JUSTICE 1 COMMITTEE

Wednesday 2 February 2005

Session 2

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JUSTICE 1 COMMITTEE
3rd Meeting 2005, Session 2

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Stewart Stevenson (Banff and Buchan) (SNP)

COMMITTEE MEMBERS

Marlyn Glen (North East Scotland) (Lab)
*Mr Bruce McFee (West of Scotland) (SNP)
*Margaret Mitchell (Central Scotland) (Con)
*Mrs Mary Mulligan (Linlithgow) (Lab)
*Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD)

*attended

COMMITTEE SUBSTITUTES

Brian Adam (Aberdeen North) (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

Douglas Wands

ASSISTANT CLERK

Douglas Thornton

LOCATION

Committee Room 5

Scottish Parliament

Justice 1 Committee

Wednesday 2 February 2005

[THE CONVENER *opened the meeting at 09:52*]

Interests

The Convener (Pauline McNeill): Good morning and welcome to the third meeting of the Justice 1 Committee in 2005. I have apologies from Marlyn Glen, who is unwell today.

As Jamie Stone is not present, I propose that we defer consideration of item 1, which is his declaration of interests. Is that agreed?

Members *indicated agreement*.

Subordinate Legislation

Remote Monitoring Requirements (Prescribed Courts) (Scotland) Regulations 2005 (Draft)

09:53

The Convener: Item 2 is subordinate legislation. I welcome Hugh Henry, the Deputy Minister for Justice, and ask him to speak to and move motion S2M-2292, on the draft regulations.

The Deputy Minister for Justice (Hugh Henry): I apologise, convener, as there seems to have been a mix-up over time. I was advised that I was required at 10 o'clock. I regret any inconvenience that has been caused to you or the committee.

The draft regulations essentially bring forward a matter that has been debated previously by the committee. We are now looking for ratification to identify the courts that would be used for the pilot project and to confirm approval of the start date.

There is a slight change to what had been discussed previously. We had thought that it would be useful to look at two courts, but we now want to include four courts in the pilot. We believe that the range in both geography and size would give useful information about the effect of the measure.

I move,

That the Justice 1 Committee recommends that the draft Remote Monitoring Requirements (Prescribed Courts) (Scotland) Regulations 2005 be approved.

Stewart Stevenson (Banff and Buchan) (SNP): I say at the outset that I seek to help the minister make a success of remote monitoring; my questions are not designed with any other purpose in mind.

I have a few practical questions about remote monitoring. The first is probably the most important: how long does it take to establish remote monitoring for a particular individual? My understanding of the technology is that it involves the installation of some equipment in the place in which the person is supposed to remain, which is usually their home. Therefore, it is probably important to understand how long the installation of the equipment takes. Secondly, it would be useful to know the approximate comparative costs of holding someone on remand—I understand that that cost varies depending on how long someone is on remand—putting someone out on bail, and putting someone on remote monitoring.

Hugh Henry: The debate that we are having this morning is not about the principle of the issue or whether we should proceed with remote monitoring. We have previously established the

principle. The draft regulations are about agreeing the dates and the specification of the four courts.

However, on Stewart Stevenson's first point, I can say that the installation time to fit the tag and install the box is approximately two hours. As for the costs, we know that prison costs per individual are substantial and are about £28,000 per year. Our estimate of the cost of tagging in the first year is between £12,000 and £13,000 per individual.

Stewart Stevenson: Just to complete the loop, does the Executive have a view on what imposing bail conditions, which might be an alternative in some circumstances, might cost? The figure should recognise that bail does not always work and that costs are associated with the failure of bail.

Hugh Henry: One of the matters that we seek to determine through the pilot is relative costs and the difference in cost between bail and using the tag.

The other issue that we should bear in mind is that although we believe that remote monitoring will have significant cost advantages and that it will take significant pressure off prisons—the benefit of that cannot be underestimated—we must also try to determine its effectiveness in enhancing public security and public confidence. Once the pilots are completed the committee will probably have a better opportunity to examine and come to a considered view on the relative effectiveness and relative cost of the options.

Mr Bruce McFee (West of Scotland) (SNP): I understand that the draft regulations are more about taking the number of courts in the pilot from two to four. However, I have a relevant point about section 24A(2) of the Criminal Procedure (Scotland) Act 1995, which is mentioned in paragraph 6 of the note from the clerk, paper J1/S2/05/3/1. The third sentence of the paragraph states:

"This provision is intended to be used as a means of tightening conditions attached to the granting of a bail order and not to allow an accused person to be released on bail when he or she would otherwise have been remanded."

