JUSTICE 1 COMMITTEE

Wednesday 17 March 2004
(*Morning*)

Session 2

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by The Stationery Office Ltd.

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CONTENTS

Wednesday 17 March 2004

JUSTICE 1 COMMITTEE
†11th Meeting 2004, Session 2

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Mr Stewart Maxwell (West of Scotland) (SNP)

COMMITTEE MEMBERS

*Bill Butler (Glasgow Anniesland) (Lab)
*Marlyn Glen (North East Scotland) (Lab)
*Michael Matheson (Central Scotland) (SNP)
*Margaret Mitchell (Central Scotland) (Con)
Margaret Smith (Edinburgh West) (LD)

COMMITTEE SUBSTITUTES

Roseanna Cunningham (Perth) (SNP)
Helen Eadie (Dunfermline East) (Lab)
Miss Annabel Goldie (West of Scotland) (Con)
*Mike Pringle (Edinburgh South) (LD)

*attended

THE FOLLOWING ALSO ATTENDED:

Hugh Henry (Deputy Minister for Justice)

CLERK TO THE COMMITTEE

Alison Walker

SENIOR ASSISTANT CLERK

Claire Menzies Smith

ASSISTANT CLERK

Douglas Thornton

LOCATION

Committee Room 3

† 10th Meeting 2004, Session 2—joint meeting with Justice 2 Committee

Scottish Parliament

Justice 1 Committee

Wednesday 17 March 2004

(*Morning*)

[THE CONVENER *opened the meeting at 10:13*]

Criminal Procedure (Amendment) (Scotland) Bill: Stage 2

The Convener (Pauline McNeill): Good morning and apologies for the late start. I ask members to do the usual and remember to switch off their mobile phones. I have received apologies from Margaret Smith, who cannot be here as she is ill. Mike Pringle, who will substitute for her, will join us shortly.

I welcome the Deputy Minister for Justice, Hugh Henry, and his team. Members should check that they have the right documents—I know that you do not have enough space for everything that you need, but I am sure that you will manage. You should have the second marshalled list of amendments, rather than the first list—that is important. Members will have noticed that the business bulletin of Friday 12 March indicated that the committee might finish its stage 2 consideration of the Criminal Procedure (Amendment) (Scotland) Bill today. We had to specify that we would not consider amendments beyond a certain point in the bill, so, as we were unclear about how far we would get today, we decided to indicate that we would attempt, if there was time, to reach the end of the bill. However, we made that decision prior to the rush to lodge amendments before Monday's deadline, so we might not get that far.

I propose to run the meeting until about 12.30, if that is acceptable to the committee, although obviously I must stop at an appropriate point. I will suspend the meeting briefly only if a member asks for a comfort break.

Section 3—Appeals

The Convener: Amendment 23, in the name of the minister, is grouped with amendments 39, 40, 40A, 192 and 41.

10:15

The Deputy Minister for Justice (Hugh Henry): At stage 1, the Faculty of Advocates expressed the view that the emphasis of proposed new section 83A of the Criminal Procedure (Scotland) Act 1995 should be reversed, to avoid a situation in which the court, in fixing trials, might appoint as the first option a trial diet that, although it was given a fixed date, could be continued from day to day. That could have inadvertently created a situation as uncertain as the one that currently plagues the High Court. It was always our policy intention that the court's first option should be for trials to have a fixed date that could not be continued. Amendments 39 and 40 will ensure that the new section more clearly reflects that intention. Amendment 39 will insert at the beginning of proposed new section 83A of the 1995 act a new subsection that will supersede section 83A(3) and set out as the primary position:

"Where … the trial diet does not commence on the day appointed for the holding of the diet, the indictment shall fall."

Amendment 41 will delete section 83A(3), which provides that the indictment would fall only if the court had specifically fixed the date on which the diet must be called. Amendment 40 will amend section 83A(1), to provide that only

"where, in appointing a day for the holding of the trial diet, the Court has indicated that the diet is to be a floating diet",

will it be possible for the trial to be continued from sitting day to sitting day without having been called.

Amendment 23 is a consequential amendment and will amend section 3 of the bill—which amends section 74 of the 1995 act—to reflect the altered emphasis of amended new section 83A. Section 74 of the 1995 act relates to appeals in connection with preliminary diets. Amendment 23 will replace the reference in section 74(3)(b) to a decision of the court to appoint the diet as a fixed diet under new section 83A(3) of the 1995 act with a reference to a decision of the court to appoint the diet as a floating diet. The effect of section 74 as amended will be that an appeal may not be taken against such a decision.

We do not consider that amendment 40A is necessary. It is not appropriate to provide that the court should indicate that a diet is to be a floating diet "only exceptionally", as that is primarily a matter of court programming.

Amendment 192 is also inappropriate, although it is well intentioned. To provide that floating trials should normally commence on the day appointed could be counter-productive, as that might convey the impression that all trials that are expected to commence on that date might be floating trials. That would alter the intended emphasis of the provision, which is that trial diets should be fixed as a first option. I ask the committee to reject amendments 40A and 192.

I move amendment 23.

Margaret Mitchell (Central Scotland) (Con): Amendment 40A would amend amendment 40, which refers to floating diets, by inserting the words

"which it may do only exceptionally".

That would create a presumption in favour of a fixed trial diet. In the evidence that the committee heard, the fixed diet definitely came across as the most desirable position.

The Convener: I will speak to amendment 192. I do not think that there is any disagreement about what we all want to achieve. As the minister rightly said, the Faculty of Advocates drew our attention to the drafting of proposed new section 83A of the 1995 act. The problem is that a fixed trial date would normally be given as part of the preliminary hearing system. As the provision stands, the court appears to have the choice of floating or fixed trials; there is no presumption that they should be fixed. The worry is that judges might opt for floating trials because they give ultimate flexibility, but that is not the point of the exercise.

Amendment 192 is similar to Executive amendment 39, but I thought that its wording would provide that presumption. It says that the

"floating diet ... shall normally commence on the day appointed".

Perhaps I just need clarification, but my concern about amendment 39 is that the indictment would fall on the day if the trial did not go ahead. I suppose that the intention is to ensure that the trial would proceed, but I am worried about what would happen if the trial had to fall. Is there a risk there? I will be happy not to move amendment 192 if it is absolutely clear that there is provision in the bill to ensure that a fixed trial is the normal way of doing things. Legislating can be a bizarre concept—all that I wanted to do was to include the relevant words in plain English. Amendment 192 is based on the advice that I received to that end.

I am not trying to achieve anything different from what the Executive is trying to achieve; nor is Margaret Mitchell. We might just be arguing about the best wording.

Mr Stewart Maxwell (West of Scotland) (SNP): There is no disagreement that we are all trying to achieve the central purpose of the bill—certainty in High Court trials. We are trying to find the best way of doing that. I have not so much a question as a concern that, by creating a situation in which "the indictment shall fall" if the fixed trial does not happen on the appointed day, we shall, in effect, create a presumption the other way round. If judges are worried that a trial might not occur on the day that they choose because the system is new and there might be problems, they might lean the other way by default and choose the floating option. Amendment 39 will create a situation in which "the indictment shall fall" and I am concerned that it will have the opposite effect to that which is intended.

Hugh Henry: Members have mentioned the possibility that the indictment will fall. However, the situation will be no different from the present situation whereby the Crown, as the master of the instance, calls the indictment. The Crown would normally push for a case to be called, but we are not talking about a completely new situation of which we have no experience. I accept entirely what the convener and Margaret Mitchell say about the intention of amendment 39. Our worry is that amendment 192 could create the situation that members seek to avoid and that it could encourage the courts to fix all trials as floating trials, which the court would expect to start on the appointed day.

I hear what the convener says, and I share her concerns about the possible unforeseen consequences of what one regards as plain English when it is included in legislation. Your intention and ours are the same. I am happy not only to give the assurance that we seek to achieve exactly what the committee seeks to achieve—the expectation is that there will be fixed trials, rather than floating trials—but to consider whether, at stage 3, we can introduce additional wording to make it clear that that is the expectation. I am not sure whether that will be achievable, legally, but we will seek to do so. Like the committee, we want to ensure that fixed trials will be the norm.

Amendment 23 agreed to.

Section 3, as amended, agreed to.

Section 4 agreed to.

Section 5—Engagement, dismissal and withdrawal of solicitor representing accused

The Convener: Amendment 24, in the name of the minister, is grouped with amendments 31 to 34, 36, 54, 57 and 60.

Hugh Henry: Subsection (1) of proposed new section 72F that will be inserted in the 1995 act by section 5 of the bill as introduced will impose a duty on solicitors acting for accused who are indicted into the High Court to notify the court and the Crown that they are acting. It will also impose a duty to inform the court and the Crown when the solicitor is dismissed or withdraws from acting.

