OFFICIAL REPORT
AITHISG OIFIGEIL

# Justice Committee

**Tuesday 18 December 2018**

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

# Tuesday 18 December 2018

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## JUSTICE COMMITTEE
**33rd 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:**

Tim Barraclough (Scottish Courts and Tribunals Service)
Dr Johanna Brown (Royal College of Psychiatrists in Scotland)
Rt Hon Lady Dorrian (Lord Justice Clerk)
Yvonne Gailey (Risk Management Authority)
James Maybee (Social Work Scotland)
John Watt (Parole Board for Scotland)

**CLERK TO THE COMMITTEE**

Stephen Imrie

**LOCATION**

The Mary Fairfax Somerville Room (CR2)

# Scottish Parliament

## Justice Committee

*Tuesday 18 December 2018*

*[The Convener opened the meeting at 10:00]*

## Decision on Taking Business in Private

**The Convener (Margaret Mitchell):** Good morning and welcome to the Justice Committee's 33rd meeting in 2018. We have received apologies from Shona Robison, and Liam McArthur has been delayed due to adverse weather conditions. We thought that that would be better than saying that he has been delayed due to wind.

Agenda item 1 is to decide whether to take business in private. Does the committee agree to take in private item 7, which is consideration of our work programme?

**Members** *indicated agreement.*

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

10:00

**The Convener:** Agenda item 2 is our fourth evidence-taking session on 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 to the meeting the Rt Hon Lady Dorrian, who is the Lord Justice Clerk of the Judiciary of Scotland, and Tim Barraclough, who is the executive director of the judicial office in the Scottish Courts and Tribunals Service. Thank you very much for your written evidence, which the committee has found to be tremendously helpful in advance of our taking formal evidence. I must also thank you for arranging not just one but two visits for committee members to see the facilities for taking evidence by commissioner, and for the opportunity to view recordings of commission proceedings. I know that the visits were very much appreciated by all members and have been very helpful in informing our scrutiny of the bill.

I believe that Lady Dorrian wishes to make a short opening statement.

**Rt Hon Lady Dorrian (Lord Justice Clerk):** Perhaps I can trespass on the committee's time for a couple of minutes just to say that I am pleased to be giving evidence on the bill, which represents a significant milestone on a journey in which I have been personally involved since 2014, as a member of the small group that conducted the initial research leading to publication of the first "Evidence and Procedure Review Report" in early 2015. That started a process of consultation and development of ideas for better ways of taking evidence from vulnerable witnesses.

From the start, and throughout the process, we have sought to ensure that measures that we could introduce without legislation had the twin objectives of reducing potential harm and distress to witnesses and increasing the opportunity for reliable, accurate and comprehensive evidence to be given.

The work following the initial report involved all those who have an interest in the criminal justice sector. We knew that the best way of getting genuinely workable proposals that people on all sides could buy into was to get those people working together to develop them, so the working group included representatives of the judiciary, the Faculty of Advocates, the Law Society of Scotland, the Crown Office and Procurator Fiscal Service, justice agencies, third sector organisations that represent the interests of children and victims of

crime and, of course, the police. The quality of the group's collaborative work was very high indeed, and the practice note, which I know many of you have seen, came very much from that collaborative process.

The pre-recorded evidence workstream of the review had two major outcomes. First, it paved the way for the practice note that I have just mentioned, which was designed to use existing legislation and to enhance the use of commissioner hearings. That, in effect, introduced the ground rules hearing that is referred to in the bill, which will regulate the conduct of commissioner hearings, bring greater consistency and put a focus on the witness's needs. It has also led to a significant increase in the number of commissioner hearings, which has enabled us to evaluate that work.

Secondly, as members will know, the working group set out a long-term vision for taking evidence from all vulnerable witnesses. We recognised that that could not be achieved overnight, that there would need to be graduated steps towards a more modern and consistent approach that would be in the interests of witnesses, and that it would take time.

The bill represents one of the significant staging posts on that journey. For that reason, I and my fellow senators of the College of Justice generally support the bill's proposals.

**The Convener:** Thank you very much. We move to questions, starting with John Finnie.

**John Finnie (Highlands and Islands) (Green):** Good morning, panel, and thank you for the work that you have done with others on the bill.

I wonder whether Lady Dorrian could expand and elaborate on the increased use of pre-recorded evidence and the benefits of the approach—in particular, the impact on vulnerable witnesses and, which is just as important, the quality of evidence that is obtained?

**Lady Dorrian:** What really sparked things off was a case in which a child aged five—I think—gave evidence at a trial. The joint investigative interview was played as evidence in chief, but the child was cross-examined at the trial—there had been no commission—some two years or so after the interview, and perhaps three years after the complaint had been made.

When children, in particular, are asked to give evidence at a time that is remote from the event, not only has their memory diminished, but they are more likely to be confused by general questioning about the incident, and in cross-examination might come across—often wrongly—as being shifty or unreliable. Indeed, they not only find it difficult to deal with questions at that stage, but are more inclined to agree with the questioner when they cannot remember something. Clearly, having a commission much closer to the incidents of which they were complaining would enhance their ability to recall and give accurate and comprehensive evidence and, of course, would reduce the harm to their lives, because they would be able to get on with their lives without having to attend the trial. In other words, everything else could carry on, as it were, without them.

**John Finnie:** In the example that you mentioned, what was the impact of cross-examination on the child?

**Lady Dorrian:** I would have to refer to the details of the case, but I think that the child found it difficult to answer the questions in a meaningful way. Again, I would have to check, but my recollection is that the child was not able to give any meaningful evidence in cross-examination.

**John Finnie:** Conversely, are there problems with taking the route in the bill? I am thinking in particular of safeguards to prevent miscarriages of justice. What safeguards should be built into the process?

**Lady Dorrian:** The safeguards are essentially the same as those that would apply if the child was giving evidence at trial. The commissioner is a High Court judge and is invested with the same powers; they are in control of proceedings and can deal with any difficulties that might arise in questioning. Equally, the commission protects the interests of the accused, just as the judge in a trial would.

Apart from simplifying the questions—which is another issue—all that the provision will do is bring the process forward. I see no real difficulties arising along the lines that you have suggested.

**John Finnie:** If, subsequent to the commissioner taking the statement, further evidence were to come to light, how would that be dealt with?

**Lady Dorrian:** We need to bear it in mind that, in such cases, cross-examination of children is very often limited to suggesting that the events did not happen or that someone else, perhaps someone who was visiting the family, was to blame, but if further evidence were to come to light, the question would arise whether it was necessary for the material to be addressed in cross-examination or in examination in chief of the child. If so, another commission could be held.

However, I should point out that since we introduced the practice note and evaluated the results—which show a 50 per cent increase in commissions, although admittedly that has been from a low-level start—we have never encountered a situation in which something has

subsequently come to light that required to be addressed in that way.

**John Finnie:** Should a requirement to pre-record evidence be built into the legislation?

**Lady Dorrian:** Certainly, a requirement to pre-record the evidence of young children and children generally is absolutely the way forward. In due course, that could usefully be extended to other vulnerable witnesses. However, that will have resource implications, so it is important to make sure that we get it right for children before we move on with other categories.

**John Finnie:** Thank you.

**Rona Mackay (Strathkelvin and Bearsden) (SNP):** I will pick up on that last point about phased implementation to cover other witnesses. What is your view of the requirement being restricted to children in the most serious cases? How might it be rolled out generally to children who appear in the sheriff court and so on?

**Lady Dorrian:** In our review, when we recommended that that particular approach be taken, we recognised that phased implementation of the change would be necessary. We felt that the best way to start was with children who are among the most vulnerable witnesses with whom we have to deal. We also felt that it would be sensible to limit the requirement to the High Court and to solemn cases.

We were developing a new model of practice that did not require legislation. We felt that, in order to make sure that the process was developed in a careful, managed and consistent way, it was important to limit it to the most serious cases in which children were giving evidence—mostly, cases of pretty serious abuse that are dealt with in the High Court. Our view was that it was important to get it right for those children, and that the danger of expanding the requirement across the country too quickly was that operation of it would be less consistent. It would also be harder for us to evaluate what was working and what was not.

**Rona Mackay:** I know that you will not be able to tell me exactly, but how long do you think it might take to evaluate that first phase?

**Lady Dorrian:** We have done our second evaluation report, through which we have identified issues that we need to look at. Some are technical and relate to the nature of filming of evidence and what is displayed on the screen. Some relate to controlling of questions and how that should be done, and so on.

At the moment, the practice note is definitely an evolving document. We will revise it and consider whether we need to change elements after the evaluation. It is difficult to say how long it might take to feel comfortable.

**Rona Mackay:** Do you envisage that the issues will be relatively easy to resolve?

**Lady Dorrian:** Yes.

**Rona Mackay:** They are not huge, serious issues.

**Lady Dorrian:** They are not: they are technical issues to do with use of equipment, the rooms in which a commission takes place and control of questioning, on which we are in negotiation with the Faculty of Advocates and the Law Society of Scotland.

**Rona Mackay:** Are you in favour of rolling out the requirement to cover adults and other vulnerable witnesses, in time?

**Lady Dorrian:** Yes.

**Rona Mackay:** That is the eventual aim once everything else is moving smoothly.

**Lady Dorrian:** Yes.

**Jenny Gilruth (Mid Fife and Glenrothes) (SNP):** I will follow Rona Mackay's line of questioning on adult vulnerable witnesses. Does the panel have a specific view on domestic abuse cases? Lady Dorrian said that the requirement to pre-record evidence will be extended to other vulnerable witnesses "in due course". Should we consider domestic abuse witnesses as vulnerable adult witnesses?

**Lady Dorrian:** I use the term "vulnerable witness" in the sense in which it is defined by legislation. Obviously, it is for Parliament to determine whether the definition should be expanded.

**Jenny Gilruth:** Thank you.

**Liam Kerr (North East Scotland) (Con):** You say that it is for Parliament to extend the definition. I think that I am right in saying that such extension would be done by regulations. Is using regulations to extend that jurisdiction appropriate, and would that make it too easy and too straightforward to extend the scope without sufficient scrutiny?