That relates to a person charged with or convicted of murder or rape. What mechanisms are in place to ensure that people for whom bail is not intended are not allowed out because they have a monitoring device? Do we have any way of ensuring that such people are not allowed out and of monitoring whether the device is being used to allow people who have been convicted or charged with murder or rape, who would otherwise have been on remand, to walk around?

Hugh Henry: To an extent, we have had some of that discussion. We could usefully come back to those details when we come to evaluate the effectiveness of the pilots.

Today I am here to address the issues of the courts that are to be used and the start date. Even if I were unable to give assurances to the committee, I am not sure that we would want to go back to unravel what has been agreed. In cases of rape and murder, bail must be granted before tagging is considered by the court. In other words, it should not be used if bail is not being considered. It is not an alternative. If the court does not think that bail is appropriate, tagging should not be used. If the court decides to grant bail but not to impose a tag in cases of rape and murder, it is required to give a reason for not doing so. In such cases, there will have to be not only due consideration of bail but consideration of whether a tag should be imposed. The tag would be additional.

10:00

The Convener: It is important that we distinguish between the two separate provisions. The issue was rehearsed in the debates on the Criminal Procedure (Amendment) (Scotland) Act 2004. Previously there was mandatory detention in murder cases, but that is no longer the case. If the court is not satisfied that detention is necessary, the accused will be granted bail. The provision to which the minister refers is a tightening-up measure. It extends to rape cases and forces the court to consider whether it would be safer to have the accused monitored.

The other provision would allow any person who has not been granted bail to go before the court and have considered whether they could be in the community if they had an electronic tag. I have put on record my serious concerns about that provision. I cannot see why in every case defence agents would not advise clients who are remanded in custody to ask the court to consider whether they should not instead be tagged. The Executive's response to the concerns expressed by the committee was to say that, rather than bring the provision into force, it would run pilots. I am pleased that the Executive has agreed to do that. However, I have some concern about the extent of the proposed pilot, which seems to be rather large. I understand why you would want to test the provision in Glasgow sheriff court, but the High Court covers all of Scotland. Why was it necessary to include the High Court in the pilot?

Hugh Henry: We wanted to see how the provisions would work in two different settings. By using the High Court in Glasgow, we can test post-conviction appeal cases. A different category of case will be considered there. We thought that that would be a useful way of testing the effectiveness of the provisions. We anticipate that the figures for the High Court will be extremely low compared with those for other settings.

In November and December 2004, bail was refused in Glasgow sheriff court in 306 cases that are likely to fall into the category in which the accused could be considered eligible to apply for bail. In a sense, that was good reason to use one sheriff court. On the other sheriff courts—leaving aside why we want to test the proposals in the High Court—one of our concerns was that, in settings outwith Glasgow, the numbers are not sufficient to give a pilot any great significance. Therefore, we thought that we would use two courts. In the period that I mentioned, bail was refused in 43 cases in Kilmarnock sheriff court and in 19 cases in Stirling sheriff court. The number of relevant cases outwith Glasgow is relatively small in comparison with that in Glasgow and is entirely manageable.

At the end of the pilot, we should see the difference between sheriff court cases and High Court cases—which will be post-conviction—and the difference between the settings. That will allow us to determine any differences in application or effect and the factors that lead to them.

The Convener: So the High Court pilot is to be only for post-conviction cases?

Hugh Henry: The High Court will be used to test post-conviction appeal cases. A slightly different category of cases are considered in the sheriff court. Sheriffs usually grant bail, but appeals against refusal are dealt with in the High Court. In my area, cases in which bail has been refused have been appealed to the High Court. Those cases are considered before conviction, but we want to test the post-conviction appeal cases in the High Court.

The Convener: I am still a bit confused. Will the pilot cover post-conviction cases and cases in which there is an appeal to the High Court?

Hugh Henry: I may have confused you—I was trying to describe other situations. In the High Court in Glasgow, we want to test post-conviction appeal cases. The best thing to do is to give the committee chapter and verse on the matter in a letter. Either that, or we would have to take out the High Court for the purposes of the pilot.

The Convener: Clarity would be helpful. I just wanted to be clear about which cases that go to the High Court will fall under the pilot.

Hugh Henry: If you give me a moment, I will check the regulations.

The Convener: Our briefing mentions that the pilot will involve

"the High Court when hearing an appeal against a refusal of such a bail condition".