The amendments in the group will extend the provisions of new section 72F to cases that are indicted into the sheriff court. Amendment 24 will remove a reference in section 72F(1) to proceedings "in the High Court" and substitute for that a reference simply to proceedings "on indictment". Amendments 31 to 34 will make appropriate adjustments to extend to solemn

proceedings in the sheriff court the provisions of subsections (3) to (10) of new section 72F, which relate to certain sexual offences. In consequence, amendment 54 will repeal section 71A of the 1995 act, which at present contains the provisions relating to sheriff court solemn proceedings. Amendment 36 will move the section that introduces new section 72F from part 1 of the bill, which contains provisions relating to proceedings in the High Court, to part 3, which relates to solemn proceedings generally. Amendments 57 and 60 will make consequential adjustments to the long title.

The amendments reflect the policy intention that in solemn cases in both the High Court and the sheriff court, the agent for the accused should inform the Crown and the court that he is acting. That will enable the Crown to provide agents with information as it becomes available, enabling them to prepare the case. Similarly, if the agent is dismissed or withdraws from acting, he must inform the court and the Crown of that fact.

I move amendment 24.

Amendment 24 agreed to.

The Convener: Amendment 63, in the name of Margaret Mitchell, is grouped with amendments 64 to 71. If amendment 35, which has been debated, is agreed to, amendment 69 will be pre-empted.

Margaret Mitchell: Amendment 63 and the other amendments in the group are a tidying-up exercise. They would replace references to a solicitor with references to legal representation. Amendment 71 would provide a clear definition of legal representation. The amendments have been lodged for the sake of clarity and to make it much more obvious what categories are intended to be covered when we refer to solicitors.

The only amendment in the group that deviates from simply giving a fuller definition of legal representation is amendment 65, which would omit the word "accused" and insert

"person who engaged the representative",

on the basis that that person may not always be the accused.

I move amendment 63.

Hugh Henry: I understand what Margaret Mitchell said about achieving clarity, but the issue is more than just clarity: the provisions concern how the court system works. Proposed new section 72F of the 1995 act, which section 5 of the bill will introduce, will impose a duty on a solicitor to inform the court and the Crown that the accused has engaged him for the purpose of defence. That duty will be introduced to facilitate the early supply of information from the Crown as it becomes available.

The amendments in the group would extend that duty to any legal representative, which would include junior and senior counsel when appropriate. The amendments are unnecessary, and we worry that they might reduce counsel's flexibility to hand over papers quickly when an unforeseen event occurs. The solicitor is an accused person's primary representative and adviser. The solicitor instructs counsel and the Crown discloses material to the solicitor. It is therefore appropriate to place the duty on the solicitor alone.

10:30

Margaret Mitchell: Amendment 63 would spell out the position to avoid doubt. We want to get everything right in the bill and to prevent any loophole or misunderstanding. The amendment would satisfy those criteria, so I will press it in the interests of greater clarity.

The Convener: The question is, that amendment 63 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Butler, Bill (Glasgow Anniesland) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Pringle, Mike (Edinburgh South) (LD)

ABSTENTIONS

Maxwell, Mr Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 1, Against 5, Abstentions 1.

Amendment 63 disagreed to.

Amendments 25 and 26 moved—[Hugh Henry]—and agreed to.

Amendment 64 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 64 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Butler, Bill (Glasgow Anniesland) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Pringle, Mike (Edinburgh South) (LD)

ABSTENTIONS

Maxwell, Mr Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 1, Against 5, Abstentions 1.

Amendment 64 disagreed to.

Amendment 27 moved—[Hugh Henry]—and agreed to.

Amendment 65 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 65 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Butler, Bill (Glasgow Anniesland) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
Pringle, Mike (Edinburgh South (LD)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 65 disagreed to.

Amendment 66 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 66 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Butler, Bill (Glasgow Anniesland) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Pringle, Mike (Edinburgh South) (LD)

ABSTENTIONS

Maxwell, Mr Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 1, Against 5, Abstentions 1.

Amendment 66 disagreed to.

Amendments 28 to 30 moved—[Hugh Henry]—and agreed to.

Amendment 67 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 67 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Butler, Bill (Glasgow Anniesland) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Pringle, Mike (Edinburgh South) (LD)

ABSTENTIONS

Maxwell, Mr Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 1, Against 5, Abstentions 1.

Amendment 67 disagreed to.

Amendments 31 to 34 moved—[Hugh Henry]—and agreed to.

Amendment 68 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 68 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Butler, Bill (Glasgow Anniesland) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Pringle, Mike (Edinburgh South) (LD)

ABSTENTIONS

Maxwell, Mr Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 1, Against 5, Abstentions 1.

Amendment 68 disagreed to.

The Convener: Amendment 35 was debated with amendment 12. If amendment 35 is agreed to, amendment 69 will be pre-empted.

Amendment 35 moved—[Hugh Henry]—and agreed to.

Amendment 70 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 70 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Butler, Bill (Glasgow Anniesland) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Pringle, Mike (Edinburgh South) (LD)

ABSTENTIONS

Maxwell, Mr Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 1, Against 5, Abstentions 1.

Amendment 70 disagreed to.

Amendment 71 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 71 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Matheson, Michael (Central Scotland) (SNP)
Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Butler, Bill (Glasgow Anniesland) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Pringle, Mike (Edinburgh South) (LD)

ABSTENTIONS

Maxwell, Mr Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 2, Against 4, Abstentions 1.

Amendment 71 disagreed to.

Section 5, as amended, agreed to.

Amendment 36 moved—[Hugh Henry]—and agreed to.

Section 6—Alteration of trial diet

Amendment 37 moved—[Hugh Henry]—and agreed to.

Section 7—Procedure where trial diet does not proceed

The Convener: Amendment 38, in the name of the minister, is grouped with amendments 43, 56, 74 and 75.

Hugh Henry: Amendments 38, 43, 56, 74 and 75 seek to introduce a new section 81 to the 1995 act, which will provide for procedure when a trial does not take place in proceedings in the High Court or on indictment in the sheriff court. Section 7 in part 1 of the bill as introduced sought to insert a new section 81A in the 1995 act, which made provision for procedure where a trial diet in the High Court does not take place. Amendment 38 seeks to leave out that provision, and amendment 43 seeks to introduce new section 81, which will make provision applicable to both the High Court and proceedings on indictment in the sheriff court. Amendment 43 will insert the section that will introduce new section 81 into part 2 of the bill, which relates to solemn proceedings generally.

I move amendment 38.

Amendment 38 agreed to.

Section 8—Continuation of trial diet

Amendment 39 moved—[Hugh Henry]—and agreed to.

Amendment 40 moved—[Hugh Henry].

Amendment 40A moved—[Margaret Mitchell].

The Convener: The question is, that amendment 40A be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Butler, Bill (Glasgow Anniesland) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
Pringle, Mike (Edinburgh South) (LD)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 40A disagreed to.

Amendment 40 agreed to.

Amendment 192 not moved.

Amendment 41 moved—[Hugh Henry]—and agreed to.

Section 8, as amended, agreed to.

Section 9—Time limits

The Convener: Amendment 92 is in a group on its own.

Margaret Mitchell: The purpose of amendment 92 is to ensure that the preliminary hearing is whenever possible held within nine months—we should try to aim for that—or at the outer limit, within 11 months, which reflects what was proposed in the Bonomy report.

I move amendment 92.

10:45

Hugh Henry: The effect of amendment 92 would be to introduce to the 1995 act a target or objective for a hearing to commence within nine months and, therefore, for indictment by the Crown to be made within eight months. It appears that the amendment would not achieve anything because the Crown will serve an indictment when a case is fully prepared, whether that be within six, seven or eight months.

The bill does not preclude indictment within eight months where that is achievable. The requirement

to commence a preliminary hearing within 11 months of first appearance would mean simply that 10 months is the maximum period for indictment in petition cases. The 1995 act sets out legal provision in relation to matters of criminal procedure; it is not the place for setting targets. The Crown will, no doubt, serve indictments as early as its investigations allow. We consider that amendment 92 is unnecessary and inappropriate.

Through being allowed up to 10 months to serve indictments, the Crown has the flexibility to set priorities for cases, which will allow it to investigate and to indict cases in which there might be, for example, children or other vulnerable victims. We would not want to interfere with that.

Margaret Mitchell: I appreciate what the minister said, but I do not believe that amendment 92 would result in interference with anyone in the categories that the minister mentioned. It would plant quite firmly in the minds of the parties the aim of holding a preliminary hearing within nine months. The culture of the bill is that matters should be dealt with within a realistic timeframe; to set down that the preliminary hearing be held whenever possible within nine months would focus attention.

One thing that has come through when I have spoken with representatives of the Crown Office and Procurator Fiscal Service is that they focus on a timeframe as soon as a deadline is mentioned. For that reason, I am going to press amendment 92 in the hope that we can achieve the target of nine months. At the very outer limit, 11 months should remain the timeframe. Obviously Lord Bonomy thought that that could be achieved—the nine-month period was his recommendation.

The Convener: The question is, that amendment 92 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Butler, Bill (Glasgow Anniesland) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
Pringle, Mike (Edinburgh South) (LD)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 92 disagreed to.

Amendment 93 not moved.

Amendment 94 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 94 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Butler, Bill (Glasgow Anniesland) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
Pringle, Mike (Edinburgh South) (LD)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 94 disagreed to.

The Convener: Amendment 95, in the name of Margaret Mitchell, was debated with amendment 81. If amendment 95 is agreed to, amendments 96, 97 and 98 will be pre-empted.

