JUSTICE 1 COMMITTEE

Wednesday 24 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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JUSTICE 1 COMMITTEE
12th 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)

*attended

COMMITTEE SUBSTITUTES

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

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

Scottish Parliament

Justice 1 Committee

Wednesday 24 March 2004

(*Morning*)

[THE CONVENER *opened the meeting at 11:17*]

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

The Convener (Pauline McNeill): Good morning and welcome to the 12th meeting in 2004 of the Justice 1 Committee. I apologise for the late start—the minister was at another committee meeting.

The Deputy Minister for Justice (Hugh Henry): I apologise. My team and I were enjoying ourselves so much at the Communities Committee that we did not notice the time flying by.

The Convener: We will put an end to that—there will be no enjoyment at this committee.

We will get straight down to business. I have received apologies from Stewart Maxwell. Agenda item 1 is the Criminal Procedure (Amendment) (Scotland) Bill. I formally welcome the minister and his team. With members' agreement, I intend to reach the end of stage 2 today, which might mean that we have to continue a bit later than planned. I assume that members would prefer that to continuing next week. Members should have the third marshalled list of amendments and the groupings of amendments.

After section 12

The Convener: Amendment 119, in the name of the minister, is grouped with amendment 186.

Hugh Henry: An important policy objective of the bill is that there should be more effective communication between parties. Amendment 119 will introduce new section 72G into the Criminal Procedure (Scotland) Act 1995 to provide that anything that is to be served, given, notified or intimated to the accused in any proceedings on indictment may be served on the accused's solicitor at his place of business. The amendment will allow documents such as notices of additional witnesses to be served on the solicitor who is acting for the accused rather than personally on the accused. The solicitor on whom documents may be served will be the solicitor who has intimated to the prosecutor that he has been engaged by the accused under proposed new section 72F(1) of the 1995 act, or the solicitor who has been appointed by the court under sections 92 or 288D of that act.

Amendment 119 will mean that the solicitor will receive documents more quickly than at present. It responds to concerns raised by the Crown Office that often the principal documents served on the accused are not received because the address held by the Crown is not current. Amendment 119, together with amendment 42, which allows for the indictment to be served on the solicitor acting for the accused, is intended to assist with the speedier preparation of the accused's defence. Amendment 186 makes a consequential amendment to the long title.

I move amendment 119.

Amendment 119 agreed to.

Section 13—Preliminary pleas and preliminary issues

The Convener: Amendment 120, in the name of the minister, is grouped with amendments 164, 167, 169, 170, 172 to 183 and 185.

Hugh Henry: Convener, I ask you to bear with me while I go through each amendment. This is a group of minor and consequential amendments to the bill and to the schedule.

First, I will deal with amendments 120 and 167. The accused, if he wishes to challenge the fact that he was on bail when he committed an offence, must do so by a preliminary objection under section 27(4A)(a). Amendment 120 will amend section 79 of the 1995 act as introduced by section 13 of the bill, so that notice of a preliminary objection is to be treated as a preliminary issue under section 79(2)(b). That has the effect that the notice provisions in relation to preliminary issues apply and the accused must give notice of such a challenge not less than seven clear days before the preliminary hearing.

Amendment 167 is consequential to amendment 120 and will clarify the provision under which notice of any challenge under section 27(4A)(a) must be given in High Court cases.

Amendment 164 will amend section 20, which introduces the schedule of amendments to the 1995 act. Some of the amendments in the schedule—for example, the amendments to the provisions on restriction of liberty orders introduced by amendment 184—might not be thought of as minor or consequential. Amendment 164 recognises that fact by generalising the description of the amendments in the schedule.

Amendment 169 is a consequential amendment that will amend sections 54 and 56 of the 1995 act and relates to the procedure where the accused is found insane and his trial may not proceed. The

amendments take into account the introduction by the bill of the preliminary hearing and will amend sections 54 and 56 to recognise that a finding of insanity may be made at the preliminary hearing in High Court cases or at the first diet in sheriff court cases, as well as at the trial diet.

Amendments 172 and 173 are technical amendments that make consequential amendments to section 68(4) of the 1995 act, in relation to notice of challenge to the condition of a production examined by a witness. In order to reflect the introduction of the preliminary hearing, the reference in section 68(4) to the accused being cited to the trial diet is to be substituted by a reference to where the case is to be tried in the High Court. That is consistent with the amendments made to section 68(3) by paragraph 11 of the schedule.

Amendments 174 and 175 are consequential amendments that are required because of the restructuring of the provisions relating to the adjournment and alteration of diets and the introduction of new section 75A. They will delete sections 71(8) and 71(8A), which are superseded by new section 75A.

