history of offending or intelligence that is held about serious and organised crime—between the police and the people who make the decision about whether to release. Continued communication between the police and the SPS is also key.

I also agree with the convener that the NHS should be included; there should be a way in which the NHS, when it finds that the person has a tag—they are not hard to spot—can access a single point of contact to inform the police that the person has come into hospital if, say, they are unconscious. There are numerous reasons why people end up breaching that are no fault of their own. Being in hospital is just one of them.

The Convener: We would be interested to see written evidence of examples of where Police Scotland has been refused information under data protection rules. Obviously, the better we can identify legitimate reasons for breaches, the better we can target people who breach and are a danger to the public.

Wendy Sinclair-Gieben: The SPS would provide that evidence.

The Convener: Absolutely.

That concludes our questioning. I thank the panellists for a very worthwhile session.

13:02

Meeting suspended.

13:02

On resuming—

Subordinate Legislation

Licensed Legal Services (Complaints About Approved Regulators) (Scotland) Regulations 2018 (SSI 2018/341)

The Convener: Agenda item 3 is consideration of a negative Scottish statutory instrument. I refer members to paper 5, which is a note by the clerk. Do members have any comments?

John Finnie: I will repeat a comment that I made fairly recently. Presumably, the Government either has an impact assessment that is shared or it does not. Paragraph 12 of the policy note that is included in paper 5 states:

"An ... impact assessment was discussed with the Law Society".

However, paragraph 13 refers to:

"A Partial Business and Regulatory Impact Assessment".

I find that quite peculiar. I have no further comment to make.

The Convener: We will feed that back to the Government's business manager, who has been taking a particular interest in SSIs; I am sure that he will find that very helpful.

If there are no other comments, does the committee agree that it does not wish to make any recommendations in relation to the instrument?

Members *indicated agreement.*

Justice Sub-Committee on Policing (Report Back)

13:04

The Convener: Agenda item 4 is feedback from the Justice Sub-Committee on Policing on its meeting of 15 November. I refer members to paper 6, which is a note by the clerk. Following the verbal report by John Finnie, there will be an opportunity for comments or questions.

John Finnie: You rightly identified, convener, that the committee's most recent meeting was on 15 November, when we held our fourth evidence session on Police Scotland's proposals to introduce, next month, a digital device triage system—also known as cyberkiosks—with the intention of interrogating mobile phone data.

The sub-committee took evidence from representatives of the Information Commissioner's Office, Police Scotland, the Scottish Human Rights Commission and the Faculty of Advocates. In taking that evidence, our main focus was on determining whether Police Scotland has a legal basis for introducing the new technology. Police Scotland had requested legal advice from the Crown Office and Procurator Fiscal Service, but that had not been provided by the time of the sub-committee's meeting. The issue of legal advice was raised at the outset of the sub-committee's deliberations in May this year, so it is disappointing that the advice had not been provided.

The sub-committee heard that there is no bespoke legislation that covers the use of the cyberkiosk technology and that, as a result, Police Scotland relies on a complex mix of legal methods in seizing and examining an electronic device. That includes the use of judicial warrants and a reliance on common and case law or statutory powers. It is fair to record that sub-committee members understood that there were protections in place for accused persons and, indeed, suspects, but we had specific concerns about the position of witnesses or complainers.

The sub-committee was told that legislation had not kept pace with technology and that legality was an issue for not just the proposed use of the cyberkiosk technology but Police Scotland's approach to accessing any digital media and biometric data. It was certainly the view of the Faculty of Advocates, the SHRC and the IOC that legal clarity should be in place before cyberkiosks are introduced.

Given the serious concerns about whether the legal framework is fit for purpose in relation to accessing data, and about the human rights,

privacy and data protection implications of introducing cyberkiosks, the sub-committee agreed to write to the Cabinet Secretary for Justice and the chief constable to seek their views on the evidence that we received. Those letters went off today.

The sub-committee will next meet on 6 December for an evidence session on Police Scotland's role in the immigration process and community relations.

The Convener: Do members have any comments?

Liam Kerr: Mr Finnie referred to the Faculty of Advocates' view on the legal framework. Paper 6 states that Clare Connelly of the Faculty of Advocates

"indicated that ... the law required to be changed prior to introduction"

of the cyberkiosks. Was she saying that we need to look at this and sort it all out, or that if the law is not changed, the system cannot legally be brought into force?

John Finnie: It was certainly the view of the Faculty of Advocates, the IOC and the SHRC that there is no sound legal basis for bringing in the new technology.

Liam Kerr: So it could be brought in without breaching the law, but it would be very inadvisable to do so. Is that what is being said?

John Finnie: That is not how I would paraphrase it. The witnesses were very concerned that there was an insufficient legal basis for operating the technology. Looking ahead, they were concerned about not only the technology racing ahead of legislation but the amount of information that is available through the technology. A comparison was made with officers searching a house having to get a warrant to search a cupboard, whereas the information that is stored on people's devices is about their private life, their finances, their relationships and everything. The concern is that technology expands on a daily basis.

Liam Kerr: I understand.

The Convener: On the sufficiency of the existing legal basis, we are still waiting for a judgment from the Crown Office and Procurator Fiscal Service. That will be coming.

Liam McArthur: It was not just the Faculty of Advocates that raised the question of the legal basis; the issue was accepted across the panel. It was also agreed that cyberkiosks had been the portal into the discussion but that that had opened up a broad area in which the legal basis is not particularly sound. The requirement to update the law is increasingly evident.

John Finnie has described the process very fairly. Police Scotland was of the view that the technology was hugely beneficial to the police and to those who had their mobile devices taken off them, because they were returned more quickly. The police have therefore proceeded without due care and attention. What was interesting about the most recent evidence session was the acceptance across the board that lessons had to be learned. For all its failings, Police Scotland came across as being very open to that, and I think that the other stakeholders gave Police Scotland due credit for how it had engaged through the external stakeholder group over the past couple of months.

The Convener: It is fair to say that, as a result of the evidence session, the presumption that Police Scotland will go ahead with the technology at the end of December was questioned. The emphasis was that this is not about the need to get it right but about the fact that Police Scotland cannot afford to get it wrong. It is so important that we get this right and identify the right circumstances in which cyberkiosks can be used.

As there are no more questions, I close the committee's 30th meeting in 2018. Our next meeting will be on Tuesday 27 November, when we will continue our evidence taking on the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill.

Meeting closed at 13:10.

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