Amendment 95 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 95 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Butler, Bill (Glasgow Anniesland) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
Pringle, Mike (Edinburgh South) (LD)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 95 disagreed to.

Amendment 96 not moved.

Amendment 97 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 97 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Butler, Bill (Glasgow Anniesland) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
Pringle, Mike (Edinburgh South) (LD)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 97 disagreed to.

Amendments 98 and 99 not moved.

Amendment 100 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 100 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Butler, Bill (Glasgow Anniesland) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
Pringle, Mike (Edinburgh South) (LD)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 100 disagreed to.

The Convener: I do not know what it is going to be like when we get to the section to which about 200 amendments have been lodged.

Amendment 101 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 101 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Butler, Bill (Glasgow Anniesland) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
Pringle, Mike (Edinburgh South) (LD)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 101 disagreed to.

Amendment 102 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 102 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Butler, Bill (Glasgow Anniesland) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
Pringle, Mike (Edinburgh South) (LD)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 102 disagreed to.

The Convener: Amendment 103, in the name of Margaret Mitchell, was debated with amendment 81. If amendment 103 is agreed to, amendments 104 and 105 will be pre-empted.

Amendment 103 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 103 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Butler, Bill (Glasgow Anniesland) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
Pringle, Mike (Edinburgh South) (LD)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 103 disagreed to.

Amendments 104 and 105 not moved.

Section 9 agreed to.

Section 10—Warrant for citation

The Convener: Amendment 42, in the name of the minister, is grouped with amendment 59.

Hugh Henry: Section 10 will amend section 66 of the 1995 act, which contains provisions relating to service and lodging of indictments. Amendment 42 will introduce to section 10 of the bill further amendments to section 66 of the 1995 act. Those amendments to section 66 will provide that service of an indictment by means of affixing a notice is, in the case of an accused on bail, to be on the door at his "domicile of citation", as stated in the bail order. In the case of an accused who is not on bail, it is to be on the door of any premises that the constable affixing the notice

"reasonably believes to be the accused's dwelling-house or place of business".

The amendments to section 66 will also introduce for the first time the option of service of the indictment on the accused's solicitor. The

purpose of amendment 42 is therefore to clarify the provisions in the 1995 act that relate to service of indictments by means of affixing, and to increase the options that are available for service by providing for service on the accused's solicitor. That option will facilitate early preparation of the defence case.

Amendment 59 will make a consequential amendment to the long title.

I move amendment 42.

Amendment 42 agreed to.

Section 10, as amended, agreed to.

After section 10

Amendment 43 moved—[Hugh Henry]—and agreed to.

Section 11—Trial in absence of accused

The Convener: Amendment 193, in the name of Bill Butler, is grouped with amendments 1, 194 to 196, 2 and 3.

Bill Butler (Glasgow Anniesland) (Lab): One of the proposals that caused deep concern for the committee at stage 1 was the bill's proposal to have trial in absence of the accused from the outset. It is clear from the majority of the evidence that we have heard that there are grave concerns about that proposal. Concerns relating to the European convention on human rights were expressed, as was the concern that if someone were to abscond and subsequently to be detained, there would be an almost irresistible case at appeal for a retrial to be ordered, which would involve witnesses having to go through the whole process again. We felt that that was unfair and unjust.

In paragraph 140 of the committee's stage 1 report, we were unanimous in rejecting the proposal that accused persons can be tried in their absence from the outset. We felt that there was little evidence to support that proposal, that there was little justice in it and that it was far too inflexible. The committee accepted that there were circumstances in which, all the evidence having been led, the absence of the accused would not affect his receiving a fair trial. That is stated in paragraph 141 of the stage 1 report.

Amendments 193 to 196—really one amendment that has been divided into four—emphasise the important points that the committee made: that evidence against the accused must have been led: that the court must be satisfied that the accused has been cited in accordance with section 66 of the 1995 act; and that the accused's failure to appear has occurred at a point in proceedings at which, after hearing the parties, the court is satisfied that it would be in the interests of justice to proceed. My amendments reflect evidence that was taken by the committee and paragraphs 140 and 141 of the committee's report, and would create a balance that would ensure fair treatment, both of the accused and of witnesses in a trial in the High Court.

11:00

I hope that members will agree to support the proposal, because I feel that it strikes a reasonable balance between paragraphs 140 and 141 of the committee's report. I hope that the Executive will accept the amendments because, as I said earlier, its initial position was far too fixed and rigid and did not reflect the majority of the concerns that we heard when we took evidence.

I contend that my amendments are a reasoned attempt to address the concerns of the committee.

I move amendment 193.

Michael Matheson (Central Scotland) (SNP): Amendments 1, 2 and 3 relate to trial in absence. The minister will be aware that the committee's stage 1 report stated that the evidence that we had received indicated that the proposal was not workable, and that serious concerns were expressed in the evidence that we received about why the Executive would choose this course of action, given the small number of cases—90, I believe—that are affected by the problem each year. I understand that those cases represent only 3.5 per cent of the overall work that is done by the High Court in a year. I cannot help but think that the Executive is using a sledgehammer to crack a nut.

The evidence that the committee received was largely opposed to the proposal that would allow people to be tried in their absence. Bodies and people who expressed serious concerns about the proposal include: the Society of Writers to Her Majesty's Signet; the Sheriffs Association; the Public Defence Solicitors Office; the Lord Justice General, Lord Cullen, who is Scotland's most senior judge; the Society of Solicitor Advocates; the Faculty of Advocates; and the Law Society of Scotland.

My amendments would put in place the recommendation that the committee made in paragraph 141 of its report, which states:

"The Committee believes that the Bill should be amended to allow the accused to be tried in their absence only at a stage in the trial where all the evidence has been led".

That is why my amendments are framed differently to Bill Butler's amendments. He believes that it should be possible to try the accused in their absence as long as the prosecution evidence has

been led. I believe that the committee's intention was that that should happen only after

"all the evidence has been led."

I hope that the Executive will recognise that if the proposal is allowed to stand in its present form it will probably undermine one of the most fundamental principles in the Scottish criminal justice system. I hope that the Executive will reflect on that, particularly in light of the limited number of cases that are affected by the problem.

I understand that the Executive wants to create greater certainty for witnesses or victims of crime when cases are brought before the courts. I would have thought that one of the best ways in which that could be achieved would be through the penalties and sanctions that can be imposed on someone who fails to appear in court, as was highlighted in the evidence that the committee received. Even if the Executive is minded to accept my amendments or Bill Butler's amendments, I hope that it continues to consider the question of what further sanctions can be imposed in order to ensure that people are sufficiently deterred from failing to appear in court.

Mike Pringle (Edinburgh South) (LD): I will support Bill Butler's amendments. As Michael Matheson has said, all the evidence that we received told us that the proposal in the bill was not a good idea.

One of the main reasons why I will support Bill Butler's amendments is that the issue is about good justice—for witnesses, in particular. The Executive has—not just in this bill, but in others—tried to achieve something better for witnesses who come to court. All of us have spoken to people who, after going to court for one reason or another, have said that it was the last time they will ever go to court. The Executive has tried to address that problem; Bill Butler's amendments certainly do that. I have some sympathy for what Michael Matheson says, but I think that Bill Butler's compromise amendments are the way forward.

Mr Maxwell: Bill Butler's amendments are an improvement on what is in the bill at the moment, but they are not in line with the committee's recommendation, which is clear in specifying

"where all the evidence has been led."

Michael Matheson's amendments are completely in line with the committee's recommendations, to which all members of the committee signed up.

If Bill Butler's amendments were agreed to, they would allow a case to proceed when only some of the evidence had been led. The written and oral evidence that we received during stage 1 suggested that there is great concern among the legal profession that there would be mistrials and problems, and that situations would arise in which those on the defence side would be unwilling to take on cases before all the evidence had been led. A number of people made that very clear. They accepted that a trial could go ahead in the absence of the accused when all the evidence had been led, but not when only some of it had been led.

I am quite surprised by Mike Pringle's statement that the issue is about achieving a balance; it is not about that—it is about a principle. The principle is that we should not go ahead with a trial in the absence of the accused. If we accept that principle, we must accept the recommendation that is made in the stage 1 report—to which all seven members of the committee signed up—which is that that should occur only when all the evidence has been led and all that is awaited are the summing up and the final judgment.

I will support Michael Matheson's amendments. Although I accept that Bill Butler's amendments would represent an improvement, I do not think that they are in line with the committee's recommendations. We should support the stage 1 recommendations that we made and the evidence that we received from virtually—if not actually—all of the legal profession, as the list that Michael Matheson read out showed. I hope that committee members will support that position by supporting amendments 1, 2 and 3.

Margaret Mitchell: I agree that the proposals in the bill are not sustainable. In evidence, we were told loud and clear that there would be appeals on the basis that the accused was not present. I understand that Bill Butler has tried to improve the proposals and there seems, up to a point, to be merit in his suggestions, but I have a grave reservation about amendment 195. If I have read it properly, it seems to take us back to saying that, if the accused is not present, further evidence could be led in his absence and the trial could go ahead.