Amendment 176 will amend section 76(3) to take account of the introduction of the preliminary hearing in High Court cases. That will allow the court, where the accused has intimated his intention to plead guilty but then at a further diet does not do so, to postpone the preliminary hearing.

Amendments 170, 177, 178 and 179 are purely technical in nature. They correct errors in paragraphs 8 and 16 of the schedule and ensure consistency throughout the bill.

On amendments 180 and 181, section 66(1) of the 1995 act currently provides for the grant of warrants to cite the accused to appointed sheriff and jury sittings. The bill will amend that section to provide that the act itself is sufficient authority for the citation of the accused to any diet and no longer refers to the appointment of sittings. Amendments 180 and 181 delete the references in section 83 of the 1995 act to sittings of the court appointed under section 66, which are now inappropriate.

Amendments 182 and 183 are consequential amendments to section 87(1)(b) and will remove an inappropriate reference to "that sitting", for consistency with the remainder of that section.

Amendment 185 is a consequential amendment that seeks to clarify the definition of the preliminary hearing to ensure that it includes any further preliminary hearings that might be held.

I move amendment 120.

Amendment 120 agreed to.

Amendments 45 to 49 moved—[Hugh Henry]—and agreed to.

Section 13, as amended, agreed to.

After section 13

Amendments 50 and 51 moved—[Hugh Henry]—and agreed to.

The Convener: Amendment 121, in the name of the minister, is in a group on its own.

Hugh Henry: The objective of section 258 of the 1995 act was to remove from the trial non-contentious issues with consequential benefits and savings in witness time and court time. Under section 258, parties can serve on each other a statement of evidence that they consider to be uncontroversial. At the moment, when statements of uncontroversial evidence are served by the Crown on the defence, there is almost invariably a challenge to the entire contents in a notice under section 258(3).

That section provides that facts "specified or referred to" in the statements are

"conclusively proved only in so far as unchallenged".

Routine challenges to statements of uncontroversial evidence mean that section 258 is largely robbed of practical effect. Under present procedure, the defence is generally under an obligation to its client to challenge such statements because, when they are served, the defence might not always have sufficient detail of the Crown case to assess properly the terms and to consider whether the evidence can be agreed.

Amendment 121 will insert into the bill a new section that introduces new subsections (4A) to (4C) of section 258 of the 1995 act. The new subsections allow the court in solemn proceedings on an application by any party to direct that any challenge to the statement in the notice under section 258(3) is to be disregarded if it considers the challenge to be unjustified.

Through a proposed practice note, the Crown has undertaken to deliver material to the defence as soon as that is reasonably practical. It is anticipated therefore that the defence will be fully informed of the Crown's case at the time of service of the statement. Together with new section 258(4A) of the 1995 act, that will prevent unnecessary challenges to those statements. We believe that the court should be able to adjudicate on any dispute as to whether the challenge is justified. Amendment 121 highlights the management role of the judge and allows the judge to determine at the preliminary hearing or first diet whether the challenge is justified and, if it is not, to disregard the challenge.

I move amendment 121.

The Convener: I do not have any difficulty with the amendment. Is it partly a response to Lord Bonomy saying in his report that he was keen that there should be some provision relating to uncontroversial evidence? Is that why you lodged the amendment?

Hugh Henry: Yes.

Amendment 121 agreed to.

The Convener: Amendment 72, in the name of Michael Matheson, is grouped with amendment 76.

11:30

Michael Matheson (Central Scotland) (SNP): One of the key themes in the evidence that we received from a variety of parties was the need to ensure early disclosure of information from the Crown to the defence. That would allow the defence to prepare its case in time for the managed meeting and preliminary hearing. The Bonomy report stated that the Crown should

"provide to the defence information about material developments in the investigation of the case as they occur, and let them have access to all relevant evidence as it becomes available."

It was clear from the evidence that we received that there was increasing concern about how the requirement for early disclosure would be met in practice. At stage 1, ministers said that they intended that the matter should be addressed through a practice note. However, as the minister will be aware, the committee said in its stage 1 report that we were not convinced that a practice note would be the most appropriate way of dealing with the issue and that we had received evidence arguing that the bill should provide for the type of early disclosure that Lord Bonomy's recommendations intended. In effect, amendment 72 would put in place the Bonomy recommendations to ensure that such early disclosure is effective.

I accept that ministers may again wish to consider dealing with the matter through a practice note. However, if the minister is not minded to accept the amendment, can the committee receive the guarantee that it has sought that

"the ethos of and the requirement for early disclosure will be clearly set out in the Crown Office practice note"?