10:15

**Lady Dorrian:** There are two separate things in that question. My previous answer mentioned the statutory definition of "vulnerable witness". My view is that whether that definition should be altered would have to be a matter for Parliament to decide. At the moment, the definition encompasses some witnesses who are complainers in domestic abuse cases, but it does not cover them automatically. That is about the statutory definition of "vulnerable witness".

There is also the question whether the process in the bill should be extended beyond children to other vulnerable witnesses—that is, to others who are defined in statute as being vulnerable witnesses. I do not see any difficulty with that being the subject of regulation, as long as extension of the definition of "vulnerable witness" was done in the knowledge that that could be the consequence. However, I understand that some people feel that extension by regulations is not an adequate safeguard, so that is something with which the committee will have to grapple.

**The Convener:** I will ask a little more about the definition of "vulnerable" in the context of vulnerable witnesses. In evidence, the Miscarriages of Justice Organisation Scotland suggested that the definition of "vulnerable" is not clear, and that people tend to look at the offence and categorise witnesses as "vulnerable" automatically for certain offences, rather than looking at the person who is in front of them.

**Lady Dorrian:** There are two separate issues there. There is a category of witnesses who are vulnerable because of the offence for which the trial is to take place, and a witness can also be vulnerable if it can be shown that they require special measures in order to give their evidence more fully because they would be apprehensive, scared or intimidated without that measure. That approach is a model that is designed more to assess the individual vulnerability of a witness, as opposed to the assessment of vulnerability being based on the complaint being about a particular offence having been committed.

**The Convener:** Does that need more explanation in the policy memorandum, just to make it absolutely clear?

**Lady Dorrian:** I do not think that there is any difficulty in identifying people who qualify as vulnerable witnesses. On the face of it, the provision that enables classifying a person as a vulnerable witness because they would find it difficult to give their evidence without special measures through being apprehensive and feeling under threat is probably sufficient. I do not have the statute in front of me, unfortunately, so I cannot be precise about the terminology.

**The Convener:** We might return to definitions later.

**Daniel Johnson (Edinburgh Southern) (Lab):** I have further questions on the extensions that are provided for in the bill. As I understand it, the provisions will apply in the first instance to children and to specific types of cases, and that can be extended by regulation. However, the bill stops short of making that possible for all types of cases in all courts. In your view, should the bill go further and make that a possibility, so that we do not need to return to primary legislation in the course of time as the situation evolves and we seek to extend the provision for other types of witnesses and cases?

**Lady Dorrian:** Ultimately, extending the bill to other courts, including sheriff courts, solemn proceedings and sheriff court summary business is largely a question of resources, as well as being satisfied that we have a model that is clear and consistent. Once we have a model that is clear and consistent, there is no reason—other than the resource implications—for the practice not to be extended to other courts. As long as the resources are available, there would seem to be no difficulty in extending it by regulation, and there is probably a better and easier argument for doing that than there is for extending the categories.

**Tim Barraclough (Scottish Courts and Tribunals Service):** I add that the facility for taking evidence by commissioner is available across the piece—that already happens at every level. The question is whether the presumption should apply to a wider range of witnesses.

In the evidence and procedure work that was done, it was recognised that it is necessary to take a proportionate approach. The pre-recorded evidence document talked about different approaches for cases of different levels of seriousness in different levels of court.

I will give an example at the other extreme. We said that it would not be a proportionate response to have a complex process for an articulate 16-year-old who had witnessed a bicycle theft. Although, by definition, that witness is vulnerable, a lot of special measures would not necessarily need to be taken to enable them to provide their evidence. We wanted to make sure that a proportionate approach is taken. As the approach is extended, proportionality should still apply.

**Lady Dorrian:** That is an important point. It is also worth noting that, at the moment, witnesses other than children can give evidence by commission if their communication or their ability to give evidence is such that that is required. The real question is whether giving evidence by commission should be made the main method of giving evidence. As Tim Barraclough said, there are proportionality issues with that in the lower courts—in the summary court, in particular.

**Daniel Johnson:** I want to draw out what resources would be required to make the extension of the proposed approach feasible. What resources would be necessary to extend the use of evidence by commission? Are we talking about facilities, court equipment or training for individuals? Will you elaborate on the resource requirements?

**Lady Dorrian:** If we had a system in which all vulnerable witnesses in the High Court had their

evidence captured in commission form, that would have significant resource implications for the police and the Crown as regards how they would go about gathering evidence and what they would do in preparation for how that evidence would be captured in due course, especially given that, with children, the standard way of capturing their evidence-in-chief is in a joint investigative interview, and that would continue. The main resource implications are at that front end.

There would also be resource implications for the court because, for every commission, a ground rules hearing would have to be held. If such a hearing involves assessing the nature of the questions to be asked, it can take some time. There are quite significant resource implications from the point of view of the court's programme of building in time for the ground rules hearing and for the commission, especially when the commissioner is a High Court judge.

**Daniel Johnson:** That was helpful—thank you.

**Jenny Gilruth:** I would like to focus a bit more on taking evidence by commissioner. Lady Dorrian, you pointed out that there has been a 50 per cent increase in taking evidence on commission since the practice note was introduced. Are there any issues with practicalities, such as the use of technology, that would affect the ability to increase the taking of evidence on commission any further?

**Lady Dorrian:** A number of practical issues exist at the moment. It is extremely important to make sure that the equipment that is used up and down the country is consistent and operates the same systems. There needs to be consistency across the country. Some issues arise with the use of particular premises for commissions. We have largely been using court premises, although not courtrooms, because that enables us to keep control over the nature of the equipment that is used.

We are keen to use remote sites when we can, but at the moment there are difficulties with that, because we have less control over the nature of the equipment that is available. There are certain issues with regard to that, as well as issues of security and safety for remote sites.

**Jenny Gilruth:** The committee heard from a children's charity about an example of a child having to give evidence 24 times. That evidence was then ruled inadmissible because the child had had to go through the process so many times. Lady Dorrian, you talked about children's memories diminishing the further they get from the event. Is there an opportunity through the bill to expedite the process to get this done more quickly, particularly for children?

**Lady Dorrian:** I am glad that the bill contains provision for that, because we were concerned that, although, through our practice note, we could encourage the use of commissions for children and encourage people to apply for the commission at as early a stage as possible in the proceedings in the High Court, it could not be done until the service of the indictment at the very earliest. We were keen to see some means by which that could be expedited, so I am pleased that the bill contains the possibility that a commission could take place before the service of an indictment.

**Jenny Gilruth:** Is there an opportunity, with the use of ground rules hearings, for the bill to specify what is required at an earlier stage?

**Lady Dorrian:** Do you mean that the bill should specify what should take place at a ground rules hearing?

**Jenny Gilruth:** Yes.

**Lady Dorrian:** I do not think that there is a requirement to have that in the bill. We have detailed recommendations in our practice note as to what should take place at the ground rules hearing. If you are interested, you can find them in paragraph 11 of the practice note, which covers about two pages. As the document will be under review, we will be able to change those recommendations as and when it appears that something else would assist. The flexibility that would be maintained by having those recommendations on the ground rules hearing set out in the practice note would be much more beneficial than trying to put those into primary legislation, which would be much more difficult to change.

**Rona Mackay:** Should the bill provide for the use of court intermediaries here, as are used in England?

**Lady Dorrian:** We are generally in favour of the use of intermediaries, where their assistance would enable a witness to give their evidence in a clearer and more comprehensive way, and where the communication needs of the witness make that necessary. Very often, with children, an intermediary is not necessarily what is required. Asking simple questions, addressing one issue per question and other approaches of that nature are usually sufficient to address children's communication needs. However, there will be cases where an intermediary would be of great assistance. Although we are in favour of intermediaries in general, I am not entirely sure whether this is the stage to introduce them to the bill.

Another issue is that we do not have a base or cadre of intermediaries who could be called upon to provide that service at the moment. That would

be another complication that might hinder progress at this stage.

**Fulton MacGregor (Coatbridge and Chryston) (SNP):** Lady Dorrian, you spoke about the use of joint investigative interviews. How often is evidence from them used as evidence-in-chief? Is that a regular occurrence and what are the practical difficulties with it?

10:30

**Lady Dorrian:** The joint investigative interview is frequently the way in which evidence is gathered from children for their evidence-in-chief. If there are care issues as well as criminal justice issues, there will be a joint investigative interview. Where there is a commission, generally the evidence-in-chief is taken to be the evidence of the joint investigative interview, and that will be played in due course to the jury at the trial. It happens on a regular basis.

One of our working groups looked at the content of joint investigative interviews. I was not involved in that group, but Tim Barraclough might be able to give the committee more information. However, in the working group on recommending a different vision, we recognised that an improvement of the quality of joint investigative interviews would be central and necessary to what we had in mind. There still seems to be an issue, even from the point of view of the commission process, that the quality of joint investigative interviews is not as consistent as one would like.

**Fulton MacGregor:** In previous sessions, the committee heard that joint investigative interviews are used as the primary means of gathering evidence from children. I should declare that I was previously a social worker and was involved in joint investigative interviews. I am interested in the evidence that we heard that there is often inconsistency in the quality of evidence taken to court. Are there statistics on the number of joint investigative interviews that take place and how many of them result in evidence that is taken to court? I apologise if you do not have the answer to that here and now.

**Tim Barraclough:** When the working group looked at that, it was hard to get clear statistics. The feeling was that around 5,000—certainly in the thousands—of joint investigative interviews take place per year but the vast majority do not end up in criminal proceedings. They have more than one purpose—they can be about finding out whether there are protection issues—and they may reveal nothing that needs to be taken further. Very often, even if criminal proceedings start, they do not necessarily go to trial. There is a big fall-off in cases because the accused pleads guilty, or for other reasons.

**Lady Dorrian:** I doubt very much whether the statistic would be meaningful. The percentage of JIIs that end up in court is not a measure of the quality or success of the information-gathering process.

**Fulton MacGregor:** Would a more meaningful statistic be the number of cases where the JII identified that there should be a prosecution but the quality of the JII did not allow for the prosecution to take place?

**Lady Dorrian:** If there were cases in which, for example, the Crown decided that it could not proceed on the basis of a JII, that would be a more meaningful statistic. Bear in mind that the decision would not be made simply on the quality of one piece of evidence. There would be issues of corroboration. The Crown might have a JII in a case and not proceed on the basis of an inadequate sufficiency of evidence, as opposed to anything else.