Hugh Henry: Yes, that is in regulation 2.

The Convener: Our briefing also mentions that the pilot will cover any case in the High Court in Glasgow.

Hugh Henry: Where regulation 2(2) mentions

"for the purposes of section 24A(2) of the 1995 Act … the High Court sitting at Glasgow",

that refers to cases of rape and murder.

The Convener: Right.

Hugh Henry: The reference to section 24A(1) of the Criminal Procedure (Scotland) Act 1995 relates to the High Court in Edinburgh for appeal purposes. I perhaps confused you with my earlier description.

Mr McFee: That is why I raised the issue. If, for example, in a case in Paisley sheriff court, which will not be one of the pilot courts and which will not have the ability to impose a monitoring condition, the individual applies through their solicitor to the High Court to try to overturn the decision—

Hugh Henry: That will not count.

Mr McFee: If somebody is turned down for bail at Paisley sheriff court, which will not have the pilot scheme, and the case ends up at the High Court, which will have the pilot scheme, what provisions are there to ensure that—or even monitor whether—bail is granted, given that monitoring is not available at the court that the person appeared in initially? My concern relates especially to cases of rape and murder.

Hugh Henry: Let me just think that through. You are talking about cases at Paisley sheriff court in which bail is refused, and in which there is an appeal to the High Court against refusal of bail.

The Convener: Those are the normal conditions that apply now.

Hugh Henry: It would be my understanding that, in cases of murder and rape, if such an appeal went to the High Court, electronic monitoring would be available.

The Convener: But surely that would apply only to the courts where you are piloting the provision. Otherwise, it means that, in every case in a sheriff court in which bail is refused, if the defendant decides to test the refusal of bail in the High Court—which they can do at the moment—the High Court would be bound to consider the same—

Hugh Henry: No. We come back to my earlier point. In cases of rape and murder, it would only be when bail was being granted that the additional factor of monitoring would be put in. The situation that Bruce McFee describes—in which a person who is refused bail at Paisley sheriff court appeals to the High Court, the High Court says "No", and electronic monitoring is introduced as an

alternative—could not happen. It would only be if the High Court felt that it was appropriate to grant bail that electronic monitoring would be an additional imposition.

The Convener: Our note on prescribed courts refers to

"the High Court when hearing an appeal against a refusal"

of bail under section 24A(1) of the 1995 act, but the High Court can hear appeals from any sheriff court.

Hugh Henry: Yes, but it would be a small number of cases in relation to the ones that are heard in Glasgow and, as far as—

The Convener: What is to stop someone who is remanded in custody and refused bail at Paisley sheriff court, where no pilot is running, appealing against that decision, knowing that the High Court has to consider whether to grant them bail in the same way that Glasgow sheriff court will have to under the pilot? Is that not encouraging appeals to the High Court?

Hugh Henry: No—far from it. That person could appeal under current conditions, and if the High Court decides to grant bail, as has happened in the past, it would do so. That process would continue.

The Convener: The High Court would not be duty bound to consider—

Hugh Henry: Bail could still be granted. We do not want to encourage more appeals by people who want bail. What we are saying is that, if a court is going to grant bail, it can consider an additional imposition. In a sense, for those who are eligible for bail, it is a higher test—a higher degree of sanction.

Mr McFee: I hear what you are saying minister, but my understanding of section 24A(2) of the 1995 act is that the difference, essentially, is that the court can impose the monitoring restriction without the person asking for it to be applied. When the High Court is considering an appeal against the refusal of bail, the court does not have to receive a request from the individual who has been remanded, so therefore it automatically has at its disposal the potential of granting bail with the monitoring restrictions imposed. I understand that that is not meant to—and nobody would seriously suggest that it should—mean that people on remand for rape and murder would be released out into the community until their trial. However, in effect that is what monitoring is about in other situations; it is used as an alternative to keeping people on remand—I am quite sure that that is how the provision will be understood.

10:15

I accept that you are expressing good intent and saying that the provision is not intended to have the effect that I described, but I am seeking to ascertain whether a monitoring system is in place to ensure that that does not happen and whether such a system has been established for the two courts that were initially chosen to take part in the pilot. The matter has been discussed before, but I raise it again because there is now a plan to extend the pilot to four courts, including the High Court in Glasgow, where appeals will be heard. Has a monitoring system been put in place to ensure that people will not be released in the way that I described as a result of the pilot in the two courts that were initially chosen? If not, why not? If such a system has been established, will it be extended to the other two courts that will be included in the pilot?