All in all, Michael Matheson has summed up the situation well. The committee was firmly of the opinion that what was proposed in the bill was not workable, sustainable or in the interests of justice. I will support Michael Matheson's amendments.

The Convener: I think that the committee recognises why the provision was included in the bill, even though it was controversial. In his report, Lord Bonomy tried to consider every reason why trials did not proceed. The Executive gave evidence that in 90 cases in 2003, the accused failed to turn up to their trial. It is clear from the evidence that was presented to us that the provision was not supported by anyone else.

Apart from what the legal profession said, there are practical issues about how instructions would be taken if there was no accused. The biggest

practical difficulty relates to the need in Scots law to identify the accused in the dock. That would not be possible without the accused, so it would be very hard to get past go. I am clear that we should continue to reject the general principle that we should try a person in their absence.

Michael Matheson is quite correct that, in trying to find a way forward, the committee suggested that the Executive could consider provisions that would allow trials to continue when all the evidence had been led. It would be helpful if Bill Butler could clarify the difference between his amendments and Michael Matheson's. I understood that Bill Butler meant that the trial could continue in the absence of the accused when the majority of the evidence had been led and the court was satisfied. I could not support that amendment unless there was some confirmation that when enough evidence had been led, any further evidence would not upset the balance of justice, and the jury would be allowed to return a verdict in the safe knowledge that there would be no opportunities for appeal.

I can see the practicality of trying to reach a compromise. The easiest way would have been to reject the notion totally and not have it in the bill at all. However, because we understand the reasons why the measure is in the bill, we are trying to find a way forward.

Hugh Henry: I acknowledge what Michael Matheson said about 3.5 per cent of cases in the High Court failing because the accused did not turn up. However, the problem is much bigger than we realise—there were also 400 such cases in the sheriff court. Even if we concentrate only on the 3.5 per cent of cases in the High Court, that represents 90 trials, involving a substantial number of victims for whom justice has been denied. It represents 90 trials, involving 1,600 witnesses, in which justice has been denied because of the actions of the accused, not for any other reason.

It is therefore right that we should consider how to achieve justice in such cases. It is not in anyone's interests—other than accused persons who abscond—for us to allow such situations to continue. I am encouraged by the fact that we have debated the issue. I am also encouraged that the committee has not dwelt on the principle, as Stewart Maxwell said, because Michael Matheson is proposing a shift from the current situation. If we were retaining the principle, we would retain what exists now. Michael Matheson has come up with a suggestion with which I do not necessarily agree, but which at least recognises that it is right to move in response to the problem. I am encouraged that the committee has reflected on the fact that there is a problem and that there is merit in doing something about it. We can now argue about what should be done.

We have listened to all the arguments that have been presented to the committee. We have read carefully the committee's report, and we accept that there is an overwhelming body of opinion that does not take the line that was originally proposed in the bill. We acknowledge that many people feel that starting trials in the absence of the accused could cause difficulty. However, I emphasise that it is not right that accused persons should be able to trample over the rights of victims and witnesses simply by absconding after a trial has started.

If amendments 1 to 3 were agreed to, the circumstances in which there could be a trial in absence would be limited to cases in which all the evidence had been led. Positions on the issue have moved somewhat, so it would be unfortunate if those amendments were agreed to because it would mean that, if all the Crown evidence had been led and the case adjourned until the next morning, and the accused's agent gave notice that he intended to lead evidence, the trial could not continue if the accused then failed to appear.

11:15

It is right that we reflect the concerns that have been expressed, so I welcome the opportunity to consider an alternative or compromise. We accept Bill Butler's point that we can find a way forward now that, after debate, the committee has agreed to the principle that trials in which the accused is not present should be able to proceed in certain circumstances. We think that Bill Butler's amendments strike an appropriate balance between the rights of the victim and the rights of the accused, which have been carefully outlined during the course of the committee's deliberations.

Although we have some worries about Bill Butler's amendments because we just do not know what impact they would have in practice, it is probably right that we signal that we are prepared to reach agreement and move on. We can accept Bill Butler's amendments in principle, but if the committee agrees to them today, we will go away and reflect on the consequences of that. If further technical changes are then necessary, we will lodge amendments as required at stage 3.

We believe that Bill Butler's amendments recognise the seriousness of the situations in many cases and reflect the concerns that the committee heard. We are prepared to work with the committee on that.

Bill Butler: I am glad that the Executive has moved from its original position of allowing an accused to be tried in absence from the outset. The committee quite rightly rejected that proposal, which was unworkable and unjust.

I note the minister's worries about the practical impact of my amendments. I do not claim that my

amendments are perfectly worded or that they would have a perfect impact—I doubt that anybody would make such a claim—but they are reasonably worded. I also note the minister's comments about the Executive being prepared to move on. I hope that committee members will agree that my amendments have some merit. They are coherent, reasoned amendments.

Stewart Maxwell said that we should not move away from the fundamental principle, but we have already done that in paragraph 141 of our report. As the minister mentioned, we are all striving to achieve a balance between the rights of the accused and the rights of victims and witnesses. I accept Michael Matheson's point that only a very small number of cases are involved—along with others, I made that point in the stage 1 debate—but I am also mindful that some 1,600 people experience the adverse impact when those 90 abscond, as the minister said. As I and others argued in the stage 1 debate, we must also be mindful that if we have an inflexible position for those who abscond, they will have an almost irresistible case for appealing the verdict, with the result that a retrial might be ordered.

I am trying to strike the balance. The convener and Margaret Mitchell both made points about amendment 195. Through my amendments, I am trying to ensure that trials in absence would be possible only in cases in which evidence had been led. Amendments 195 and 196 also state that the judge would have discretion as to what should happen in the particular circumstances of each individual case. I stress to members that that would also enable the judge to refuse to allow a case to continue.

That is all that I have to say in summing up, other than to say that I hope that members will take due notice of the debate that we have had and will vote accordingly.

The Convener: I would like to ask one more question about the effect of your amendments. How much evidence would need to be led?

Bill Butler: The preponderance of evidence. Amendment 195 would insert the wording,

"including by allowing further evidence to be led in respect of charges where evidence has already been led".

It would not mean that absolutely all evidence would have to have been led.

The Convener: Would it mean the majority of evidence?

Bill Butler: It would mean the majority of evidence, as far as I understand it.

Michael Matheson: Amendment 193 would insert the wording,

"after evidence has been led against the accused".

That is basically the prosecution's case.

Bill Butler: Sure. That is true.

Michael Matheson: In effect, the provision would kick in only in relation to the prosecution's case, not the defence's.

Bill Butler: That is right.

Michael Matheson: I am just clarifying that point.

Bill Butler: Sure. The later amendments leave it to the discretion of the court to say whether or not, in the particular circumstances of the individual case and in the interests of justice, that would be enough. In certain circumstances, the judge might say—and I argue that this is possible with the amendments in the group—that it is not enough that all the evidence against the accused has been led, and the proceedings would then halt. My amendments are an attempt to give discretion to the court—in effect, to the judge—and I believe that they would allow greater flexibility and therefore would strike the balance that others, including the minister, have said ought to be struck. They strike a balance between the rights of the accused and the rights of victims and witnesses. That is the spirit in which I lodged my amendments.

The Convener: The question is, that amendment 193 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Butler, Bill (Glasgow Anniesland) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Pringle, Mike (Edinburgh South) (LD)

AGAINST

Matheson, Michael (Central Scotland) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 4, Against 3, Abstentions 0.

Amendment 193 agreed to.

Amendment 1 moved—[Michael Matheson].

The Convener: The question is, that amendment 1 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Matheson, Michael (Central Scotland) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Butler, Bill (Glasgow Anniesland) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Pringle, Mike (Edinburgh South) (LD)

The Convener: The result of the division is: For 3, Against 4, Abstentions 0.

Amendment 1 disagreed to.

Amendment 194 moved—[Bill Butler].

The Convener: The question is, that amendment 194 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Butler, Bill (Glasgow Anniesland) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Pringle, Mike (Edinburgh South) (LD)

AGAINST

Matheson, Michael (Central Scotland) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 4, Against 3, Abstentions 0.

Amendment 194 agreed to.

Amendment 195 moved—[Bill Butler].

The Convener: The question is, that amendment 195 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Butler, Bill (Glasgow Anniesland) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Pringle, Mike (Edinburgh South) (LD)

AGAINST

Matheson, Michael (Central Scotland) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 4, Against 3, Abstentions 0.

Amendment 195 agreed to.

Amendment 196 moved—[Bill Butler].

The Convener: The question is, that amendment 196 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Butler, Bill (Glasgow Anniesland) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Pringle, Mike (Edinburgh South) (LD)

AGAINST

Matheson, Michael (Central Scotland) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 4, Against 3, Abstentions 0.

Amendment 196 agreed to.

Amendment 2 moved—[Michael Matheson].

The Convener: The question is, that amendment 2 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Matheson, Michael (Central Scotland) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Butler, Bill (Glasgow Anniesland) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Pringle, Mike (Edinburgh South) (LD)

The Convener: The result of the division is: For 3, Against 4, Abstentions 0.