That is one of the measures to look at, but more than one measure would have to be considered. One could try to ascertain the extent to which JIIs have been the subject of objection on the basis of their quality or the use of leading questions. I am not aware of that being a significant issue, but it is another element that could be considered.

**Fulton MacGregor:** That is helpful.

Moving on from that point, representatives of both social work and the police have been in front of the committee and have talked about looking at new training techniques for JIIs. Is there anything that you think should be included in training on prior statements?

**Lady Dorrian:** As I said, we produced a report on the use of JIIs that set out clearly what we recommended should be the way forward for the training of both social workers and police officers in the taking of that evidence. I was not on that workstream, but Tim Barraclough might be able to supply more information on it.

**Tim Barraclough:** As Mr MacGregor said, the group recognised that there was a lot of inconsistency and variation in the quality of JIIs across the piece and that two main things were required to improve consistency and quality. The first of those things was equipment: the technology had to be improved because it was very out of date. Secondly, it was recognised that there had to be a common approach—Mr MacGregor raised that point—because different approaches were being taken in different parts of the country. A common approach to the training of forensic interviewing is required. There is a lot of academic research out there on different ways of interviewing children forensically. Some of the information from the barnahus experience was very useful in that regard. We had experts in both

Scotland and the wider United Kingdom who could give advice.

It would be for Police Scotland to give the details, but I understand that it is in the process of changing the approach to training. When we looked at the training, it consisted of a one-week course, with training for four days and interview practice on the final day. However, the training has to be over a much longer period. Alongside that, one of the other things that was picked up was the importance for quality of interviewers being properly trained in forensic interviewing according to the recognised models and practising it regularly in real life. The quality issues came through when a large number of police officers and social workers who were trained in interviewing practised it only once or twice a year, which meant that they could not keep up or develop their skills and that their skills were not evaluated. Therefore, there has to be evaluation and regular practice as well as initial training that is of high enough quality.

**Fulton MacGregor:** I have a supplementary question that is a bit off topic. In earlier answers to colleagues, you talked about the extension of the rule to other vulnerable witnesses. I was interested in the Scottish Government's decision not to extend the rule to a child accused. Do you have a view on that?

**Lady Dorrian:** First, the current legislation provides that a number of specialist measures would be available to an accused child for the giving of evidence. Probably the most appropriate of those measures would be giving evidence by closed-circuit television from a remote location outside the courtroom. It is one thing to sit in a courtroom and listen to a trial in the presence of a jury, but it is another thing to go into the witness box and give evidence to that jury. It might be that CCTV evidence is currently underused in the context of children, young people and other vulnerable witnesses.

Some people have raised the issue of somehow capturing the evidence of an accused child before a trial, but I am afraid that I cannot see how that could ever be done. The accused, whether they are a child or otherwise, is not required to give evidence; the decision about whether they give evidence has to be made in the context of what the evidence at the trial has been, which we will not know until the end of the trial. We might anticipate that the evidence will be A, B and C, but frequently that turns out not to be entirely accurate, and the accused has to respond to what the evidence has been at the trial. I cannot see a way in which the evidence of a child accused could be taken in advance of the trial, nor can I see how requiring an accused child somehow to do that would not be in breach of their rights.

**Fulton MacGregor:** Thank you for that helpful answer. As the Age of Criminal Responsibility (Scotland) Bill goes through the Parliament, my personal opinion is that we should be moving away from seeing children as perpetrators.

**The Convener:** That is a matter for a different bill, as you said.

**Daniel Johnson:** How frequently do technical issues impinge on the quality of JIIs—and also on the quality of evidence taken by a commissioner, given what has happened recently? Have technical issues rendered evidence unusable in court?

**Lady Dorrian:** I am not aware of technical issues having rendered evidence unusable in court, but we have had technical issues such that the evidence could have been captured on film in a way that was easier to follow, for example. If the evidence is taken on a remote site—for example, if a child is giving evidence at a commission by closed-circuit television—there are issues to do with who is seen on the screen and when, and sometimes the end result is that the child is not given as much prominence on the screen as one might wish them to have. We are very much addressing that at the moment, to ensure that such technical issues do not get in the way of the evidence.

**Daniel Johnson:** Does that imply that there is a requirement for detailed technical standards for evidence taken by a commissioner and for JIIs, to ensure consistency and quality? Would it be sensible to develop such standards?

**Lady Dorrian:** We are trying to get some kind of overall, consistent standard of what a commission film looks like. Again, the specification of something in the bill would bring difficulties. Technology advances at a much faster rate than the legislation might be able to follow, so such an approach might not be helpful.

**Daniel Johnson:** I was not implying that we should include technical standards in the bill. It was more a practical policy point.

**Lady Dorrian:** The development of standards is certainly sensible.

**Tim Barraclough:** Across the court estate, there has recently been substantial investment in the technology, such that I do not think that we have particular concerns about the quality of recording, playback and video and audio, given the technology that is now available to us.

I think that the issue that Daniel Johnson raised arises with JIIs, in relation to which there will be greater variability, because different people will provide the equipment. Members should remember that the joint investigative interview is a pre-court procedure, so we do not have a huge

amount of influence on how JIIs are conducted; that is more a matter for local authorities and the police. We would like improved quality and consistency, because that makes everything that follows easier.

**Daniel Johnson:** Thank you; that is helpful.

**Lady Dorrian:** I endorse what Tim Barraclough said. We would very much like to see an improved and consistent quality of recording in relation to JIIs.

**Liam Kerr:** May I go back to Fulton MacGregor's point about the child accused? I totally understand the point that Lady Dorrian made about the logistical and justice reasons for not extending the approach to the child accused—full stop. I get that. However, a conclusion of the evidence and procedure review was that the ability to secure the most comprehensive, reliable and accurate evidence is maximised by a process such as we are talking about. If, as you said earlier, a child is more likely to agree with a questioner, there is an inherent tension in that regard. Is not the answer to Fulton MacGregor's question that there is more to be said about how we improve the evidence of and our ability to get justice for a child accused?

10:45

**Lady Dorrian:** You have to bear in mind the process for a child accused, who has no need to answer anything or give any evidence. Trying to create a situation in which a child accused is somehow required to answer the allegations prior to any trial would have significant constitutional issues. I am not sure that I can say any more about that, as it is not really part of what I anticipated to be the remit of this morning's discussion.

**The Convener:** I return briefly to the technology. Are you satisfied or confident that the Scottish Courts and Tribunals Service budget for 2019-20 will be sufficient to have the necessary resources for the technology that would be required?

**Lady Dorrian:** In order to deal with the use of commissions for children, we are satisfied that we have the equipment. At the moment, we are restricted in places to use; most committee members have seen the room in Parliament house, which is not ideal, and we are looking at other options, which are likely to be resource dependent. Members will know about a very good facility that will be coming on stream in Glasgow, and in due course we will have a good facility in the Highlands when the Inverness justice centre comes on board. However, if the vision is that the commissions should take place more widely across the country and be less focused on court buildings, that would be another issue. Tim Barraclough might have something to add.

**Tim Barraclough:** The direct answer to the question is that we are confident that the facilities are being brought on stream in places that will cope with the likely increase in commissions, certainly in the short to medium term. The Glasgow facility is expected to have three commission rooms that are dedicated: they are in a separate building and do not have the difficulties that are associated with being in court buildings. That facility operating at a reasonably high capacity—not full—could cope with about 1,000 commissions a year; it would be the centre and we aim to upgrade facilities elsewhere across the country, as Lady Dorrian said. In the short to medium term, we are confident that we will have the facilities and people in place to manage them, as well as the judiciary.

If we look a bit further, as availability of commission hearings is expanded to other categories of witness, we would keep in constant dialogue with the Scottish Government, which has so far been very supportive, for example, in providing the resource for the Glasgow centre. It has indicated that it is keen to be as supportive as it can be. In the short to medium term, we see no problems.

**The Convener:** The committee will welcome updates about the resource issue as you progress; that is key to ensuring that the proposal will work well and be successful.

**Rona Mackay:** On the subject of facilities, the committee recently had a trip to Norway during which members visited a barnahus. It is fair to say that we were all very impressed by it. Do you see Scotland moving to that approach in the future? If so, what would be the benefits, practicalities and downside?

**Lady Dorrian:** As members know, all the countries that operate the barnahus system do so slightly differently, because they have adapted it to their own requirements. We have set out our vision of how a forensic interview of a child might take place, which was designed to meet our system's particular circumstances.

We suggested a forensic interview of the child, which would require much greater training for the JII and a very different approach. The idea was that lawyers would have minimal involvement in that. That was our view of how we could use some of the best aspects of the barnahus model. We envisaged that such an interview would take place in centres that also had medical or social work facilities available to assist the child.

That vision is very different from what is in the bill. As we recognised in our report, achieving the vision that we set out would involve a long-term

strategy, because it requires so much of a cultural change and so much of a change in the form of the forensic interview that takes place.

**Rona Mackay:** In Norway, we saw how the barnahus model could work in an adversarial system. As you said, the system is different in other countries. In the long term, could such an approach happen in Scotland?

**Lady Dorrian:** The vision that we suggested could work in that way.

**Tim Barraclough:** We have visited a number of barnahuses in different countries, which are all slightly different, as Lady Dorrian said. The core idea of a barnahus as a centre that has a number of facilities to receive a child or other vulnerable witness who is reporting a serious offence could be used today in Scotland, in the context of having a really good place for a joint investigative interview. However, the legal system would still have an evidence-by-commission hearing later. The idea of a barnahus as a very good space for interviewing children could be developed now.

The long-term vision that was set out in the report was that in the right cases—given that the procedure is resource intensive—a move could be made to such an approach, but that would mean changing the legal system as well as the facilities that are available, as Lady Dorrian said. The approach would involve much more than just building facilities and having certain people there; it would mean changing the culture, because taking lawyers out of direct questioning of the witness would be alien to how things have been done here.

**Rona Mackay:** We were impressed to see that the professionals went to the child rather than the child going to them; the approach was holistic. We will wait and see.