Hugh Henry: Some of the questions about the principle that Bruce McFee legitimately asks were discussed previously by the committee, as he indicated. I hope that members of the committee do not seek to overturn the principle that was established. Today we seek to determine whether we should move forward with the pilot in four courts and to agree the implementation date. However, some questions that have been asked relate more fundamentally to the principle of whether the approach is acceptable. Bruce McFee and other members of the committee have previously raised concerns about that.

On the question whether the measure should be piloted in two courts or four, we could justify the use of two courts by piloting the measure in Glasgow sheriff court and the High Court in Glasgow. That would satisfy the requirement to run the pilot in two courts, but there would be no great benefit in taking that line, because it would be useful to test the measure beyond Glasgow, where the sheriff court is extremely busy. The addition of Kilmarnock and Stirling sheriff courts will not make a great deal of difference as far as the principle is concerned.

The Convener: I agree that the purpose of the committee's discussion is to consider in which courts the provision should be piloted until 2007, when it will be for Parliament to consider the results. However, I want to be clear about the impact of including the High Court and to ensure that there will be no back-door route into using the provision for courts that are not included in the pilot, given that the provision is quite wide. I am rehearsing old arguments, but defence agents will feel obliged to use any provision that is open to them to secure bail for their clients, rather than leave clients remanded in custody. However, we are here to discuss the pilots—

Hugh Henry: It would be useful to point out that we consulted widely on the proposal. We consulted the Crown Office, the Scottish Court Service, the police and local authorities, which agree with the proposal that is before the committee.

Margaret Mitchell (Central Scotland) (Con): I understand that we are not here to discuss the fundamental principle behind the measure—unfortunately, we lost the argument. However, I remain fundamentally opposed to the policy objective to reduce the number of people who are remanded in custody.

We must consider damage limitation, because I have serious concerns about the extension of the pilot to four courts. The minister said that Kilmarnock and Stirling sheriff courts would be included in the pilot, although bail was refused in only 19 cases in Stirling and in only 14 cases in Kilmarnock—

Hugh Henry: I said that bail was refused in 43 cases in Kilmarnock sheriff court.

Margaret Mitchell: Sorry—there were 43 cases in Kilmarnock.

The measure is potentially dangerous. A person cannot be half safe; if they were refused bail initially, the imposition of tagging should not be a reason to grant bail. I have very serious concerns that as a result of the pilot even more people will potentially be in danger from people who should not be out of custody. Why are we considering extending the pilot to Stirling sheriff court and the High Court in Glasgow, given that you said that the volume of cases in Glasgow sheriff court is huge? There are probably more than enough cases in Glasgow sheriff court to enable the reservations that many of us have to be tested.

Hugh Henry: Margaret Mitchell usefully expressed her concerns not in relation to the pilots but in relation to the principle. The reason why we wanted to test the system outside Glasgow is that Glasgow sheriff court is unique in Scotland, given the huge volume of cases that it handles. Also, we wanted to test whether there were different applications elsewhere. We wanted accurately to consider usage of the measures, to gauge their potential and to see whether they will reduce the prison population. In those tests, we wanted to consider different sizes of courts. If we simply chose Stirling and Kilmarnock sheriff courts, there would always be doubt about whether the system would work in a court such as Glasgow sheriff court, given the volume of cases that it considers. On the other hand, if we simply chose Glasgow people might see it as a Glasgow solution with no application for small courts beyond Glasgow. We thought that it would be useful to test the measures in a variety of circumstances.

Margaret Mitchell's comments are to some extent disingenuous because the courts will still take safety issues into account. There is no requirement on the courts to disregard safety, which is paramount. We have explained that there is an additional safeguard in cases that are considered by the High Court in Glasgow. The view of the agencies that we have consulted is that it is unlikely that large numbers of people will be released. We believe that the measure is targeted, and we want to test the provisions in the legislation. Margaret Mitchell might have had more cause for concern if we had simply brought forward a proposal to start the system with no regard to how it would work in practice. I would have thought that the use of the bail pilots would meet some of the concerns that have been expressed by the committee. We responded to those concerns, and I think that the draft regulations represent a responsible way to move forward. I would be disappointed if the committee, instead of working with the spirit of what we have tried to do to meet its concerns, wanted to revise the principle to which it previously agreed.

Margaret Mitchell: With respect, minister, you have not answered my question. Why do we need a pilot in Stirling sheriff court as well as the pilots in Glasgow and Kilmarnock sheriff courts? They are all sheriff courts, and I presume that the same procedures go on in them.