I move amendment 72.

Margaret Mitchell (Central Scotland) (Con): Early disclosure is the key. The amendment would tighten up the procedure and, on that basis, I support it.

The Convener: I do not have any difficulty with the content of Michael Matheson's amendment 72, but the question is whether the matter would be better addressed in the bill or in a practice note. In our previous papers, there was a practice note from the Crown Agent, which referred to lists of witnesses' statements and information on how early disclosure should be managed—I welcome the fact that we have that before us. I do not think that members disagree on what we want to achieve, but the question is how best to get the assurances that the Crown will meet its obligations in respect of early disclosure.

Margaret Smith (Edinburgh West) (LD): I have a question for the minister. If something is in a practice note, but it does not happen in practice, what would the Executive do? Obviously, if something is provided for in the legislation, it might be easier to think about sanctions, but if the practice note does not work in practice, what would happen?

The Convener: Before I call the minister to speak, I will raise a concern about Norman McFadyen's letter, although I do not necessarily ask for a reply to what I will say. In paragraph 2 of the letter, the Crown Agent says that, under the practice note, more material will be disclosed than the Crown would normally disclose,

"including all witness statements taken by the police, at stages as close as possible to commencement of proceedings."

I simply raise that issue for the *Official Report* because the committee expressed concerns about the revelation of all police statements to the defence. I would certainly want assurances from the Crown that there will be consultation—particularly with Victim Support Scotland and other organisations that might be concerned—before that part of the practice note is brought into operation. I appreciate that that is a matter for the Crown and not for the Executive, but I thought that this might be the obvious point in the debate to put down a marker and draw people's attention to the Crown Office's new procedure.

Hugh Henry: I will address the general issue that Michael Matheson raised before taking up the points that Margaret Smith and you raised, convener.

Paragraph 2(c) of chapter 20 of Lord Bonomy's report states:

"The Crown should also provide to the defence information about material developments in the investigation of the case as they occur, and let them have access to all relevant evidence as it becomes available."

Paragraph 2(d) says:

"Along with the courtesy copy of the indictment the defence solicitor should receive a copy of all documentary productions which he has not already received."

Those paragraphs, along with 2(a) and 2(b), are covered in the protocol.

Amendments 72 and 76 would insert into the bill a provision placing a duty of disclosure on the Crown. However, we believe that what the Crown has already undertaken to do by way of its practice note goes further than would be achieved by the amendments.

The Crown has undertaken to produce a practice note that will give a clear statement of intention to provide detailed and comprehensive information to the defence at identifiable points in the process. The Crown is consulting the Law Society of Scotland, the Faculty of Advocates and other relevant professional bodies on the terms of the note. As you say, convener, copies of the letter and the practice note have been circulated and are available on the committee's website.

The key point of the practice note is that the Crown is committing itself to disclosing significantly more material, including all witness statements taken by the police, at stages as close as possible to commencement of proceedings. That will enhance the ability of the defence to prepare for trial in a focused and effective manner and will allow meaningful preparation to begin at a much earlier stage in proceedings. The approach ensures that, although the Crown is committed to providing the defence with copies of statements and productions, the arrangements for doing so are sufficiently flexible to take account of the interests of vulnerable witnesses and the practicalities of disclosing material in large and complex cases. Flexibility is important in that regard.

The practice note will facilitate the successful operation of the system of preliminary hearings. Although the practice note is not in statutory form, it will be published and the court will be entitled to have regard to its terms at the preliminary hearing. Michael Matheson's amendments are therefore unnecessary and have been overtaken by the progress made by the Crown on disclosure and its work with the defence on the contents of the practice note.

On Margaret Smith's point, I say that what would happen is that the judge would use a sanction against the Crown at the preliminary hearing. In a custodial case in which the trial is delayed because the Crown has not met the protocol, the accused might get bail. That would be a matter for the court to decide. The court would be able to take action if it felt that it would be inappropriate not to.

The convener mentioned disclosure of information and the police. In any case in which witness statements are provided to the defence, it will be open to the Crown to ensure that obscure or confidential information contained in the statement, the disclosure of which is unnecessary, would not be given. The legal term for that is "redaction". That would, we hope, ensure that, for example, the home address of a witness who might fear intimidation was not given as part of the process. If there was any suggestion that information given to the police in a statement was confidential, that information would not be included. Again, that is part of the protocol.

Michael Matheson: Minister, are you saying that if the defence requires certain information that has not been made available to it at the preliminary hearing, the court can instruct the Crown to make that information available?

Hugh Henry: Yes.