**Tim Barraclough:** There are lots of good ideas that we could introduce as best we can.

**Lady Dorrian:** Yes.

**The Convener:** Communication has been a theme in our evidence sessions so far. What are your views on communication with vulnerable witnesses? How much support are they given before, during and after prosecution? The period after they have given evidence and the accused has been convicted is crucial and is not addressed in the bill.

**Lady Dorrian:** From the court's point of view, our involvement—

**The Convener:** Stops.

**Lady Dorrian:** It also does not start until someone becomes a witness in the court system. The support that might be available to witnesses in advance needs to be discussed with the police and the Crown. Our objective is to ensure that, when a witness gives their evidence, they are given the best circumstances in which they can do so. If that requires them to have screens, to give evidence through CCTV, to have a supporter present or to have a commission to take their evidence, that will be done.

Our focus is on ensuring that the representatives who seek to lead a vulnerable witness—that means not just the Crown but the defence—think about the witness's requirements, their communication needs and everything else and advise the court of that in the vulnerable witness notice. The court will then specify anything else that requires to be done to assist that process.

However, after that, they move out of the court system. The question of what support may then be available for them seems to be more of a therapeutic issue with which the court has no involvement; nor does it have the skills or expertise to be able to address those issues. There would also be constitutional issues were it to be suggested that the courts should be involved in that.

**The Convener:** I fully understand that. You are obviously very passionate about this, Lady Dorrian, and you want it to succeed, as we all do. A recent case that has come to my notice suggests that if there is not that support later—this is looking at the legislation as a whole, not from the point of view of the judiciary—we could almost reach a situation in which the vulnerable witness says, "If only I hadn't given evidence, I would still be able to follow my career and not be rejected because I have been traumatised; I wouldn't be reviled by my close community; and my family wouldn't be facing horrendous problems with where they're living and what they're doing."

There is an issue here. If the word goes out that people can give evidence and get the conviction and that is fine, but then there are repercussions, there is a danger that we will not be giving people the support, encouragement and confidence they need to come forward.

**Lady Dorrian:** One of our objectives in looking at the ways in which the witnesses give evidence is to minimise the harm involved in the process of giving evidence. If there is the risk of harm to the witness from having given evidence, clearly that should be addressed, but it requires to be addressed outwith the court service.

**The Convener:** I totally understand that.

**Lady Dorrian:** Tim Barraclough has just reminded me that the recently constituted victims task force may well address such issues and the Lord Advocate is the co-chair of that task force.

That might be a more suitable forum to address the issue.

**The Convener:** When the cabinet secretary comes to the committee, that might be a question for him.

In your submission, you state that it would be helpful to have a definition of solemn proceedings in the bill. Is that right?

**Lady Dorrian:** Could you just remind me where that is in the submission?

**The Convener:** The point about the definition was mentioned on page 5 of the committee issues paper. In your submission, you state:

"We wonder, therefore, whether provision of a definition of 'solemn proceedings' would be beneficial in"

the context where a child witness is giving evidence in the

"relevant criminal proceedings which are solemn proceedings".

Later on, you add that there is also no definition of "solemn cases" in the bill, so it is not clear.

**Lady Dorrian:** The issue is slightly technical, as you will appreciate, because the proceedings are taken to have commenced when the indictment or the complaint is served on the accused. Therefore there is the question of when there are solemn proceedings as opposed to proceedings. Currently, you would only be sure that you had solemn proceedings when the indictment was served.

A petition is how you commence initially solemn proceedings, but proceedings on petition can be reduced to summary complaint so you would not be able to say that a petition meant that there were solemn proceedings. Simply from the point of view of being able to utilise the suggestion in the bill that we could have a commission at a much earlier stage, it would probably be of assistance to have that definition.

**The Convener:** In previous evidence, the Miscarriages of Justice Organisation Scotland highlighted two other definitions that it thought could be looked at—a definition of the term "ground rules" and a definition of "permissible" in the context of "permissible lines of questioning", which it thought was vague. Do you think that that needs further clarification?

11:00

**Lady Dorrian:** Actually, I do not, because the organisation of the commission is discussed at the ground rules hearing. What is involved in a ground rules hearing is well understood, and I do not see what would be gained from defining it. As I said earlier—I am sorry, but I cannot remember who asked about it—the kind of issues that are raised at a ground rules hearing are listed in detail in the practice note. If as we evaluate the practice note we find that there are other issues that it would be useful to discuss, we can very quickly add them in. If they were listed in the primary legislation, that would not be possible.

What is permissible is a matter for the court to determine. Indeed, it would be very difficult to come up with a comprehensive definition, given how much depends on the actual circumstances of the case. The first rule of permissibility is that the question must be relevant to the circumstances of the case, and as far as the form of questioning is concerned, the questions must be sufficiently geared towards the witness's level of comprehension. The kind of questioning that would be permissible for a five-year-old child would be quite different from what would be permissible for a 17-year-old or an adult vulnerable witness. My strong feeling, therefore, is that these things can be developed within the overall concept without requiring them to be put in a straitjacket of a definition.

**The Convener:** It has been helpful to tease that out in discussion.

**Tim Barraclough:** If the focus of this process is to address a witness's individual needs, you will want to have the flexibility to do so, and if legislation says that certain things must be covered—which might mean that other things get left out—one's ability to take that kind of victim or witness-focused approach might well be limited.

**The Convener:** That, too, was helpful.

A final issue that arises from the policy memorandum relates to the use of the generic term "victim". It has been suggested that the term "complainer" would be better.

**Tim Barraclough:** That is certainly the term and formulation that we would use from the court's point of view. There are a number of cases about the use—and appropriateness—of a particular term by a judge, and the term "complainer" would certainly be of more assistance.

**The Convener:** That concludes our questioning. I thank Lady Dorrian and Tim Barraclough for their evidence, which has been exceedingly helpful in our scrutiny of the bill.

I suspend the meeting for a five-minute comfort break.

11:03

*Meeting suspended.*

11:08

*On resuming—*

# Management of Offenders (Scotland) Bill: Stage 1

**The Convener:** Agenda item 3 is an evidence-taking session on the Management of Offenders (Scotland) Bill. 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 John Watt, chair of the Parole Board for Scotland; Yvonne Gailey, chief executive of the Risk Management Authority; Dr Johanna Brown, a consultant forensic psychiatrist and member of the Royal College of Psychiatrists in Scotland; and James Maybee, the principal officer for criminal justice and the interim chief social work officer in Highland Council, who is representing Social Work Scotland. I thank the witnesses for the written evidence, which, as ever, has been really helpful to the committee in advance of our hearing from them in person.

We move straight to questions from members, starting with John Finnie.

**John Finnie:** Good morning, panel, and thank you for your written submissions.

I want to ask about the new arrangements and the improved information sharing that we have been advised of. Who takes the decisions? At what level are they taken?

**The Convener:** Who would like to start? If we do not have volunteers, we will have conscripts. Can we try you, Mr Watt?

**John Watt (Parole Board for Scotland):** What stage of the process are we talking about, Mr Finnie?

**John Finnie:** It is the point at which the Scottish Prison Service assesses someone's suitability for home detention.

**John Watt:** In that case, I can sit back, because at that stage the issue has not come before the Parole Board.

**The Convener:** Would anyone else like to start off, then? Mr Maybee?

**James Maybee (Social Work Scotland):** Obviously, criminal justice social work is involved in the home detention curfew assessment process. A written assessment is requested of us, which we submit to the Scottish Prison Service for consideration as part of its decision-making process. Ultimately, it is the SPS's decision whether to release someone on HDC.

**John Finnie:** Is that a change from the previous arrangements?

**James Maybee:** No. Criminal justice social work has always provided an assessment report to the Scottish Prison Service.

**John Finnie:** Okay. It is said that the aim is to improve information sharing, but has there ever been an issue in that respect between the Scottish Prison Service and criminal justice social work?

**James Maybee:** Information exchange has generally been very good. We work to the current HDC guidance, which was refreshed a couple of years ago and which I believe is subject to further review. A joint SPS, Police Scotland and Scottish Government working group has been looking at that issue, and Social Work Scotland is formulating its response to the social work aspects of that report. However, that response has not yet been brought to the Social Work Scotland justice standing committee.

**John Finnie:** We are primarily taking this evidence because of a very tragic case that has focused a lot of minds on the matter. We had—not unreasonably—expected something else. You have suggested that existing arrangements are being refreshed, but are you saying that, as far as you are aware, there have been no difficulties at all with information sharing?

**James Maybee:** There has always been a clear set of guidance on HDC, and the criminal justice social work responsibilities are set out very clearly. For example, the guidance that was introduced a couple of years ago set out in a much clearer way our responsibilities with regard to conducting home visits. We have to ensure that there is not just, say, a telephone conversation with the home owner, but a physical visit to ascertain the circumstances in relation to the prisoner's proposed property and residence.

**John Finnie:** Okay. Let me take a different tack, then. The Scottish Prison Service has told us in evidence that there is now a presumption against home detention curfews and that that has led to a 75 per cent reduction in their use. Is it therefore reasonable to suggest that risk aversion has crept in that was not there previously? I am trying to understand the wider implications for prison capacity and the very important issue of rehabilitation. Can all the panel members comment on that, please?

**James Maybee:** With respect, Mr Finnie, I think that that will be difficult. There is no representative from the Scottish Prison Service here, and I can speak only from my agency's perspective. When we are requested to provide an assessment, we will do so in accordance with the guidance. What triggers a request is entirely a matter for the Scottish Prison Service. All that we can do is

respond to that request and provide the assessment, ensuring that it contains sufficient detail to enable the Scottish Prison Service to undertake a fuller and more rounded risk assessment of whether somebody qualifies for release.

**John Finnie:** If, as we have been advised, there has been a 75 per cent reduction in the granting of these curfews, is it still too early to see any manifestation of that in the work load of criminal justice social work?

**James Maybee:** I cannot sit here and say that I can quote you figures for HDC requests. It might suggest that the Scottish Prison Service has taken a slightly different tack, perhaps in light of media coverage and concerns about prisoners being released on HDC. However, I am afraid that I cannot say much more than that.

11:15

**The Convener:** Miss Gailey, do you have a view on that from a risk assessment viewpoint?

**Yvonne Gailey (Risk Management Authority):** Thank you for inviting us to be here today.

I have an interest in HDC from the perspective of risk assessment, which is the only perspective I can comment on. I cannot speak about operational processes. We have recently been invited to join a group run by the Scottish Government and the Scottish Prison Service to review the guidance for HDC with a particular focus on the risk assessment process. That has a bearing on the questions that Mr Finnie asked about the reduction in numbers.