Hugh Henry: Yes, but we also wanted to test in different police force areas and different geographical areas. We thought that it was important that we did not concentrate the pilots in the Strathclyde police area.

Margaret Mitchell: I am certainly not convinced by that answer.

Hugh Henry: Also, I am reminded that Stirling sheriff court was included at the request of the Association of Chief Police Officers in Scotland, which also wanted to test how the measures worked in more than one area.

Margaret Mitchell: My fundamental priority is the safety of the public and from what I have heard this morning I am not convinced that the pilots should be extended from two courts to four.

The Convener: I call Stewart Stevenson.

Hugh Henry: Sorry, convener, could I perhaps answer Margaret Mitchell's point? Again, I think that she is being disingenuous. She says that she is concerned about the safety of the public and that she is therefore concerned about the extension of the pilots from two courts to four. If that fundamental concern existed, the committee would not have sanctioned the pilots at all. Whether the measures are tested in Stirling, Kilmarnock or Glasgow, we have sought to give assurances that public safety is paramount. The

public safety issue is not about whether pilots take place in two courts or in four courts, but about whether the pilots and the courts will have regard to public safety, and we say that they will. It is a spurious argument to say that there will suddenly be more anxiety about safety if we extend the pilots from two courts to four.

Margaret Mitchell: On the contrary, we lost that argument.

Hugh Henry: I am glad that you recognise that you lost the argument.

Margaret Mitchell: If you do not impose the pilots, you will go straight to implementation; I am being realistic about that, not disingenuous.

The Convener: Margaret Mitchell's opposition to the provision during the original debate is well noted.

Margaret Mitchell: My opposition now to the extension from two courts to four is—

The Convener: Hold on. I am not going to allow this. You have had your say and so has the minister. Let us move on.

Stewart Stevenson: I just want to be quite clear about something. I think that it will assist us all if we can pin down the comparison between the present situation in relation to the pilot and the introduction of a change—that change being the provision to sheriffs and others, when they have determined to provide bail, of an additional way of monitoring the behaviour of the person to whom bail is granted. We need to compare that with the situation if that provision is not made, and we need to check what is happening. It seems to me that during the pilot—we shall leave aside what might happen after the pilot—we are looking at something that should increase public safety rather than diminish it.

To establish whether that is the case in relation to the pilot—I keep saying that—is it your understanding and your objective that no one will be granted bail during the course of the pilot because of the existence of that additional monitoring measure? In other words, there should, during the course of the pilot, be absolutely no difference in the criteria that are applied by judges in determining whether bail is granted. Is it your policy objective, therefore, that during the pilot there should be no change in respect of the people who are granted bail, or is that not the case?

Hugh Henry: Generally, that would be my understanding. The difficulty with giving a specific answer to Stewart Stevenson's question is that each individual case is determined by the judge in that particular case. It would be wrong of me to second-guess judges or to suggest how they would act. I reiterate a point that Stewart Stevenson referred to. It is our belief that the provision is a public safety measure and that, for those who could be considered for bail just now, there is an additional level of scrutiny involved. I shall leave murder and rape aside because those are specific cases and I have addressed that issue. We will obviously continue to consider the potential for any difficulties that might arise. We have tried to frame the legislation in such a way that it would simply be seen as an opportunity to release people who might not otherwise be considered as being suitable for release into the community. We think that people are sometimes taken to prison who do not necessarily need to be in prison.

Stewart Stevenson: I am trying to second-guess, so it might be helpful if you could say whether my guesswork is correct. Following the pilot, you will have on your desk a report about the pilot, which I presume you will share with us, although that is up to you at the end of the day. I want you to share it with us, but it is up to you. Is it your fervent hope that what you will see in that report is that, in the courts where the pilot is being conducted, the breach of bail conditions or the early and effective detection of breaches is improved over the operation of the bail system in those courts where the pilot is not being conducted? In other words, is the objective of the pilot—among other objectives—to improve public safety, and is it the case that one of the tests that you and the Executive will apply in going forward following the pilot will be based on whether it has improved or diminished public safety and the effective operation of the bail system? Is that a fair characterisation of what the pilot is actually about? Are the concerns about public safety that are being expressed around this table precisely the concerns that you will end up sharing with us all?

Hugh Henry: I agree. There would be little value in my repeating some of what Stewart Stevenson has said. He is absolutely right. As I have said several times this morning, public safety is paramount; therefore, we will not engage in anything that we think leaves the public more at risk.