Michael Matheson: From your response to Margaret Smith's question, I understand that the procedure will be the same with the practice note in place. A case will reach the preliminary hearing and the defence will be able to say, "They haven't even stuck with the practice note." The court may then instruct the Crown to make the information available. Indeed, the practice note may direct the court to tell the Crown that the information should be made available. However, what type of sanction would be applied if the disclosure did not happen?

Hugh Henry: I can put that back to you in another way. Under the terms of the amendments, what sanctions would apply if that requirement was not met?

Michael Matheson: The bill would then provide for the court to direct disclosure. That would be in the bill, not in a practice note.

Hugh Henry: The practice note would have the same effect. It would be open to the court to make such a direction in any case and the court could apply the sanction that we have suggested.

Michael Matheson: Surely, the key is not to allow things to get to the stage where such matters are being discussed at the preliminary hearing. As has been clear throughout our consideration of the bill, the key is to try to get such things more or less sorted out before a case gets to the preliminary hearing.

Hugh Henry: I accept that and we believe that the protocol provides for that. The whole system is now predicated on—as much as anything else—the cultural change that we are introducing. Early disclosure will become a fact of life and people will co-operate. What we now have, in the development of the protocol, is an engagement, a dialogue and a consultation with all the key players. The protocol is not something that has just been produced and given out, with people being told, "You will do that." There is on-going discussion with all the players who are involved and people are responding well. We think that we can get much more out of the protocol than we

can get by trying to put such a requirement in the bill, which would introduce a degree of inflexibility. We believe that we are achieving exactly what Michael Matheson is attempting to achieve, but more so, and we think that the protocol is a better way of doing it.

Michael Matheson: I take on board what you are saying, minister, but I continue to have concerns and I will, naturally, reflect on the comments that you have made. I cannot emphasise enough that the evidence that the committee received was clear that disclosure must take place at an early stage. I cannot help but feel that having a statutory authority to that—having it based in the bill—will force the issue, whereas, with a practice note, someone might hedge their bets. I suspect that, if a case went before a judge at a preliminary hearing and a statutory provision had been breached, the judge would take a much dimmer view of the matter than if the terms of a practice note had not been applied—I suspect that the sanctions that a judge would apply in that situation would be somewhat different.

Hugh Henry: We will have to agree to disagree. We are both looking for the same outcome; we have a different view of how it can be achieved.

Michael Matheson: I will reflect on what the minister has said. I seek permission to withdraw amendment 72.

Amendment 72, by agreement, withdrawn.

Section 14—Bail conditions: remote monitoring of restrictions on movements

Amendment 201 not moved.

Amendments 122 to 127 moved—[Hugh Henry]—and agreed to.

Amendment 128 moved—[Hugh Henry].

Amendments 128A to 128C not moved.

Amendment 128 agreed to.

Amendment 129 moved—[Hugh Henry].

Amendment 129A not moved.

Amendment 129 agreed to.

Amendment 130 moved—[Hugh Henry]—and agreed to.

Amendment 131 moved—[Hugh Henry].

Amendment 131A not moved.

Amendment 131 agreed to.

Amendments 132 to 138 moved—[Hugh Henry]—and agreed to.

Amendment 139 moved—[Hugh Henry].

Amendment 139A not moved.

Amendment 139 agreed to.

Amendment 140 moved—[Hugh Henry]—and agreed to.

Amendment 141 moved—[Hugh Henry].

Amendment 141A not moved.

Amendment 141 agreed to.

Amendments 142 to 149 moved—[Hugh Henry]—and agreed to.

Amendment 150 moved—[Hugh Henry].

Amendment 150A not moved.

Amendment 150 agreed to.

Amendment 151 moved—[Hugh Henry]—and agreed to.

Amendment 152 moved—[Hugh Henry].

Amendment 152A not moved.

Amendment 152 agreed to.

Amendments 153 to 156 moved—[Hugh Henry]—and agreed to.

Amendment 157 moved—[Hugh Henry].

Amendment 157A not moved.

Amendment 157 agreed to.

Amendment 158 moved—[Hugh Henry].

Amendments 158A to 158I not moved.

Amendment 158 agreed to.

Amendment 73 moved—[Margaret Mitchell].

11:45

The Convener: The question is, that amendment 73 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)
Smith, Margaret (Edinburgh West) (LD)

The Convener: The result of the division is: For 1, Against 5, Abstentions 0.

Amendment 73 disagreed to.

Section 14, as amended, agreed to.

Section 15— Bail review: rights of prosecutor to be heard etc.

The Convener: Amendment 159, in the name of the minister, is grouped with amendments 160 to 162.