Amendment 2 disagreed to.

Amendment 3 moved—[Michael Matheson].

The Convener: The question is, that amendment 3 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Matheson, Michael (Central Scotland) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Butler, Bill (Glasgow Anniesland) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Pringle, Mike (Edinburgh South) (LD)

The Convener: The result of the division is: For 3, Against 4, Abstentions 0.

Amendment 3 disagreed to.

The Convener: Amendment 44 is in a group on its own.

Hugh Henry: Amendment 44 relates to section 11, which will amend the Criminal Procedure (Scotland) Act 1995 as regards trial in absence of

the accused. The amendment will add three new subsections to section 11.

The first of the new subsections will amend section 70 of the 1995 act to make the provisions on trials in absence apply consistently to bodies corporate and individuals. The new subsections will extend the same safeguards to a body corporate as will be afforded to an individual accused before the court will allow a trial in absence.

The other new subsections will provide for amendment of the Legal Aid (Scotland) Act 1986 so as to extend the automatic entitlement to legal aid to situations in which the court appoints a solicitor to act in the absence of the accused, and to include, as exceptions to the general right of an accused person receiving legal aid or advice and assistance to select his solicitor and counsel, circumstances in which the court, in the absence of the accused, appoints a solicitor to act on his behalf.

I move amendment 44.

Amendment 44 agreed to.

Section 11, as amended, agreed to.

Section 12—Reluctant witnesses

The Convener: Amendment 197, in the name of Marlyn Glen, is grouped with amendments 198, 187, 199 and 190. If amendment 198 is agreed to, amendment 187 will not be called, as it will have been pre-empted.

11:30

Marlyn Glen (North East Scotland) (Lab): Section 12 is headed "Reluctant witnesses", which I feel is an unhelpful title. I would like to press for a change in the wording to reflect better the content of the section.

I do not want to repeat all that was said about witnesses in the stage 1 debate in the chamber, but I restate that although many witnesses are reluctant to go to court, with proper notice, information and support, even more people than at present would turn up and serve as effective witnesses.

Section 12 is about witnesses who the court believes will deliberately not turn up, their intention being to obstruct court proceedings—an intention that is not covered by the term "Reluctant". Therefore, the section requires clarification, which I hope amendments 197 and 199 would give by adding the phrases "deliberately and obstructively" and "deliberately obstructive".

If a witness was being "deliberately obstructive", there would be no just or reasonable excuse for them not turning up, thus subsection 2(b) of proposed new section 90A can be deleted.

There is another reference to "reluctant" in the long title, which amendment 190 seeks to remove and replace with the word "obstructive", for the reasons that I have outlined.

I move amendment 197.

Margaret Mitchell: Amendment 187 proposes adding the phrase "and reasonable", to try to flush out what is meant by "Reluctant witnesses". An excuse can be just in that a certain thing has happened, but is it reasonable? There are circumstances in which it might well be reasonable and other circumstances in which it might not. The amendment aims to move towards the meaning of someone who is being deliberately obstructive rather than someone who is merely reluctant.

Hugh Henry: Marlyn Glen's proposals reflect some of the concerns expressed by the committee. We are happy to give our support to what she is trying to achieve.

We would have been happy to accept what Margaret Mitchell proposes in amendment 187—the intention of which we support—but we recognise that pre-emption means that agreeing to Marlyn Glen's amendment would have the effect of removing Margaret Mitchell's amendment. We are happy to give our support to the intentions of the amendments.

Amendment 197 agreed to.

The Convener: I remind members that, if amendment 198 is agreed to, amendment 187 cannot be called.

Amendments 198 and 199 moved—[Marlyn Glen]—and agreed to.

The Convener: The lead amendment in the group of amendments on remote monitoring is amendment 188, in the name of Stewart Maxwell, which is grouped with the amendments shown on the groupings paper—I will not read them out.

This is a large group because of technical factors such as pre-emptions and the existence of amendments to amendments—in some cases we are reaching well into the alphabet. To facilitate debate, I have broken down the group into a number of sub-groups, so that there can be a debate on each sub-group. We will proceed as normal with the person with the lead amendment speaking to the whole sub-group and winding up at the end, so the person with the lead amendment will not lose out; they will still wind up.

If I call a member and they do not have the lead amendment, they do not have to move the amendment; they can just speak at that point. I will tell members when they have to move amendments formally.

I move on to the pre-emptions. If amendment 188 is agreed to, I cannot call amendments 200,

107 to 111, 111A, 111B, 112, 112A, 113 and 114. Why are members not writing this down?

Bill Butler: We trust you implicitly, convener.

The Convener: There are other pre-emptions. Amendment 200 pre-empts amendments 107, 108 and 109. Amendment 189 pre-empts amendments 116 and 117. Amendment 201 pre-empts amendments 122 to 127.

Amendment 188 is in a sub-group with amendment 189.

Mr Maxwell: The effect of amendment 188 would be to remove the ability to allow the tagging of so-called reluctant witnesses. Amendment 189 seeks to remove the ability to restrict their movements without tagging.

The purpose of the amendments is in line with the evidence that the committee received at stage 1. Paragraph 157 of the stage 1 report starts by saying:

"The Committee is unconvinced by the evidence presented that the option of tagging 'reluctant witnesses' is necessary."

That evidence came across loud and clear, particularly from the researchers from the University of Wolverhampton, who explained in clear terms at the committee and in their written submission that witness care programmes will deal with most reluctant witnesses.

We have to be careful about what we call people. There is a big difference between reluctant witnesses and recalcitrant witnesses. From the evidence, it seems that most witnesses who do not turn up in court are reluctant witnesses. They do not turn up because of a series of issues to do with child care, fear, not understanding the process, or a lack of communication between the court and themselves. There is a range of reasons, which could and should be dealt with through a witness care programme.

In their evidence, the researchers discussed pilot schemes. When witness care programmes were put into practice, the effect was that more than 90 per cent of so-called reluctant witnesses appeared in court.

The proposal in the bill to tag reluctant witnesses is a bit of a blunt instrument to deal with the problem, although I accept that there is a problem. If we had a witness care programme to deal with reluctant witnesses, all the bill would have to deal with would be recalcitrant witnesses. I do not believe that the current provision in the bill will deal with the core problem of those who deliberately try to obstruct the court process. I do not believe that the tagging or restriction of those people will resolve the core problem.

The core problem is caused by people who deliberately and knowingly do not turn up in court as witnesses. I do not understand why the Executive believes that telling people to stay in their houses during certain hours or tagging them will force them to turn up in court. At present, the court has the right to apprehend people who are in that situation. If the bill is passed, the provision will make no difference whatever. We would be tagging reluctant witnesses and not dealing with recalcitrant witnesses.

What would the effect be if we tagged recalcitrant witnesses? It would be nil, because such people are deliberately obstructive. How would tagging them force them to appear in court? What is the logic behind the thinking that says that if we tag someone and put a local base station in their house, they will turn up in court on time and give evidence as required?

We must be clear that tagging is not a global positioning system. If we have recalcitrant witnesses who are being obstructive—which may be for any number of reasons; they may be afraid, but for some it will be because they do not want to give evidence against their compadres and others in the community with whom they are associated—and who do not wish to give evidence, so they abscond, imposing restriction of liberty orders or tagging them will make no difference at all.

If a recalcitrant witness disappears off to London or abroad or anywhere else—even down the next street—we will not know where they are. The tag will make no difference to knowing where that person is located, therefore I am at a loss to understand how tagging a recalcitrant witness will make any difference and make them more likely to appear in court. Tagging will not tell us if they are in London or if they are in the next street. It will tell us nothing at all. If they deliberately intend not to turn up, a tag will not force them to do so.

Paragraph 157 of the committee's stage 1 report on the bill states:

"The Committee is concerned that tagging is being viewed as a measure to ease administrative burden rather than as a punishment as was originally intended with the creation of restriction of liberty orders. It is not clear in what way tagging will ensure the attendance of a witness."

I have addressed the second point. On the first point, in proposing to use tagging in this way, the Executive is confusing the purpose of tagging. Tagging is being used for a series of different reasons, and its purpose is being confused. I understand that tagging was introduced as an alternative to custody for people who had been found guilty of something. The people whom we are talking about have not been found guilty of anything. The use of tagging for different reasons is confusing the issue of why we do or do not electronically tag certain people.

The use of tagging is inappropriate in this circumstance because it will lead to confusion, but it is particularly inappropriate because it will not achieve the end that is intended. The end is a good one: we want witnesses to turn up so that trials go ahead and so that witnesses, the accused and victims all get their case dealt with at the appropriate time. However, tagging will not achieve that end, for the reasons that I have stated. If we tag reluctant witnesses, we achieve nothing, apart from punishing those who could be made to appear if we had a witness care programme. By tagging recalcitrant witnesses—those who deliberately will not attend—we will achieve nothing, because they will not attend anyway. Tagging will make no difference.

I move amendment 188.

Hugh Henry: It will be useful to clarify what the debate is about. I accept responsibility, because it may be our fault that we appear not to be focusing on what we had intended to result from the proposals. I assure Stewart Maxwell that we are not talking about tagging witnesses who are reluctant to appear because they have child care problems or are genuinely worried about threats; in such cases other support could be brought in.