The group had its first meeting last week. One of the points made at that meeting was that, if a risk assessment process is being refined, and there is an argument for doing that, there is a need to start from a clear understanding of the purpose of the intervention that is being assessed. The recent introduction of the presumptions against HDC has inadvertently or on purpose—it is not for me to say—raised the question of the purpose of HDC, its intention and what it is in place to achieve. It is from that perspective that we can work out the correct risk assessment process and have as clear an idea as possible of who the right candidates for HDC are.

**John Finnie:** If there is a reduction of 75 per cent, as we are told by the chief executive of the Scottish Prison Service, that suggests that there was a frailty in the previous system, and that there is a new, robust regime in place. Do you have a view? Were the previous arrangements satisfactory? That has to be acknowledged as a dramatic turnaround in figures.

**Yvonne Gailey:** I cannot comment on the operational arrangements as opposed to the risk assessment process.

**John Finnie:** Surely they are one and the same thing? The whole basis of the Scottish Prison Service and the judicial process should be about risk assessment in terms of the suitability of someone for HDC and the requirement that they be put in custody in the first place.

**Yvonne Gailey:** To answer the question in a robust way, we would need to take up the recommendation of HM inspectorate of prisons for Scotland on the research needed on the home detention curfew, both to understand what has happened in the past and to guide the way forward. I am not aware of evidence currently available to tell us what we need to know, although that could be my lack of knowledge. We understand that there has been an 80 per cent successful completion rate in HDC. In order to answer the question, it would be interesting to know the circumstances and characteristics of the 80 per cent of successful cases and of the 20 per cent of cases that did not complete successfully. From that, we could understand the reason for the dramatic reduction and whether that is the direction of travel that we wish to go in.

**John Finnie:** Were any of the panel members aware of the Scottish Prison Service's change in the presumption arrangements and did any of your organisations play any part in informing the change?

**Yvonne Gailey:** My organisation's first involvement was when we were asked to take part in the recently established group.

**The Convener:** It would be helpful if you could explain about the Risk Management Authority, who appoints you, what you do and at what stage in any process you might have input.

**Yvonne Gailey:** We have a number of statutory functions, all of which have a bearing on effective risk assessment and risk management practice. The one that is most relevant to the discussion is the responsibility to set the standards for risk assessment against which practice is judged generally. We also have specific responsibilities in relation to the order for lifelong restriction.

For our discussions today, it is our more general functions that are relevant, which are advising on policy and research, setting standards, delivering training and publishing guidelines, all in relation to risk assessment and risk management.

**The Convener:** Did you have concerns prior to the new rules coming into being? Were any general or, indeed, specific concerns raised from a risk assessment point of view?

**Yvonne Gailey:** No concerns were raised specifically on HDC. As I said, our first direct involvement has been in recent times. I have talked about us generally setting standards, but we are also involved in different risk assessment processes at different points in time, so that we can give advice on developing current practice processes into those that will aspire more closely to the standard that we have set. In recent times, colleagues of mine have been involved in work with the Scottish Prison Service to look generally at the risk assessment of short-term prisoners. There is a close overlap between that work and the discussions on HDC. That might be the most direct route of influencing the risk assessment of HDC.

**The Convener:** That is helpful in clarifying that you have looked at risk assessment for those with short-term sentences, but not specifically for HDC. Clearly, you think that there is now an argument for looking at HDC.

**Yvonne Gailey:** There is a basic approach to risk assessment that can be applied in any situation, with any group and in any context. We have set the standard for that type of risk assessment. We work steadily through different processes and with different agencies to integrate that approach. It is well integrated in criminal justice social work processes and in Police Scotland. In certain areas of work with the Scottish Prison Service, that approach is already well integrated, and the work that we are currently doing together looks at short-term prisoners. That issue raises particular challenges.

**The Convener:** We have supplementaries from Liam Kerr and Daniel Johnson. Is that right?

**Liam Kerr:** No, but since you are bringing me in—

**The Convener:** Perhaps the questions have moved on from where you were going to come in.

**Liam Kerr:** I will happily ask Yvonne Gailey a question, if I may. You talked about risk assessment; risk to whom and risk of what? John Finnie mentioned that there has been a 75 per cent reduction in the use of HDC, which clearly has a negative impact on prison overcrowding and opportunities for rehabilitation. One would have thought that the overriding consideration is risk to the public from allowing people out on HDC. Is that the case?

**Yvonne Gailey:** That is an excellent question, and it is a fundamental question when we talk about risk. In any practice process or set of guidelines that are developed, it is essential to identify what we mean by the term “risk”. Often, several different risks are involved.

In relation to the Risk Management Authority’s work, the legislation is very specific that we are talking about the risk of serious harm to the public. In most areas of work, that is a primary consideration. In certain aspects of work in the criminal justice system, when people talk about risk they are thinking about the likelihood of reoffending, which is also a valid concern at times.

When we talk about risk, we need to consider a combination of the likelihood of something happening, the impact that that will have on whom and how serious that impact is estimated to be. There are a number of dimensions to risk, but it is always essential to identify what you are assessing and what you are estimating or forecasting in your risk assessment. What person or what group of people is at risk from a particular person? What is the nature of that risk?

**Liam Kerr:** Thank you for that answer, but I am not sure that I heard you say where the priority lies. I would have thought that the key priority is preventing harm to the public. Is that the case?

Secondly, you talked about the prevention of serious harm. I am slightly concerned about that because you have triggered something in my mind that I cannot quite put my finger on. Does the term “serious” refer to the possibility or, indeed, probability of harm to the public such that if it is not serious harm, the decision could be taken to allow someone to go out on HDC?

**Yvonne Gailey:** Thank you for clarifying that. I was unsure whether we were speaking generally or in relation to HDC. I wonder whether you are referring to the three guiding principles for HDC. Can you clarify that, when you talk about risk of harm to others or to the public being a priority, you are talking about that risk of harm as opposed to another? I am not quite clear what you are asking me about. When we talk about risk assessment, what will always be foremost in someone’s mind is risk of harm to others, whether specific or to the public at large.

**Liam Kerr:** Is that harm clarified or caveated by a category of seriousness? Or does it refer to any harm to the public?

**Yvonne Gailey:** If we are talking about the HDC guidance, that caveat or clarification is not there. I have read through the guidance several times and it appears to me that the risk that is being considered is risk of harm to the public.

**Liam Kerr:** And that is the top priority or consideration.

**Yvonne Gailey:** At the beginning of the HDC guidance, there is a reference to there being three objectives or three guiding principles or considerations that must come into play: the protection of the public; the prevention of

reoffending; and reintegration. In a situation where there was a choice to be made about one of those trumping the others, then risk of harm to others would win out. However, in reality, those working in that context must balance all three considerations, because reducing reoffending and promoting the safe reintegration of prisoners into the community are two of the best ways of protecting the public. There is therefore not an either/or choice in terms of those considerations. However, if there was a situation in which one consideration had to win out, it would be that of protecting the public; my reading of the HDC guidance suggests that that is the priority. I think, though, that there is scope for clarification of the guidance material along the lines that you are talking about in order to make it absolutely clear that risk of harm to others is the priority consideration.

**The Convener:** I think that we would agree with that. Daniel Johnson has a supplementary question.

**Daniel Johnson:** I want to follow on from points that John Finnie raised about the role of social work in assessment and information sharing, and particularly where he left off regarding the assessment of homes. Clearly, in the Craig McClelland case, where the individual who murdered him resided was in question. How is such information shared? Is that information acted on? When someone is not present at the address that they have given or concerns are raised about the likelihood of their reoffending in connection with that, is that information, or are those concerns, acted on? In addition, when people give addresses that are outside Scotland, which is a concern that was raised through the McClelland case, what happens in those circumstances? How is that assessed?

**James Maybee:** The guidance on the criminal justice social work role states very clearly that we must visit an address that is put forward for HDC. There are two caveats to that: one is where the individual is the sole keyholder of the address—that is, it is their own property; and the other is about remoteness, because there are significant geographical challenges in visiting addresses in some parts of Scotland.

The overriding focus is on visiting the address; that is clear. The word used in the guidance is "must". If an assessment report is completed by the criminal justice social worker and is returned to the Scottish Prison Service and the home has not been visited and it has not been made clear why, the SPS is perfectly within its rights to contact the criminal justice social work service and ask for an explanation, and then seek further information and clarity about the address. There is absolute clarity around that.

11:30

**Daniel Johnson:** By implication, you do not necessarily know how that information is being used.

**James Maybee:** No, and that is perhaps one of the issues. It might be helpful to refer to the "Report on the Review of the Arrangements for Home Detention Curfew within the Scottish Prison Service" that was published in October 2018. A number of recommendations come out of that particular piece of work, one of which is:

> "The assessment process should therefore be reviewed to ensure that it can satisfy the assertion within the guidance that:
>
> '… a robust assessment process has been developed …'
>
> However, it must be recognised that the SPS is not currently funded or staffed to undertake a more detailed multi-disciplinary approach to HDC risk assessment, and as such the financial and resource implications would need to be addressed and appropriate funding provided".

Recommendation 3 states:

> "Specific training in risk evaluation and assessment must be provided to individuals or teams tasked with making the decision to release someone on HDC."

It is an issue that, although information from criminal justice social work goes back to the SPS, it is the decision-making forum and we have no input into the final decision, which is made entirely internally within the SPS. There have been occasions, certainly within my local authority, when we have given information to the SPS and have taken issue with its decision, because we believed that the information that we provided was of significant concern and that HDC was not appropriate.

My reading of the recommendations is that there is a move towards having more of a multi-agency framework for decision-making and ensuring that SPS staff are properly trained in the tenets of risk assessment. I refer to Yvonne Gailey's points. In Scotland, we all work to the risk assessment management and evaluation framework that sets out the core tenets of how we should approach risk assessment and risk management. It is about ensuring that the circle is closed.

I do not want to sit here and seem to be unnecessarily critical of the SPS. It is just about understanding the process and how all the parts of the journey link together.