Hugh Henry: The amendments will introduce to section 15 of the bill provisions to make further amendments to sections 30 and 31 of the Criminal Procedure (Scotland) Act 1995 in relation to bail review. The effect of amendment 159 will be to introduce a new subsection into section 30 to give the prosecutor an express right to be heard in relation to any application for bail review by an accused person. The provision is a response to concerns that were raised by the Crown Office that in some situations it might not be clear whether the prosecutor had a right to be heard.

Section 15(3) of the bill will introduce into the 1995 act proposed new sections 30(2A) and 30(2B), which will provide that any application for review by an accused who is granted bail pending his appeal, or any appeal by the Lord Advocate should be intimated to the Crown Agent and heard not less than seven days after the date of intimation. Amendment 160 will ensure that those provisions also apply in the case of any application for review by any convicted person who is granted bail pending sentence. That is to ensure that the prosecutor receives notification of any application for review and is given sufficient time to prepare for the hearing. Amendment 161 will delete a provision that will be superseded by amendment 159.

Section 15 of the bill will also introduce to the 1995 act proposed new sections 31(2A) and 31(2B), which will have the effect that, where the prosecutor makes an application for review of bail that is granted to an appellant or a convicted person pending an appeal by the Lord Advocate, the application must be heard not more than seven days after the day on which it was made. Amendment 162 will ensure that those provisions also apply to any application for bail review by a prosecutor in respect of a person who is granted bail pending his sentence.

I move amendment 159.

The Convener: I want clarification on a point: I am not absolutely sure to what the amendments refer. Do they refer to bail conditions under section 14 of the bill, where the person is applying to be released on bail under remote-monitoring supervision, or to bail generally?

Hugh Henry: They refer to bail generally.

Amendment 159 agreed to.

Amendments 160 to 162 moved—[Hugh Henry]—and agreed to.

Section 15, as amended, agreed to.

Section 16—First diet in sheriff court solemn proceedings: witnesses and bail

Amendment 52 moved—[Hugh Henry]—and agreed to.

Section 16, as amended, agreed to.

Sections 17 to 19 agreed to.

After section 19

The Convener: Amendment 78, in the name of the minister, is grouped with amendment 79.

Hugh Henry: The Protection of Children (Scotland) Act 2003 aims to strengthen safeguards for children. It provides for Scottish ministers to establish and maintain a list of persons who are disqualified from working with children. Those who are on the list will commit an offence if they work with children, and organisations will commit an offence if they knowingly employ a disqualified person in a child care position. The courts are to make referrals to the list when a person is convicted of an offence against a child, but not until the individual has had the opportunity to appeal the proposed reference. That is in recognition of the possible human rights issues involved in banning a person from working with children on account of a conviction that is subject to appeal.

In planning for implementation, it became apparent that section 10(6) of the 2003 act, which defines the point at which an appeal period is deemed to be exhausted, is unworkable. Amendment 78 will clarify the position and provide a workable provision. The amendment is legal and technical, and does not alter the agreed policy, as set out in the explanatory notes for the Protection of Children (Scotland) Act 2003.

Amendment 79 is a consequential amendment to the long title of the bill.

I move amendment 78.

Michael Matheson: Will that mean that a person's name cannot be entered on to the list until they have decided that they will not appeal the conviction?

Hugh Henry: Yes.

Michael Matheson: What would be the average length of that period?

Hugh Henry: It would be eight weeks, we believe.

Michael Matheson: Would such people be able to work with children while they were on bail pending an appeal?

Hugh Henry: Yes.

Michael Matheson: There is clearly a gap in which such people could be working with children. What can be done to protect children from an individual who is awaiting appeal?

Hugh Henry: There is an eight-week maximum, and the conviction would be on such a person's record. I will need to take further advice, however. I can get back to the committee if the provision needs to be strengthened in any way. We believe that the provision would be sufficient, but I take Michael Matheson's point and I will certainly look into the matter.

The Convener: That would be helpful.

Michael Matheson: That gap concerns me.

Hugh Henry: I will look into the matter and respond to Michael Matheson via the convener. The provision has been balanced against human rights issues. We are pushing as far as we can to give added protection, but there are and will be constraints on what we can do.

Michael Matheson: An obvious question is whether it is possible to have an interim entry on the register, where "pending appeal" is clearly stated. At the moment, people do not know whether a person's case is pending appeal. I would have thought that such a provision would protect a person's human rights—in that it is stated that they are appealing a decision—while protecting organisations that refer to the register. Such organisations would be able to take the pending appeal into consideration.