Stewart Maxwell mentioned the evidence that the committee took from the University of Wolverhampton. The Executive is happy to consider suggestions or proposals from any quarter that can make the experience of victims and witnesses in court more constructive and productive. To that end, we already deliver a range of support services for witnesses. We have Victim Support Scotland, the witness service, and victim information and advice. If we can build on that and learn from evidence elsewhere, we will do so. I assure the committee that we do not propose to tag anyone in the categories to which I referred. Tagging is for a very, very small number of cases.

I shall come back to effectiveness in a moment. Marlyn Glen's amendments, which the committee has agreed to, usefully help to redefine the issue. As Stewart Maxwell said, we are talking about recalcitrant and unco-operative witnesses who, for specific reasons, are refusing to co-operate because they might see some advantage to the accused or because they might be associated with the accused. We are talking only about the very small number of witnesses who could at the moment end up in jail because of that recalcitrance in co-operating.

11:45

In circumstances in which we think that such a person might be confronted with jail, we want to consider the option of tagging. We are not proposing to roll out tagging without further consultation. We want to consider the option and test it, and I assure the committee that I can come back if we need a statutory instrument to give effect to that. At the moment, we are looking only to run a pilot project to test out the tagging of witnesses—I accept that we have not made that entirely clear. There will in any event be only a handful of cases—one or two over the course of a year—where we think that the provision might kick in. We want to see whether or not it might be a useful option for the courts to have that provision available rather than to jail that witness.

What to do would still be a matter for the court. If it believed that jailing a witness was the most secure way of ensuring that that witness gave evidence, the court could and should use that option. However, if the court felt that there were circumstances in which the witness, instead of being put into jail, could reasonably be held in the community, in his or her own home, we think that it is right that we test out whether that would be a better option for the court. We are not dictating to the court that that is what should happen.

I accept Stewart Maxwell's point that tagging a witness is no guarantee in and of itself. A tag is not a global positioning system, although experiments are now being considered in the use of that technology. If some technical problems are resolved, GPS may well be an option that is available in future. If the court thinks that it is worth taking the chance of not putting an individual—a witness who is not guilty of anything—into jail, he or she could be contained in their own home and, at the very least, tagging would give the police an early warning if the witness broke that condition. Tagging would not tell us exactly where the individual was and I accept that it would not give us an absolute assurance that he or she would turn up in court the next morning, but at least the police might have a 12-hour start in searching for that individual and they might be able to find him or her before the court case proceeds, thereby avoiding disruption to the court case. A very small number of people would be faced directly with the prospect of jail.

We will try out the proposal and take whatever measures are necessary to assure the committee that, after it has been tried out, we will come back to the committee to indicate how it has gone, so that we can collectively consider whether tagging is a useful tool. I shall say more about that later.

I do not want to over-egg the proposal or overstate how successful it is likely to be. It is something that we want to try out in a very small number of cases to avoid the courts possibly sending some people to jail, if that is at all possible. I accept that some of Stewart Maxwell's concerns are real and that there are limitations to the proposal, but I genuinely think that it is worth trying.

The Convener: May I seek a point of clarification? Is it the intention that, rather than the provision of a tag being decided in the first instance, a witness who has already been detained in custody would be able to apply for the provision of a tag if that would enable them to be released?

Hugh Henry: There could well be cases in which, in the first instance, the court would decide that the provision of a tag was appropriate. However, it could also be that, having jailed the witness, the court might come back to the decision after it had reflected on the circumstances. However, I stress that we are talking about between one and four cases a year.

The Convener: I just wanted to be sure that the provision, as it stands, allows the witness to make an application. Is that the case?

Hugh Henry: Yes.

The Convener: And the same construction is used in section 14, is it not?

Hugh Henry: Absolutely.

The Convener: The provision allows a witness who is already in custody to make an application, if they so wish, to have their request for the imposition of a tagging requirement to be considered.

Hugh Henry: That is exactly right.

Michael Matheson: I would like you to clarify what you mean when you talk about very small numbers. Have you been able to quantify that? On average, how many witnesses are detained in custody in a year?

Hugh Henry: I will have to get back to you on the number of witnesses who are detained in custody in a year. However, the problem is quite small and, again, I think that we are talking about only one, two, three or four people a year. In any case, the number would certainly be in single figures.

I offer the committee the assurance that, if we go down the route of tagging reluctant witnesses, we would treat it as a try-it and test-it situation. If, as Stewart Maxwell suggested, other appropriate technology became available, we would come back to the committee with some indication of how the system was working at that point. Frankly, it is in neither the committee's interest nor the Executive's to continue with a system that has been shown not to work.

The assurance that the committee, rightly, wants to hear and that we are happy to give is that we do not view this proposal as a device by which we can tag dozens or hundreds of witnesses who might be scared of coming to court and for whom some form of support would be more appropriate, as Stewart Maxwell indicated. We do not intend to go in that direction; we will use the provision in only a small number of cases and we will give the committee the opportunity to ensure that we do so. Further, I assure the committee that we do not intend to tag reluctant witnesses until we have tried out some of the other measures that we have not yet come to. Tagging is not an option of first instance. There will be other pilots for other groups that we hope will be carried out before we even think of trying tagging with the group that we are talking about.

Michael Matheson: For clarification, when you talk about the number being in single figures, are you talking about the number of those whom you expect would be tagged in any given year, or the number of witnesses who are currently detained in custody?

Hugh Henry: At the moment, the number of witnesses who are detained in custody is in single figures.

Michael Matheson: And you expect that the number of people who would be tagged would also be in single figures?

Hugh Henry: Yes. Further, we would not expect that all reluctant witnesses would be tagged, as there could be good arguments for some of them to be retained in prison.

Mr Maxwell: I thank the minister for clarifying a lot of the confusion that has surrounded the issue in my mind, if not in the minds of other committee members. I am pleased that we have focused on the deliberately obstructive witnesses. That is helpful.

However, I am still unconvinced that tagging and releasing deliberately obstructive witnesses would serve any purpose. In effect, the provision allows for the possibility that the court, having decided in the first instance that the witness should be held in custody because of the danger or likelihood that the witness would not show up for the trial, could subsequently release the witness under a tagging order. That would simply create the definite possibility that the witness would abscond, so there is still some confusion on that.

I accept the minister's assurances that the provision will be piloted, that it will apply to only a small number of witnesses and that there will be witness care programmes, but I want him to ponder one point. Earlier, we agreed to amendment 39, which states:

> "Where … the trial diet does not commence on the day appointed for the holding of the diet, the indictment shall fall."

Is the minister not concerned that providing for the option of releasing deliberately obstructive witnesses under a tagging order gives them an

obvious temptation or incentive not to not turn up, especially when they know that the indictment will fall if the fixed trial does not take place on the day appointed? Surely it would be safer—and better for justice—to hold this small group of deliberately obstructive witnesses in custody rather than tag and release them.

The Convener: Amendment 200, in the name of Marlyn Glen, is in a sub-group with amendments 111A, 111B, 112A, 115A, 115B, 118A, 201, 128A, 128B, 128C, 129A, 131A, 139A, 141A, 150A, 152A, 157A, 158A, 158B, 158C, 158D, 158E, 158F, 158G, 158H and 158I.

Marlyn Glen: Amendment 200 continues to deal with the electronic tagging of witnesses rather than of the accused. That might be a little confusing, but like Stewart Maxwell I feel a bit more assured now that we have cleared up who would be affected by section 12 of the bill; it would not apply to many people.

Amendment 200 seeks to change when decisions could be made about whether to use the option of electronic tagging for an obstructive witness. It would allow the court to consider tagging instead of jail in the first instance. Having listened to what the minister said, I can see that we are making some progress, but the question is whether it would be helpful if the decision to tag the witness could be made before the witness was in custody, rather than afterwards.

I hope that that is clear.

The Convener: Amendment 111B, in my name, is a consequential amendment, which would amend amendment 111, in the minister's name, by deleting "or (1A)". Let me clarify that that refers to section 24A(1A) of the 1995 act, which requires the court to consider an application from the accused, who would have the right to be considered for bail with a requirement for electronic monitoring.

On amendment 201, it is fair to say that the committee has spent a lot of time considering the conditions for bail that the bill provides. It has taken me some time just to understand the provisions in the bill as they stand.

The construction of section 12 on reluctant witnesses and section 14 seem to have the same model, but section 14 might not affect so many people in so far as it is when the person is in custody and has been refused bail that they have the right to apply to be considered for release if an electronic tag would persuade the court that it would be safer to release them.

The bill provides that a court must refuse bail, and then wait for an application from an accused. Amendment 128, in the name of the minister, makes an exception for cases of rape and murder, and I have no difficulty with that. In such cases the court will be able to impose a remote monitoring requirement "at its own hand" when first granting bail. I have used the Executive's wording for the construction of my amendment 201, but I would be a lot happier if the court could consider in the first instance what conditions it wishes to attach to bail. That seems to be the most sensible way of going about it.