**Daniel Johnson:** That is helpful. I do not want to put you on the spot and ask you to characterise some of those situations, but if it were possible for you to provide some examples, bearing it in mind that there will be confidential elements to them, of your information not necessarily being acted on, that would be useful for the committee's deliberations. Can I just touch—

**The Convener:** Jenny Gilruth has a supplementary question, if you do not mind Daniel. It is on an area that Jenny has already indicated an interest in. If your question has not been answered after hers, I will bring you back in.

**Jenny Gilruth:** I would like to drill down into some of the written evidence that we received ahead of today's meeting.

I note from Social Work Scotland's written evidence that it would have reservations about the use of electronic monitoring as an alternative to lower-tariff disposals. The submission goes on to say:

"there is a risk that a two-tier system would be created in which EM is used disproportionately with those on low incomes."

Why might that be the case?

**James Maybee:** Social Work Scotland is not convinced by the argument that EM should be used for offences such as fine defaults, for example. Our concern is that there is a risk that EM would become the default option and that because someone cannot afford to pay, they would get EM. There are lots of ethical issues around EM and proportionality. It is a restriction of somebody's liberty in a way that fining them is not. These things have to be taken into consideration when thinking about whether EM is a proportionate disposal or sentence for people who present a much lower risk.

**Jenny Gilruth:** I want to follow up with a question on any additional conditions that might be attached, other than the curfew. In your submission, you say that

"guidance for GPS monitoring should involve clearly defined boundaries for buffer and exclusion zones"

and that

"It is imperative that boundaries are unambiguous and clearly outlined for those subject to restriction."

You then go on to talk about the implications of that in terms of resource and staffing. Are there any other issues with GPS in terms of rurality? I think that that issue is also alluded to in your submission. Further, has Social Work Scotland considered the issue of training?

**James Maybee:** With regard to GPS, there are issues about remoteness and whether the equipment will function consistently enough to enable it to do its job. Technology is developing all the time and so on, but I am not sure that we can be absolutely confident that problems will not arise.

The question of the resources around how GPS will be used is interesting because, to a certain extent, we do not know the answer to that from a Scottish perspective, although we can look at what is happening internationally.

The answer depends on the way in which GPS is used. For example, are we talking about active GPS monitoring or passive GPS monitoring? If we are doing active monitoring, which involves monitoring the movements of an offender in real time 24/7, there is clearly an issue in terms of resource, who does that, how the information is shared and so on. We can certainly learn from colleagues in other jurisdictions and internationally, but it would be hard to say that there would be no additional costs—indeed, I think that there probably would be. In such a system, resources have to kick in quickly when someone steps over an exclusion line, because there is an assumption that someone has breached that line with intention. It might be that there is a perfectly reasonable explanation for that breach but, until you know that, you have to assume that someone is potentially at risk—if that were not the case, obviously, an exclusion zone would not have been set up. Clearly, such a system would involve resource implications not only for criminal justice social work but for agencies such as Police Scotland and the courts service.

Passive monitoring involves a slightly different situation. It involves reviewing someone's movements over the course of a day, for example, to see whether they have breached their exclusion zones, and then deciding what action to take.

**The Convener:** Daniel Johnson has a follow-up question on the home detention curfew, and Liam McArthur wants to come in after that. After those questions, we will move on to release on parole. I am conscious that Dr Brown and Mr Watt have not spoken yet, but they will get a chance.

**John Watt:** I am quite happy.

**Daniel Johnson:** I have questions about Mr Maybee's comment on developing a multi-agency response and, more broadly, about what Yvonne Gailey's organisation is responsible for.

Mr Maybee talked about the details in the reports of HM inspectorate of constabulary in Scotland and HM inspectorate of prisons for Scotland. Further, HMIPS said that the processes that were in place were not what it would describe as being robust. What are your reflections on those reports, Ms Gailey? What do you think are the key issues that need to be developed, bearing in mind your direct perspective on multi-agency working and the development of risk management standards? What do you think is the gap that has been identified by those two reports?

**Yvonne Gailey:** I find myself in almost complete agreement with the recommendations on risk assessment in the prisons inspectorate's report,

although I come at the issues from a slightly different angle.

Last week, I shared with my colleagues my view that we have in place only part of the risk assessment practice. Essentially, we promote an approach that involves a risk assessment process that has three core steps: identifying the relevant information; analysing the meaning and the relevance of the information; and evaluating all that to inform the decisions that you are charged to make.

Currently, the risk assessment process sets out a range of information that the person who is doing the assessment is required to identify. The information that they are required to identify is very rational and is evidence-based. It involves the kind of behaviours that have happened in the past and the kinds of behaviours that can be taken into account currently that might suggest whether someone is likely or less likely to comply. However, the process does not then go to the next stage and give the person who is doing the assessment some guidance on what to do with that information.

One of the questions concerns whether there has been adverse behaviour in prison, and the assessor considers whether or not there has been. However, it then falls to the person doing the assessment to discern the meaning of that and then to decide the implications of that meaning for the recommendation about HDC.

In those two areas, there is a need for further guidance for the practitioner—generally, a middle management prison officer—who is undertaking the HDC assessments before they go to the governor for sign-off. It is perfectly achievable for us to work with the Scottish Government and the Scottish Prison Service to refine that process to make it that bit more robust by including that additional guidance and by determining, as the prisons inspectorate has recommended, what element of training is required to support that.

I also support the recommendation about the need for some analysis of the use of HDC in the past and currently.

**Daniel Johnson:** When representatives of the SPS came to the committee recently, they told us that they were upholding the regulations, such as they were, up until the point when they changed. On the basis of the report that we have from HMIPS, do you think that that is correct?

**Yvonne Gailey:** When you talk about the change in the regulations, are you talking about the presumption against HDC being introduced?

**Daniel Johnson:** Essentially, the representatives of the SPS told us that they were complying in full with the regulations, such as they were, and that no deficiencies had been exposed in terms of them following the regulations as set out. Do you agree with that?

**Yvonne Gailey:** You must understand that I do not have access to any of the details in that regard, but my understanding is that the SPS and the inspectorate found that the process was followed correctly.

**James Maybee:** It might be helpful to give a bit of context around risk assessment. For example, a criminal justice social worker must undergo a five-day training course—with pre and post-course evaluation—to gain accreditation and to be able to use the level of service/case management inventory, or LS/CMI, risk/need assessment tool. This is not a criticism of the SPS and the HDC process, but short-term prisoners—those who receive prison sentences of less than four years—might not have a criminal justice social work report prepared at the court stage; they might just go straight to prison for that short period without the sort of formal risk assessment that would previously have been carried out. It is therefore reasonable to ask whether all that information is being handled in a systematic and structured way that involves pulling the information together, assessing it and then evaluating it. For long-term prisoners—those who received prison sentences of four years and longer—there will be formal risk assessment that SPS can use as a basis for developing its judgment around HDC.

I stress again that I am not being critical of the SPS, and I do not doubt that the response that you got from the SPS was absolutely correct and that it is following the current process with regard to HDC. However, I think that we would not have the recommendations if there were not some gaps that we need to consider in order to improve and tighten up the system to ensure that we have the best possible decision making around HDC.

There are a number of reasons why HDC is a good thing. It tests out prisoners who are coming to the end of their sentences and it helps them to re-establish connections with their communities, families and friends and to start looking for work. However, we must ensure public protection and community safety, and we must have an absolutely robust system in place to do that.

**The Convener:** As you say, we want the very best system.

11:45

**Liam Kerr:** Currently, when a person breaches an HDC they do not commit an offence. The HMICS report from October states that there should be such an offence. Does the panel have a view on that? Do you agree?

**The Convener:** Right, who wants to answer? Is the question directed at anyone in particular?

**Liam Kerr:** Not really, but perhaps James Maybee could answer. Should a breach of HDC be an offence, given what you said in answer to Daniel Johnson's question?

**James Maybee:** I can give you a personal, not a Social Work Scotland response. I think that there would be merit in considering that. There is a cause and effect and there is an issue of personal responsibility in adhering to that. Breaches of, for example, community payback orders or prison licences have clear consequences in that an individual is held to account for a breach of such an order. It does not necessarily follow that a sanction is imposed—for breaching a CPO, for instance—but the person has to go back, state their case and be held responsible for the fact that they have not complied with the conditions of the order. It is right to consider making it an offence, but I would not argue that it necessarily follows that there would be a sanction in every case, although that may be a consideration.

**Liam Kerr:** I understand. The committee heard at a previous evidence session that, if a police officer suspects at 3 o'clock in the morning that a person has breached their HDC conditions, there is currently no power to arrest that individual. The police view that was given to the committee was that there should be a power to arrest that person, simply on suspicion of having breached an HDC. Do any of the panel members disagree with that view?

**John Watt:** In my previous existence, I was a procurator fiscal. If a policeman suspects that there has been, or is likely to be, a breach of a bail order, they have the power to arrest without warrant. You can see parallels between an accused being on trust on a bail order and a prisoner being on trust in relation to a licence condition. I have forgotten who it was now, but I tend to agree with what the police service representative said—that without some kind of provision they feel powerless. There are arguments about what the police can and cannot do in certain circumstances without a warrant. Search without a warrant implies the power to break open lockfast places, for example, but in the 21st century there appears to be a reticence to do that. I can well see why the police would say, "Give us a statutory power," and with a bit of luck they would be able to use it, and quickly.

**Liam Kerr:** Thank you. That is helpful.

**The Convener:** We move on to questions about parole.

**Rona Mackay:** It is now accepted that there were weaknesses in relation to HDC, and the figures that John Finnie quoted about a 75 per cent reduction speak for themselves. Are there lessons to be learned about parole, risk assessment and returning to custody from the previous experience?

**John Watt:** The experience of the failure of HDC?

**Rona Mackay:** Yes, in the light of recent tragic events.

**John Watt:** It is a difficult question to answer. Any decision that is based on risk requires three considerations, as far as we are concerned—the interests of the prisoner, the interests of third parties, usually victims, and the public community safety interest. If one of those takes priority it is community safety, but it is a balancing exercise. It is almost impossible to answer the question without seeing a case, because each decision has to be case specific.