Hugh Henry: I will investigate that, but if anyone was doing a disclosure check, that conviction would come up. The issue might affect someone who was already in employment, in which case there might not be a requirement for a check to be carried out. We will consider the matter and get back to you on it.

The Convener: I think that the committee is unanimous in its support for the measure, although there are some issues that need to be considered further. I welcome what the minister has said. I hope that we can keep a dialogue open before stage 3, although I realise that amendment 78 is not, strictly speaking, a justice amendment, but an education one.

I state for the record my view that it would have been helpful if amendment 78 had been brought to our attention at stage 1 so that we could have scrutinised it. I support the amendment whole-heartedly, but I have some reservations about its being introduced to a bill about delays in the High Court. Amendment 78 has been lodged quite late in the day, although I do not think that anyone would want to stand in the way of that important provision. In the light of those circumstances, the committee will welcome dialogue before stage 3 to ensure that—because we have not been able to scrutinise the amendment as we would have done had it arrived earlier—we can at least correspond with the Executive so that the amendment can be proofed.

12:00

Hugh Henry: I am aware that my colleague, Peter Peacock, has written to you, but I shall certainly convey your remarks to him. We all recognise that it would have been better for amendment 78 not to be included in the bill. However, once it became apparent to us that there was a problem, we believed that it was right to act quickly to address the defect. I accept that limitations are placed on the committee by the late introduction of the amendment and I am grateful for members' consideration and tolerance in the matter. However, we felt that speed was of the essence. That is why we considered the provision's inclusion in the bill; it was the first opportunity that became available to us. We accept that it would have been better had another opportunity been available and had there been more time, but that was not the case.

Amendment 78 agreed to.

The Convener: Amendment 163, in the name of Hugh Henry, is in a group on its own.

Hugh Henry: Although section 260 of the 1995 act provides that prior statements of witnesses are admissible as evidence, there is some doubt as to whether that will include statements that were not included in the list of productions served by a prosecutor with the indictment. Amendment 163 is intended to clarify that doubt and will provide that the fact that a prior statement is not included in the list of productions that are lodged by either party is no bar to the statement being admitted as evidence.

I move amendment 163.

Margaret Smith: Would prior statements include statements that had been given to police?

Hugh Henry: Yes.

The Convener: Amendment 163 does not represent a dramatic change. The committee wants to be sure that that provision will not be in the bill as a facility for what we have just heard about from the Crown Agent in relation to the routine issuing of prior statements.

Hugh Henry: That is a separate issue. Amendment 163 is just for clarification.

Amendment 163 agreed to.

Section 20—Minor and consequential amendments

Amendment 164 moved—[Hugh Henry]—and agreed to.

Section 20, as amended, agreed to.

Schedule

MINOR AND CONSEQUENTIAL MODIFICATIONS OF THE 1995 ACT

The Convener: Amendment 165, in the name of Hugh Henry, is grouped with amendments 166, 166A and 168.

Hugh Henry: Section 9 of the bill will introduce amendments to section 65 of the 1995 act to provide that the accused is entitled to be admitted to bail if statutory time limits are not complied with. Under proposed new section 65(8C), where the prosecutor's application for extension of the time limit is refused or where he does not make such an application, the courts shall admit the accused to bail. The amendments in the group will modify the normal rules that govern bail set out in part III of the 1995 act to the situation where an accused is admitted to bail under proposed new section 65(8C).

Amendment 165 will disapply section 24(6) of the 1995 act in relation to bail under proposed new section 65(8C). Section 24(6) allows the court to impose as a condition of bail a requirement that the accused, or a person on his behalf, deposits a sum of money. We do not consider it appropriate for the accused to be prevented from being released on bail when the time limits have been reached only because he is unable to find a sum of money.

Amendment 166 seeks to clarify that if any conditions that the court proposes to impose in granting bail under proposed new section 65(8C) of the 1995 act are not accepted by the accused, he will remain in custody on the warrant of committal for as long as he fails to accept those conditions.

Amendment 166A seeks to adjust amendment 166 expressly to provide that any continued detention of the accused for refusal to accept proposed bail conditions under proposed new section 65(8C) of the 1995 act is subject to section 65(1) and proposed new section 61(1A). The provisions make it clear that an accused shall not be tried on indictment for any offence unless, when the indictment is served in respect of the High Court, a preliminary hearing is commenced within a period of 11 months and, in any case, the trial diet is commenced within a period of 12 months. If the preliminary hearing or the trial diet is not so commenced, the accused is entitled to be discharged from the indictment and is not liable to be proceeded against on indictment for that offence at any time. That applies to all cases commenced on petition, whether or not the accused is in custody.