12:00

I am very unhappy with the provisions as they stand, because it would mean that those who had already been refused bail would be allowed to make an application, and might be released from custody if a tagging order were in place. Those provisions concern me most.

The minister referred earlier to the possibility of considering pilots in relation to the provisions for witnesses. We did not hear oral evidence that the provisions will be piloted. I would like to hear more from the minister about pilots and how he intends to go about them. The Parliament should have a chance to consider the result of any pilot.

I am gravely concerned because, when we ask who is targeted by the tagging provisions, the response is that the minister cannot really tell us, although he expects that they will apply to only a small number of individuals. We are struggling to identify who is being targeted. It struck me that the provisions might be aimed at women offenders. We know that a high proportion of women offenders are on remand and electronic tagging might mean that they might not have to be remanded. We have not had answers to those questions and, in the absence of answers, I remain concerned about how the Executive proposes to deal with the provisions. I am keen to hear more of what the minister has to say on the subject of pilots and how the Parliament might scrutinise that.

Margaret Mitchell: I lodged amendments 73 and 77 on the basis that I am against the principle—

The Convener: Can I stop you there? You will get a chance to speak to those amendments when I call them. At the moment, you can speak generally to any of the amendments in the sub-group that I read out.

Margaret Mitchell: Assuming that there is a possibility that my amendments might fall, I have a great deal of sympathy with Stewart Maxwell's amendments 188 and 189, especially since the minister has outlined the category of person who would be considered for remote monitoring.

Hugh Henry: I will try to follow your guidance on how you want the discussion to go, convener.

On Marlyn Glen's amendment 200, I should say that the policy intention is to allow the court to release a witness on bail with the full range of options open to the court. Tagging as a condition of bail, as an alternative to custody, is an option that the court does not have at the moment, and the policy intention, as I indicated, is to pilot that option before we consider extending it to witnesses. Any consideration of extending that measure to witnesses is much further down the line, and we would want to be reassured that the technology was appropriate and effective. We would also come back to the committee to give members some indication as to how it was working.

I understand what members are saying about some of the broader issues of extending monitoring. We recognise and accept that remote monitoring as a condition of bail is a policy that needs to be tested. We plan to pilot and evaluate the new provisions and how they are working in practice. My amendment 158 provides for regulations designating the court or classes of court that would be able to use the provisions. Our intention is also to make regulations naming the two courts, to pilot any such activity, to evaluate the provisions and to come back to the committee with our indication of how well that has been working.

It is not our intention simply to roll out the provision across the country without any reference to its effectiveness or any consideration of its appropriateness. I hope that I can give members the assurance that we shall pilot the proposal, both for the accused and for witnesses, and give the committee the opportunity to engage in further discussions.

The Convener: Part of the problem is that we were not told that the Executive is going to pilot that proposal. We do not have any information, there is nothing in the explanatory notes and we have pointed out in our report that we are concerned about it. I would have felt less uneasy about the proposal if I had known from the beginning that the Executive wanted to pilot it, but that would not satisfy all my concerns. If there were an opportunity for the Parliament to examine the results before rolling out the scheme, I would be a lot happier about the proposal.

I do not think that your amendment 158 specifies whether the regulations would be subject to the affirmative or the negative procedure. Are you able to give that any consideration?

Hugh Henry: Our original intention was that the regulations would be made subject to negative resolution, but I am certainly happy to go back and consider whether we can change that so that they can be done subject to the affirmative procedure.

In the white paper, "Modernising Justice in Scotland: The reform of the High Court of Justiciary", we flagged up the issue of piloting. In the last sentence of paragraph 136 we said:

> "In time, electronic monitoring of witnesses might be an option, but in the short term our intention is to pilot electronic monitoring as a condition of bail for accused persons who would otherwise be remanded in custody."

That has been flagged up and it remains our intention, but I am also happy to give you the assurances that you seek about further scrutiny of just how well that is working.

Marlyn Glen: I feel much more content, given the minister's assurances that electronic monitoring of the accused will be piloted first, and that witnesses will be looked at way down the line. I am also reassured by the commitment to come back to the Parliament to debate the issues, and by the proposal to change the process to the affirmative procedure. Perhaps the media led us down a path that the minister did not mean us to go down. It is a pity that we did not examine the issue in more detail in committee.

The Convener: We move to amendment 107, which is in a sub-group with amendments 108, 109, 111 to 113, 116, 117, 122 to 127, 129 to 134, 136 to 140, 142, 143, 147, 150 to 154, and 157.

Hugh Henry: Amendment 157 introduces the terms "movement restriction condition" and "remote monitoring requirement" with a view to simplifying the drafting of the provisions that will be inserted into the 1995 act by section 14 of the bill. It also contains an explanation of the term "accused" for the purpose of those provisions. We have attempted to simplify the drafting in response to concerns expressed by the Subordinate Legislation Committee. Our amendments should achieve that objective. Amendments 123, 125, 129, 131, 133, 134, 137, 138, 139, 142, 152 and 154 are consequential amendments that flow from the introduction of the terms "movement restriction condition" and "remote monitoring requirement" by amendment 157.

Amendment 157, taken together with amendment 127, also seeks to incorporate a slight technical change of approach. There will no longer be section 24A(1) orders. Providing for separate orders that impose remote monitoring requirements had the potential to cause problems in terms of the relationship between the new remote monitoring provisions and the general provisions on bail in part III of the 1995 act. Instead, amendments 157 and 127 take the approach that movement restriction conditions and remote monitoring requirements will simply be imposed as conditions of bail, which will ensure that they fit more easily with the general bail regime.

As we are now proposing by way of amendment 128—to which we will come later—that in certain limited circumstances the court can impose remote monitoring at its own hand without an application from the accused, we should not refer to the accused as the "applicant". Amendments 122, 124, 126, 130, 132, 136, 140, 143 and 147, taken together with the definition of the "accused" as introduced by amendment 157, will make the necessary changes to section 14, and amendment 113 will make the necessary changes to section 12.

Amendments 150 and 151 are consequential amendments that tidy up the drafting of proposed section 24A(7) to take account of amendments elsewhere. They do not substantively change the effect of that section.

Amendment 153 is consequential on the new approach that I mentioned earlier, whereby the bill will no longer provide for orders, but rather will make it clear that remote monitoring is simply a further condition of bail, so breach of the remote monitoring condition will be a breach of a condition of bail, which is to be notified by the monitor to the police under proposed section 24A(8).

The amendments to section 12 are partly consequential on the new approach in section 14, but are primarily intended to achieve consistency of terminology and approach between sections 12 and 14, and to simplify the drafting of the provision in response to comments from the Subordinate Legislation Committee. To that end, amendments 116 and 117 introduce the terms "movement restriction condition" and "remote monitoring requirement". Those terms are incorporated into provisions in section 12 by amendments 107, 108, 109, 111 and 112.

12:15

The Convener: In the next sub-group, amendment 110 is grouped with amendments 114, 115, 118, 135, 155 and 158.

Hugh Henry: Amendments 155 and 158 respond to an issue that was raised by the Subordinate Legislation Committee, which suggested that the provisions in subsections (10) to (12) of proposed new section 24A of the 1995 act should be more transparent. That committee said that references to sections 245A to 245H of the 1995 act in relation to restriction of liberty orders had the potential to cause confusion. We agree with the Subordinate Legislation Committee's comments. Amendment 158 will remedy that by replicating in full the provisions that apply to regulation-making powers in new section 24B; those that apply to monitoring compliance with orders in new section 24C; those that apply to remote monitoring in new section 24D; and those that apply to documentary evidence in new section 24E.

In addition, paragraph (b) of subsection (3) of new section 24D has been inserted into the 1995 act in response to the issue that this committee raised about tampering with or damaging monitoring equipment constituting breach. The amendment provides that the court shall include in the order a requirement that monitoring equipment should not be tampered with intentionally or knowingly.

Amendment 155 deletes subsection (13) of proposed new section 24A. That is a consequence of the fact that the new approach that is reflected in the amendments in the previous sub-group makes it clear that remote monitoring requirements are conditions of bail. Consequently, subsection (13) is not needed.

The amendments to section 12—amendments 114, 115 and 118—respond to similar concerns from the Subordinate Legislation Committee, and are largely consequential on the changes to be made to section 14.

Amendment 115 provides for the powers under most of the new sections that are inserted into the 1995 act by amendment 158 to apply also in relation to remote monitoring requirements for reluctant witnesses. We thought that that was the simplest approach to take. However, we considered that trying to extend proposed new section 24E, on documentary evidence, to reluctant witnesses would be too complicated and would require too many modifications. Amendment 118 inserts an equivalent of new section 24E into the reluctant witness provisions. Amendments 110 and 135 are consequential.

The Convener: If there are no further comments on that sub-group, we move to amendment 128, in the name of the minister, which is in a sub-group on its own.

Hugh Henry: Amendment 128 addresses a significant issue, which has attracted some interest. It will enable the sheriff court or the High Court to impose electronic monitoring as a condition of bail at its own discretion—I emphasise that—in a case where a person appears on petition or on indictment, charged or convicted with murder or rape. In post-conviction cases of murder or rape, where bail might be appropriate pending sentence or appeal, the court will have to justify the non-use of bail if appropriate conditions have been attached to its being granted.