For example, you could have a prisoner who is a relatively high risk and you would need a very tough management programme to manage that risk in the community before you were satisfied that you could make a decision to release. On the other hand, you might have a prisoner who is a lower risk of reoffending but if he reoffended it would be catastrophically serious, and you probably could not have a management plan in place to deal with that. You could have management plans that involve all sorts of satellite surveillance, GPS and what not, but sometimes you get to a point at which, if you need all that, the prisoner is probably too dangerous to release anyway.

It is a question that we cannot answer in advance. I know that the European Court of Human Rights, for example, is very wary of broad statements such as, "We will not do this" in relation to a particular process, because that may breach someone's rights under the convention. For example, if we were to say that we will not release anyone who has been accused of violence or sexual offending, that would be struck down immediately. That is why we cannot answer that question in advance. If you showed me a case, I could talk you through it and explain the risk assessment and what is relevant to that case and that person.

**Rona Mackay:** I understand what you are saying, but in the light of recent tragic events and two reports that have recommended quite sweeping changes, have you re-evaluated how you deal with parole cases?

**John Watt:** No.

**Rona Mackay:** Okay. Dr Brown, what are your thoughts on whether a psychiatrist should still be involved and can you expand on the part of the bill that deals with that?

**Dr Johanna Brown (Royal College of Psychiatrists in Scotland):** From our reading of the bill, we understand that psychiatrists would be precluded from being on the parole panel. However, we think that the presence of a psychiatrist is of benefit to the panel and that they should remain. Our written evidence outlines the reasons for that and the expertise that a psychiatrist would bring to the panel. Part of that is what we have heard about our involvement in risk assessment and part of it is our understanding of and experience in treating mental illnesses and the management of individuals within a prison setting and in the community.

**Rona Mackay:** Do you have any thoughts on that, Mr Watt?

**John Watt:** I was asked a question like that the last time that I came to the Parliament and I am pretty sure that that was shortly after a recruitment process. We were recruiting legal, psychiatric and general members and we had two applicants who were psychiatrists, one of whom we appointed. There does not appear to be an appetite out there.

Not only that, but the board appoints members to particular hearings in accordance with their availability. Even if we had psychiatrists, they would not necessarily be available for those cases that we needed them for. We try to use the psychiatrists that we have for those difficult and awkward cases that are usually at the state hospital. It would be very difficult to recruit the number of psychiatrists that would be needed to sit on all the cases that they might be useful on. That is just a fact of life.

We have a lot of NHS psychiatric service members—many of whom are senior nurses or who have a nursing background—who have a firm understanding of the process. Beyond that, it is very difficult to say how we would be able to get the number of psychiatrists to get them on to the cases that we would need them on, unless there was a dramatic change and we could appoint on an ad hoc basis.

**Rona Mackay:** Would you like to respond, Dr Brown?

**Dr Brown:** Within psychiatry in general, we are aware of recruitment issues at a variety of levels. We know that there have been difficulties in relation to the Parole Board and those difficulties remain. However, that does not necessarily mean that we should not be part of that process.

**John Watt:** My final point on that is that if the board considers that it needs the assistance of a psychiatrist, it can instruct that a psychiatrist carry out some work with the prisoner and attend the hearing as a witness to assist the tribunal in working its way through before arriving at a conclusion. The board makes its decision on the evidence before it. In some ways, having the professional evidence of a psychiatrist who has seen the prisoner for a particular purpose is perhaps as valuable as having a psychiatrist on the panel. It is not as though, in certain cases, we do not have the benefit of psychiatric evidence. Far from it—if we need it, we will go out and get it.

**Rona Mackay:** Does that mean that you have psychiatric evidence for certain cases?

**John Watt:** It is very unusual, but we do. I am going to the Orchard clinic tomorrow and I fully expect to have two psychiatrists there to explain the position.

**Rona Mackay:** Do you take that into account?

**John Watt:** Oh yes, absolutely.

**The Convener:** What do you think about the psychiatrist angle, Ms Gailey? Is it necessary for risk assessment?

**Yvonne Gailey:** At the point of the consultation on the changes to membership of the Parole Board, my view was that the previous arrangements, which required a number of people from different backgrounds, were quite helpful in maintaining a balance of views and expertise on the board. However, my view on that is from somewhat of a distance and I am sure that other witnesses know much more about it than I do.

**The Convener:** If I understood you correctly, Mr Watt, you were saying that if you think that you need a psychiatrist, you can call in that forensic expertise. That relies on you knowing and recognising that need. If there is a statutory obligation for the psychiatrist to be part of the team, the expertise is there from day 1, as soon as a case—

**John Watt:** It is—

**The Convener:** Please let me finish. We are looking at risk assessment, and highly emotive issues are involved. I, for one, would not want to leave the situation to chance; without the statutory obligation, we would in effect be leaving it to chance.

**John Watt:** It is not leaving it to chance. All members have very broad experience of the criminal justice system.

**The Convener:** I understand. You have made that point.

**John Watt:** We have 2,500 cases a year and one psychiatrist. It is hard to see how a system like the one that you have described—in which a psychiatrist looks at all the cases to make sure that we do not miss the one that needs a psychiatrist—would be possible. I spent a lifetime in the prosecution service identifying cases where there were peculiar issues, or in which one would

seek a report from a psychologist or psychiatrist on a precautionary basis. If there is doubt about a case, we have enough members who could be approached. However, each case is informed by a dossier that one would expect to throw up a clue—a history of psychiatric illness, or something very peculiar about the case. That is where we look.

I am not conscious that there has been an issue—not in my time on the board, anyway—where we have misinterpreted a case and missed a prisoner who required some kind of psychiatric input. Usually, those cases are transfers from prison to secure or middle-secure psychiatric hospitals and a psychiatrist has been involved in the prison. We deal with long-term prisoners on sentences of four years or more, and there is usually an opportunity in prison for that kind of problem to be identified. The problem may not be resolved, but it will almost always be identified.

**The Convener:** We are returning to my initial point about the system being reliant on the board thinking that there is an issue. You think that you have enough general expertise with people who have some kind of psychiatric background. I want to bring in Dr Brown. It seems to me that your very specialised knowledge would be useful to have on a statutory basis, more generally, and certainly to pick up the expertise where it is required.

**Dr Brown:** That is the position that the Royal College of Psychiatrists in Scotland holds. As the panel knows, risk assessment is a very broad area. Psychiatry is part of that, as are many of our multidisciplinary and multi-agency colleagues. The specific knowledge and expertise that we bring is broader than that. Mr Watt mentioned the role of other health experts, including psychiatric nurses and clinical psychologists. Psychiatry brings knowledge of the treatment of illness—of what we can expect people to agree to, and to be involved with, in terms of their care. Looking forward to time in the community, it also looks at integration within community mental health teams and at whether they should be forensic led, and it defines the involvement of the Mental Health (Care and Treatment) (Scotland) Act 2003, should that be required. We have outlined a variety of levels of expertise, which we think should remain part of the Parole Board in a statutory way.

**The Convener:** I certainly found your submission compelling.

**Rona Mackay:** Miss Gailey, when you do risk assessment, does a person's mental health not come into that? Is the presence of a mental health issue part of your decision on what the risk will be? If you do not know that, how can you do a proper risk assessment?

12:00

**Yvonne Gailey:** Mental health is certainly a factor that would need to be considered when someone undertakes a risk assessment. The extent to which it is suspected that there are mental health issues would very much determine the kind of professional who needs to be involved in the assessment.

**Rona Mackay:** Who makes the judgment? Do you call in professional services because you think that there might be mental health issues? How does it work?

**Yvonne Gailey:** I will draw on the social work experience. If a criminal justice social worker was interviewing somebody to undertake an assessment, and if they felt that there were aspects of that person's presentation that suggested that there might be mental health issues, it would be incumbent on them to approach a mental health professional.

**Rona Mackay:** A criminal justice social worker would do that.

**Yvonne Gailey:** Yes, or they would say to the person for whom they were providing the report, "I have concerns about certain issues, but I don't have the competencies to assess them." We either need to live with those issues being unassessed, or they need to be referred to the correct mental health professional.

**Rona Mackay:** Forgive me, but that sounds quite arbitrary—it might happen or it might not. Is it not essential to know whether someone has a mental health issue?

**Yvonne Gailey:** It certainly is, but that does not mean that there is always the resource to address that matter. What is central is that somebody does not attempt to assess something that they do not have the experience and expertise to assess.

**John Watt:** If I am following the discussion correctly, the argument is that it is not for members of the board or for social workers to identify whether an individual is, or might be, suffering from a mental illness; a psychiatrist should make that assessment. Am I following the discussion correctly?

**Rona Mackay:** I am putting the question to you. Do you think that that should happen?

**John Watt:** As I have said, experienced and seasoned professionals ought to be able to spot an issue and then follow it up. If you are not with me on that, the only solution that I can see is that every prisoner has a psychiatric assessment that goes into their dossier before it comes to the board.

**Dr Brown:** We are all at risk of experiencing mental illness. One in four people will experience

it, and that applies within the prison setting, too. Mental health difficulties may or may not have been identified prior to someone coming into prison. Prison is not an easy experience, and many people develop different symptoms during their time in prison. There might not have been historical concerns; there might be more recent concerns.

In Scotland, we are very fortunate in that there are mental health teams in prisons. For the most part, people who experience mental illness are identified readily by the experienced staff in the prison and then directed to the mental health teams. There should be access to professionals—not just psychiatrists but trained mental health nurses, too. That information could be made available if it is required. That said, that information might not be part of the original dossier, so having access to a psychiatrist on the Parole Board would be of benefit in order to follow up on the information and to have access to it in a way that could inform.

**The Convener:** That is exceedingly helpful.

**Fulton MacGregor:** My questions are directed at James Maybee. Can you outline the role of social work in informing decisions about release on parole? Taking into account earlier questions, can you tell us about how mental health services are accessed and the role of mental health officers in that respect?

**James Maybee:** As far as parole is concerned, there is a clear process that includes a community-based element and a prison-based element. Every prison has a social work unit, and it produces a parole report that goes into the dossier to be considered by the Parole Board. A separate report is provided from the community-based element.