We do not consider amendment 166A to be necessary. As it is clear that section 65(1) and proposed new section 65(1A) of the 1995 act apply to all such cases, it is not necessary to specify that the measures will apply particularly in the case of an accused who continues to be detained after the expiry of the time limits under proposed new section 25A to be inserted into the 1995 act.

Amendment 168 seeks to amend section 28 of the 1995 act to clarify that, in circumstances where an accused released on bail under proposed new section 65(8C) breaches any of his bail conditions, he will be brought before the court that granted bail. The amendment also seeks to amend sections 31 and 32 of the 1995 act in order to clarify that, in cases in which a prosecutor seeks a review of bail or an appeal in relation to bail granted under proposed new section 65(8C), that review or that appeal may relate only to the conditions imposed on bail and may not relate to the grant of bail itself.

I move amendment 165.

The Convener: Amendment 166A is a probing amendment. At a previous meeting, we debated the question of what happens when time limits are breached. The Executive has now lodged an amendment that seeks to stipulate that an accused who refuses to accept bail conditions will be held in custody.

Committee members were concerned that the time limits were not made clear in circumstances in which the time limits had been breached and the accused was entitled to bail but had refused to accept the conditions. Could that situation theoretically continue ad infinitum? After all, those people are in a different position to those who are not in custody or those who are in custody but whose stay in custody has not breached the time limits.

Given that this is such a radical departure from current provisions under which the accused is either entitled to walk free when certain time limits are breached or automatically receives bail, I just wanted to ensure that every loophole has been closed. For example, in the unlikely event that an accused does not accept the conditions that have been imposed on them, could they theoretically be held for longer than the 12-month time limit for non-custody cases?

Hugh Henry: I assure you that the 12-month time limit applies in all solemn cases and that the accused cannot be kept beyond that.

Amendment 165 agreed to.

Amendment 166 moved—[Hugh Henry].

Amendment 166A not moved.

Amendment 166 agreed to.

Amendments 167 to 170 and 53 moved—[Hugh Henry]—and agreed to.

The Convener: Amendment 191, in my name, is grouped with amendment 171. If amendment 191 is agreed to, I will not be able to call amendment 171.

Amendment 191 relates to section 67 notices, which allow the Crown by leave of the court to include evidence after the time limit has passed if the court thinks that the circumstances are such that the evidence should be put before it. The issue has been raised by both the Crown and the defence, but in particular by the defence, whose concern is that such notices are used too frequently.

The principle behind the bill is to reduce delay in the court and I would not want other principles that relate to the balance of justice to cut across that. The Executive has amended the provision in the 1995 act and my fear is that the new test, which will allow such evidence before the jury is sworn to try the case "in special circumstances" might be quite high, because we do not know what "special circumstances" will mean compared with the provision in the 1995 act, which is that such evidence may be allowed

"with the leave of the court".

There is already a heavy duty on the Crown, and rightly so. The bill relies heavily on the Crown to have the procedures in place to achieve early disclosure. However, I am worried that the court's interpretation of "special circumstances" might mean that some evidence will not be allowed.

I welcome the provision in so far as the new time limit will mean that evidence may be heard up to the moment when the jury is sworn, whereas under the current provision, the time limit is two days before the jury is sworn—I have no issue with the timescale. However, we can only predict how the court will view the test. My concern is that if the court deems it to be a higher test than the one that we have at the moment, that might cut across the interests of justice, as it might prevent some evidence that would currently get into court from doing so.

I move amendment 191.

Hugh Henry: At stage 1 and in the committee's stage 1 report, concern was expressed that the proposed amendment to section 67 of the Criminal Procedure (Scotland) Act 1995 in paragraph 9 of the schedule would be too restrictive on the Crown. The Law Society of Scotland agreed with that concern. The effect of section 67 as the bill would amend it would be to prevent the evidence of witnesses that came to the notice of the Crown at a late stage from being led because the notice periods could not be adhered to. That was not the intention and, clearly, is not in the public interest. Amendment 171 addresses that concern and will allow a witness to be examined with the leave of the court where notice is given at any time

"before the jury is sworn to try the case".

As the convener knows, amendment 191 seeks to retain the status quo—the provisions in section 67 of the 1995 act on the Crown lodging late notice of witnesses and productions. The schedule to the bill amends that section, and we consider that those provisions, as amended by amendment 171, are better suited to the overall package of measures that the bill introduces. The aim is to encourage notice of further evidence to be given before the preliminary hearing, at which it is intended that all such incidental matters should be dealt with.