The provisions require the court to make a decision whether to grant bail before applying the remote monitoring condition. They are drafted in such a way as to ensure that the court applies the remote monitoring requirement as an additional measure, rather than as a reason for granting bail instead of remanding the person.

In cases in which the charge is reduced, the accused has the right to have the remote monitoring requirement revoked, unless there are exceptional circumstances that justify its retention. The prosecutor also has the right to be heard before the requirement is removed, which allows the court to take into consideration any other information.

Amendment 128 responds to the committee's stage 1 report, which concluded that section 14 is cumbersome, because the accused has to be refused bail in the first instance, before consideration is given to a remote monitoring condition. In addition, we were prompted by the findings in the research report that was published today on the operation of the bail provisions in the 1995 act in relation to the number of people accused of serious crimes, in particular murder and rape, who are released on bail with no supervision.

As I indicated in my opening remarks on section 14, the reasons for not giving the court the power to impose a remote monitoring requirement at first instance in all cases are based on sound evidence. The provisions need to be targeted. However, amendment 128 goes some way towards providing the courts with powers to impose a remote monitoring requirement at first instance, as an additional measure in the most serious cases. There have been too many cases recently in which the court has decided to grant bail to someone who is accused of a very serious crime and we believe that it is right to impose further restrictions, so that if the court decides to grant bail, for whatever reason, the imposition of a remote monitoring requirement should be considered. The provision will not encourage the court to grant bail; it will still have the right to refuse to grant bail in such serious cases.

The Convener: I support amendment 128 and welcome the fact that the Executive has responded to some of the committee's concerns about section 14. The amendment means that the court may make provisions for remote monitoring "at its own hand". It is fair to say that there has been some public concern since the Bail, Judicial Appointments etc (Scotland) Act 2000 ended the mandatory requirement to detain those accused of murder, so to require the court to justify a decision not to impose a remote monitoring requirement represents a good development.

The minister said that the ability to impose an electronic monitoring requirement should not encourage the court to consider granting bail to those who would otherwise have been detained. I support that. It is important that if the provision becomes law—as I hope that it will—we pursue the matter and scrutinise the courts' application of the provision, to ensure that, in cases in which an accused in a murder or rape case cannot legally be detained, the imposition of electronic monitoring provides an additional safeguard for the public, unless the court believes that there is a reason why such an imposition would not be fair.

I have only one question for the minister, which is the one that we always ask, to put the matter on the record. Has amendment 128 been ECHR proofed? I ask only because the provision is similar in design to a restriction of liberty order and I know that there are ECHR issues in relation to those orders.

Hugh Henry: We believe that amendment 128 is ECHR compliant and that it addresses some of the concerns—although understandably not all of them—that many people have expressed about cases that have been reported. It is right that the provision should be used in cases in which the court decides, for whatever reason, that an accused should be released on bail.

The Convener: In the next sub-group, amendment 141, in the name of the minister, is grouped with amendments 144, 145, 146, 148 and 149.

Hugh Henry: Amendments 141, 144, 145 and 146 require the court to obtain reports from the local authority about the place or places to which an offender is to be restricted and about the attitudes of those who are likely to be affected by the enforced presence of the accused at the place of restriction, before it imposes a remote monitoring requirement—or varies such a requirement, for example if an accused or appellant requires to change their address. It is important to avoid situations in which the accused's family might not wish the accused to be restricted to a particular address.

Amendment 148 allows the court to hear evidence from the author of the report if it considers that that would be appropriate. Amendment 149 is a minor consequential amendment that is required as a result of the renumbering of subsections.

The Convener: Amendment 156, in the name of the minister, is in a sub-group on its own.

Hugh Henry: As you know, new section 24A of the 1995 act provides the court with the power to impose a remote monitoring requirement as a condition of bail. As such, the provisions in the 1995 act concerning review of and appeal against decisions on applications for bail will also apply to new section 24A. As drafted, new section 24A could have opened up the possibility that a person who had been refused bail in the first instance under section 23 of the 1995 act and then applied for but was refused bail with a remote monitoring requirement might be able to appeal against the two decisions separately under section 32 of the

1995 act, which would result in two appeals and which could have placed an onerous burden on the courts. I am sure that the committee will agree that that should be avoided, as long as there is no detriment to a person's rights.

Amendment 156 addresses that by making it clear that any appeal against decisions under both section 23, on refusal of bail at first instance, and new section 24A will be heard simultaneously. The amendment also makes it clear for the avoidance of doubt that a person applying for bail under section 23 may appeal against a refusal of that application, despite the availability of a right to apply for bail subject to a remote monitoring condition.

The Convener: In the last sub-group, amendment 73, in the name of Margaret Mitchell, is grouped with amendment 77.

Margaret Mitchell: Amendment 77 would amend the long title to reflect the fact that amendment 73 would leave out section 14. In principle, no one in the category that the minister just described who was deemed liable to be committed and imprisoned should be released under the movement restriction condition in section 14. When the minister was talking about the provision he mentioned the element of risk and said that the pilot would be monitored to see how it would play out. The Executive's proposals are a step too far and present a risk that I am not prepared to take. That is why amendment 73 would leave out section 14.

Hugh Henry: I ask the committee to resist amendment 73 on the basis that section 14 offers the court the option of an additional condition of bail that can be used in cases where it considers that monitoring will provide the additional security that is sufficient to allow someone who would otherwise be remanded to remain in the community. Decisions to remand someone or grant them bail can be made on many occasions during the process of bringing an offence to trial or during the trial. An accused has the right of review of or appeal against a bail decision and section 14 provides an additional option to the courts to consider. There is no obligation on the courts to use the option unless it is felt to be appropriate in the circumstances of the individual case.

Our intention is to introduce a targeted option based on evidence from earlier Home Office pilots and the views of the Scottish consultation on the future of electronic monitoring in Scotland. The conclusion drawn from both those pieces of work is that electronic monitoring as a condition of bail should be targeted at those who would otherwise have been remanded. I accept that in the case of those who are charged with murder or rape there are further considerations in relation to the protection of the public. I hope that amendment 128 will address that problem. However, the use of those additional powers in cases other than murder and rape where the person would be bailed in any case would be a blunt instrument that would tie up human and financial resources, with little to show in return. We should not take a belt-and-braces approach whereby everyone being considered for bail should automatically be considered for electronic monitoring. There would be issues of affordability if that were to become the norm. There would be pressures on the police to deal with breaches, on the Procurator Fiscal Service and, ultimately, on the courts.

I believe that our provisions will work. The court will still retain the power to grant or refuse bail, taking into account the circumstances of the accused and public safety issues. We intend to pilot and test the policy, the targeting, the usefulness, the impact on other agencies and the cost effectiveness of the measure. That is what is behind new section 24B of the 1995 act.

Amendment 77 is consequential on amendment 73. I ask Margaret Mitchell not to move amendments 73 and 77, on the ground of the assurances given.

12:30

Margaret Mitchell: I acknowledge that what the minister said was said in good faith and with the best of intentions. However, I am still of the opinion that if bail is not granted at first instance for this category of people, there is nothing in the remote monitoring requirement that would give me the confidence to impose it as a condition that would satisfy the criterion of protection of the public. In other words, I am not convinced that I would be prepared to take such a risk. On that basis, I am still calling for the removal of section 14 from the bill.

The Convener: The question is, that amendment 188 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Matheson, Michael (Central Scotland) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Butler, Bill (Glasgow Anniesland) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Pringle, Mike (Edinburgh South) (LD)

The Convener: The result of the division is: For 3, Against 4, Abstentions 0.

Amendment 188 disagreed to.

Amendment 200 not moved.

Amendments 107 to 110 moved—[Hugh Henry]—and agreed to.

Amendment 111 moved—[Hugh Henry].

Amendments 111A and 111B not moved.

Amendment 111 agreed to.

Amendment 112 moved—[Hugh Henry].

Amendment 112A not moved.

Amendment 112 agreed to.

Amendments 113 and 114 moved—[Hugh Henry]—and agreed to.

Amendment 115 moved—[Hugh Henry].

Amendments 115A and 115B not moved.

Amendment 115 agreed to.

Amendment 189 moved—[Mr Stewart Maxwell].

The Convener: The question is, that amendment 189 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Matheson, Michael (Central Scotland) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Butler, Bill (Glasgow Anniesland) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Pringle, Mike (Edinburgh South) (LD)

The Convener: The result of the division is: For 3, Against 4, Abstentions 0.

Amendment 189 disagreed to.

Amendments 116 and 117 moved—[Hugh Henry]—and agreed to.

Amendment 118 moved—[Hugh Henry].

Amendment 118A not moved.

Amendment 118 agreed to.

Section 12, as amended, agreed to.

The Convener: I propose to stop there.

We did not reach the end of the bill today. There will be a new deadline for the lodging of amendments, which will be Monday at 2 o'clock. I advise members that the next meeting will take place on Wednesday 24 March when we will continue with further consideration of stage 2 of the bill.

Meeting closed at 12:37.

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ISBN 0 338 000003 ISSN 1467-0178