A process called throughcare assessment for release on licence—or TARL—has just been evaluated, and there has been a pilot to look at streamlining that process and bringing together the prison and the community-based parole reports into one assessment. There are good reasons for having one assessment rather than two separate ones—for example, it can bring together the best of both worlds. After all, prison-based social workers' view of risk and risk management is sometimes different from that of the community, which simply reflects the different perspectives that people bring to the task.

Interim guidance has been issued and signed off by chief social work officers through Social Work Scotland in respect of how the current arrangements should work if there is any difference of opinion. In the very small number of cases where that happens, the default position is that the community gets the final say, given that it will be managing the risk when an individual gets back into the community. We therefore have a very clear process for submitting assessments and engaging with the parole process.

**Fulton MacGregor:** That was a good outline, but the previous question was about mental health. I think that colleagues around the table are concerned that mental health issues are perhaps not being considered in the risk assessment process. Can you tell us anything about social work risk assessments and the tools used, which you identified earlier? How do they specifically address mental health, and how are other agencies—mental health officers, for example—brought into that process?

**James Maybee:** I can absolutely tell you something about that. The issue of mental health would be considered in any social work assessment, from the original criminal justice social work report that goes before the court onward. Although a social worker might not be a mental health officer, they could have that qualification, which would mean that they would have an additional degree of knowledge and expertise compared with a normal social worker.

However, when a social worker has concerns about someone's mental health, at whatever level, they will certainly seek to refer that individual to the specialist mental health services for an assessment. For example, even at the court report stage, it is not beyond the realms of possibility for a social worker to suggest to the court that it needs a further psychiatric report or psychological assessment in order to inform the sentencing decision.

Social workers are therefore very alive to the issue of mental health, and that process will continue during someone's journey through the prison estate. If somebody is being considered for parole, the prison-based social worker and, indeed, the community social worker involved in the individual's integrated case management will always consider the individual's mental health. As Dr Brown said, we know that there is a high prevalence of mental health issues among those individuals. Social workers are not experts in the same way that psychiatrists or forensic psychologists are, but they will always seek to make referrals for further assessment and information to inform their decision making and will include that information in their report. I would be very surprised if a prisoner with a mental health problem got to a Parole Board hearing and that information had not been flagged up in some shape or form.

**Fulton MacGregor:** Would that surprise you because the risk assessment would have already identified that there had been a history of mental

illness being diagnosed or that there was currently such a diagnosis?

**James Maybee:** Yes. The social worker would always look for any previous involvement with mental health services and would seek to put that information together. It is a critical part of the overall assessment.

**Fulton MacGregor:** That is helpful. What is the role of social work in monitoring parole conditions? What might be the areas of difficulty and where is there good practice?

**James Maybee:** Do you mean with regard to someone actually being in the community?

**Fulton MacGregor:** Yes.

**James Maybee:** Somebody who is subject to a statutory prison licence will be monitored and supervised in accordance with the national outcomes and standards and the associated guidelines. It is fair to say that the current throughcare guidance for criminal justice social work is very out of date; it was written in the late 1990s or early 2000s, and since then there have been significant developments in the way in which we do business. It is generally accepted that we need a more up-to-date set of throughcare guidance to follow.

However, the high-level national outcomes and standards set out very clear guidelines for how often an individual should be seen in relation to their risk. Certainly, the task of social workers is to ensure that prisoners are seen in accordance with those guidelines and are very strictly monitored.

**Fulton MacGregor:** I am happy with that, convener.

**The Convener:** That concludes our questioning, and I thank all the witnesses for attending and presenting their evidence in person to the committee.

I suspend the meeting briefly to allow the witnesses to leave.

12:10

*Meeting suspended.*

12:10

*On resuming—*

# European Union (Withdrawal) Act 2018

## Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment) (EU Exit) Regulations 2018

**The Convener:** Agenda item 4 is consideration of a Scottish Government proposal to consent to the UK Government legislating, using the powers of the European Union (Withdrawal) Act 2018 in relation to a UK statutory instrument, the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment) (EU Exit) Regulations 2018. I refer members to paper 5, which is a note by the clerk, and invite comments.

**John Finnie:** I note that our papers say that, with regard to the timescale for considering this SI,

"drafting issues emerged late".

I do not have a particular issue with the proposal, but we will clearly want to understand why the period for considering what are very important issues has been restricted. I just want to put that on the record.

**The Convener:** I ask Stephen Imrie to clarify the issues.

**Stephen Imrie (Clerk):** If Mr Finnie wants me to go back to the Scottish Government for a bit more information on what the drafting issues were and when they arose, I am happy to do so and provide the committee with more of an explanation.

**John Finnie:** That would be helpful. I am grateful to the clerk for that.

**The Convener:** If there are no more comments, is the committee content to recommend that the Scottish Parliament gives its consent to the UK Parliament to pass this statutory instrument?

**Members** *indicated agreement.*

**The Convener:** The clerks will produce a short report. Is the committee content to delegate authority to me to publish that report?

**Members** *indicated agreement.*

# British Transport Police in Scotland (Proposed Integration into Police Scotland)

12:12

**The Convener:** Agenda item 5 is consideration of an update from the Scottish Government in relation to the proposed integration of British Transport Police into Police Scotland. I refer members to paper 6, which is a private paper. Do members have any comments?

**Liam Kerr:** Are we not getting the cabinet secretary to come to the committee?

**The Convener:** No. We agreed to get a written update from him.

**Liam Kerr:** Okay. So we are just noting the letter and the cover note.

**The Convener:** That is right.

**Liam Kerr:** Thank you. That is duly noted.

**The Convener:** It is not immediately clear whether the Government is looking at a specific option or what the timetable is for implementing what it is now suggesting. However, I think that the Government's objective is still full integration at some point. Perhaps we should get clarification on exactly where we are in the process and where the Government sees us going. We could also ask other stakeholders—BTP, the BTP Authority and the BTP Federation—to comment on where we are now and what they expect in terms of timescales, as that might put some meat on the bones.

**Daniel Johnson:** I echo the convener's point about clarity on timescales. Given that concern has also been expressed about what the programme has cost up to now, it might be useful to request an update on that, too.

12:15

**Liam Kerr:** The points that Daniel Johnson has made are exactly right, but I want to put something else out there, as it is the question that I would have put to the cabinet secretary.

The cabinet secretary says that, if a satisfactory arrangement is arrived at in the medium term, full integration might not be necessary, and he makes it absolutely clear that he is concerned—and rightly so—about uncertainty for the officers and the long-term impact of that. However, his letter still says that, regardless of what happens in the medium term, the Government is still going for merger in the long term. I genuinely do not understand that position. The cabinet secretary is a smart guy—like anyone else, he will get this. However, he seems to be saying, "It doesn't matter if we're successful in the medium term—we're still going to do this."

**The Convener:** That is why the question of timescales is crucial.

**Rona Mackay:** It is important to point out that the cabinet secretary has realised that stakeholders have issues with the proposal and that he is asking them to work with him on an interim solution. However, the ultimate objective is still full integration. I think that, in the letter, he is taking steps to clarify where we are with the process, and what he has set out is sensible and practical.

**John Finnie:** Many valid points have been made. I am quite frustrated about the process, although I think that my frustration is for different reasons than those of other people.

However, one thing that I hope we can unite over is the fact that we have a police service operating in Scotland with all the powers of the police service—powers of stop and search, powers of arrest, powers of surveillance, powers to execute warrants and so on—but this Parliament has no power of scrutiny over it. That is a major deficiency that we need to consider. However, I agree that it would be useful to get updates.

**The Convener:** Does the committee agree to write to the stakeholders and the Government to seek information on the points that have been raised?

**Members** *indicated agreement.*

# Justice Sub-Committee on Policing (Report Back)

12:17

**The Convener:** Agenda item 6 is feedback from the 6 December 2018 meeting of the Justice Sub-Committee on Policing. There will be an opportunity for comments and questions following the verbal report, and I refer members to paper 7, which is a note from the clerk.

I invite John Finnie to provide the feedback.

**John Finnie:** As you have said, convener, the sub-committee met on 6 December, when we heard from Police Scotland and the Scottish Refugee Council in an evidence session on Police Scotland's role in the immigration process. Part of that evidence concerned Police Scotland's role in assisting the Home Office compliance and enforcement teams with the enforced removal of people from residential properties in Scotland, and we considered the wider implications of that and its impact on relationships with communities. We heard that there is much that Police Scotland can do to improve its role with regard to assisting the Home Office compliance and enforcement teams, but I point out that people were not being critical of Police Scotland.

One area that was raised concerned the risk assessments that are carried out by the Home Office prior to a request for officers from Police Scotland to be present when people are arrested and detained. The Scottish Refugee Council told the sub-committee that the Home Office is not good at assessing vulnerability and gave specific examples of individuals targeted for arrest who had low mental capacity and who were, in fact, blissfully unaware of what was going on. It suggested that Police Scotland's involvement in the process was an opportunity to ensure that such vulnerable people in Scotland were not detained.

It is important to say that Police Scotland was clear that it applied the same strict criteria for detaining someone in custody, regardless of the circumstances in which someone was arrested. Police Scotland was not able to confirm what the Home Office risk assessment entailed or say whether it included an assessment of vulnerability or the impact on children if their parents were to be detained, and the sub-committee has written to the Home Office to ask for details of its risk and vulnerability assessments. It is fair to point out that we sought evidence from the Home Office in advance of the meeting, and we were disappointed that that evidence was not forthcoming.

The sub-committee heard that Police Scotland has no statutory duty to work with or inform—even in a confidential way—third sector organisations or other relevant stakeholders that it is to detain an individual. The sub-committee is checking whether the Home Office provides information to relevant agencies prior to a removal request. Involving third sector agencies would give health, social work and third sector organisations the opportunity to provide vital support services to those who are to be detained.

Finally, there is a lack of statistical data in the public domain on immigration detentions in Scotland. The sub-committee has requested statistical data from Police Scotland.

Given the overlap of issues, the sub-committee has informed the Equalities and Human Rights Committee of our work. It also agreed its forward work programme, as part of which it will schedule an evidence session with the chief constable in January 2019.

The next meeting of the sub-committee will be on 17 January 2019.

**The Convener:** Thank you for that comprehensive report. As members have no questions, we will now move into private session. Our next meeting will be on 8 January 2019, and I wish you all a merry Christmas.

12:20

*Meeting continued in private until 12:58.*

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

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