Lord Bonomy's review identified the late lodging of section 67 notices as a feature of the high number of adjournments in High Court cases. We acknowledge that the Crown may receive evidence at a late stage—that is why we introduced amendment 171, which will allow a notice under section 67(5) of the 1995 act to be lodged until the jury is sworn. Nevertheless, we do not think it unreasonable for the Crown to justify that late lodging, which might cause the trial to be adjourned. That is why we have introduced the test of special circumstances, which the prosecutor must demonstrate to the court before it allows late notice to be lodged.

Although the productions may be lodged at a late stage, we would hope that the Crown would notify the defence as soon as the evidence became available and that the trial would be able to proceed on the date fixed.

We take on board the points about cause shown, the test and the interpretation of special circumstances, but we hope that we can persuade you that our proposals are reasonable and that you will withdraw your amendment. We assure you that we will go away and consider the issues that you have raised in relation to the test to be applied, and you would have the opportunity to return to the issue at stage 3.

We believe that the test should be on cause shown, and we will consider whether "special circumstances" might be too high a test. We will consider all the issues and come back to you with a response. That will allow the committee to reflect on whether we have addressed the issues and whether there are issues that the committee, or

the Executive and the committee together, need to address at stage 3.

12:15

The Convener: If no other member wishes to speak, I will wind up. I agree with everything that the minister has said—the Crown should justify late evidence. I whole-heartedly accept that the bill is designed to ensure that there is late evidence in only very few circumstances. There is not much distance between my position and the minister's position. My concern was that special circumstances could mean that evidence was excluded, even if in only a few cases. If the minister is saying that he will consider another test—cause shown—so that the Crown would still have to justify late evidence being brought to the court, I am happy to withdraw amendment 191 and to have further discussion at stage 3.

Amendment 191, by agreement, withdrawn.

Amendment 171 moved—[Hugh Henry]—and agreed to.

Amendments 172 to 175, 54, 176 to 179, 55, 56 and 180 to 183 moved—[Hugh Henry]—and agreed to.

The Convener: Amendment 184, in the name of the minister, is in a group on its own.

Hugh Henry: Amendment 184 is specific to sections 245A, 245C and 245E of the Criminal Procedure (Scotland) Act 1995, which relate to restriction of liberty orders. The amendment introduces consistency between the provisions of a remote monitoring requirement as a condition of bail under new section 24A with the provisions relating to restriction of liberty orders under sections 245A, 245C and 245E of the Criminal Procedure (Scotland) Act 1995. The effect of amendment 184 will be to provide in section 245A, on restriction of liberty orders, for a report to be prepared by a local authority officer about the place or places of restriction and about the attitudes of persons likely to be affected by the enforced presence of the offender. It also provides for the officer who prepared the report to be heard from, if necessary. In practice, that information is already provided by the local authority but, for consistency, amendment 184 brings the provision into line with that proposed for bail.

Section 245C, on remote monitoring, will be amended to clarify the fact that tampering with, or intentional damage to, the remote monitoring equipment is a breach of the restriction of liberty order.

Section 245E, on the variation of a restriction of liberty order, will be amended to provide that, before varying a restriction of liberty order to change the place or places of restriction, the court has to obtain a report about the place and the attitudes of persons likely to be affected by the enforced presence of the offender. Again, the officer who prepared the report may be heard from, if necessary.

I move amendment 184.

Amendment 184 agreed to.

Amendment 185 moved—[Hugh Henry]—and agreed to.

Schedule, as amended, agreed to.

Sections 21 and 22 agreed to.

Long Title

Amendment 106 not moved.

Amendments 57, 58, 74, 59, 60 and 75 moved—[Hugh Henry]—and agreed to.

Amendment 190 moved—[Marlyn Glen]—and agreed to.

Amendments 186 and 61 moved—[Hugh Henry]—and agreed to.

Amendments 76 and 77 not moved.

Amendment 79 moved—[Hugh Henry]—and agreed to.

Long title, as amended, agreed to.

The Convener: Thank goodness for that. Stage 2 consideration of the Criminal Procedure (Amendment) (Scotland) Bill is ended. Members are allowed to cheer. I thank the minister and his team. We have had an excellent debate. It has been a hard morning for the minister, but you can now relax—not so fast for members, though. I remind them that there will be a committee meeting on Wednesday 31 March, when we will consider hutters' rights, access to children, the transparency of legal fees and post-legislative scrutiny of the Protection from Abuse (Scotland) Act 2001. There is never a dull moment here. I thank members for their attendance.

Meeting closed at 12:23.

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Printed in Scotland by The Stationery Office Limited

ISBN 0 338 000003 ISSN 1467-0178