10:30

Stewart Stevenson: Can I, in that case, conclude the matter? We could go on for ever, but that would not be helpful. If the pilot shows that there has not been the improvement that is sought, will you proceed further?

Hugh Henry: I hesitate to prejudge a trial. If the pilot showed that public safety had been put at risk, I doubt that we would want to continue with the pilot scheme. If the trial showed that remote monitoring had had no effect and had not improved the situation in respect of the issues that

Stewart Stevenson mentioned, I would hesitate before making any recommendations. If the trial showed that people were being held on remand when otherwise that would not be the case, I would have to question the value of the initiative. The pilot scheme is essentially a way of trying something out without having to make a wholesale change so that we can find out whether the change would make the contribution that Stewart Stevenson suggests. I guarantee that we would not do anything that would prejudice public safety.

The Convener: What will be assessed in the pilot scheme? Will the Justice Department undertake the assessment in 2007? Who will do it?

Hugh Henry: Ministers will have to draw a conclusion from the evidence that is presented and then defer the matter to the committee and Parliament for determination of whether there is any value in going forward. However, for ministers to make that decision, we will have to be presented with evidence and analysis that will be carried out by an independent person.

The Convener: So, it will not be someone in the Scottish Executive who carries out the assessment.

Hugh Henry: No. We will use an independent assessor.

The Convener: Who is that likely to be?

Hugh Henry: We have not decided.

The Convener: The Executive will just appoint someone who it regards as being independent.

Hugh Henry: There will be a tendering process.

The Convener: I see. Will you lay down the criteria for assessing the suitability of the provision? For example, will you consider the number of breaches and the number of failures to turn up at court?

Hugh Henry: Exactly. The overriding issue is public safety, but we will also want to consider the number of breaches and the impact on the courts. A range of administrative as well as judicial matters will need to be considered, so it will be a fairly comprehensive analysis.

The Convener: So, in 2007, a committee of the Parliament will have an opportunity to examine the information with which the Executive has been presented.

Hugh Henry: We do not have the authority to roll out the pilot scheme across Scotland. At the moment, all we seek to do is try it out, as we agreed. We reflected on the concerns that were expressed by the committee, and that is why we are doing it this way. De facto, before there could be any extension of the pilot scheme, scrutiny by the committee and approval by Parliament would be required.

Mr McFee: Let us return to paragraph 2 of our note on the draft regulations and the discussion that took place between Stewart Stevenson and the minister. Stewart Stevenson asked whether the idea behind the regulations was to increase public security when people are released on bail, subject to its conditions—clearly, that was agreed on—or whether it was a question of having people out with monitoring devices on who otherwise would have been in custody. That was kind of glossed over.

However, paragraph 2 makes it clear:

"The policy objective is to reduce the number of accused persons held on remand in custody who, subject to safeguards in respect of public safety, can be released on bail".

I can accept that. It is a logical and reasonable objective. However, my concern is with section 24A(2) of the 1995 act, in respect of those convicted of or charged with murder or rape. We had not expected that to be a condition or a policy objective, in terms of paragraph 6 of the paper from the clerk.

My concern is that there may be a loophole. A sheriff may refer an appeal from a court that does not have the ability to impose a monitoring device on someone who is accused of, or convicted of, murder or rape, but when the case gets to the High Court, that option will be open to it. I am taking it at face value that that is not the intention, which is why I asked what the monitoring procedure will be to ensure that that does not happen. Will it be in place at Glasgow High Court if the pilot is rolled out?

I am not against the pilot. My concern is that there is a loophole in respect of the High Court in Glasgow that could result in individuals who are accused of, or convicted of, murder or rape being allowed out with monitoring devices when they were not allowed out or granted bail by the sheriff court that could not impose monitoring. I am not hearing about the monitoring that will be put in place to ensure that that situation does not arise. Doing so would allay my fear.

Hugh Henry: I confess that I am puzzled. I am struggling to think what the loophole is. As I have probably said on more than one occasion, the High Court must—I emphasise must—decide to grant bail. Then, if the High Court believes that it is necessary or right to grant bail, the court must further impose electronic monitoring. If the High Court decides not to impose electronic monitoring, it must explain why, in the particular case, electronic monitoring was not sufficient. Of all the cases that are to be considered in the pilot, those cases will probably be the ones that have even

more added conditions. I may be misunderstanding or missing something, but I cannot understand what the loophole would be if the High Court had to take that decision.

The Convener: If I may, I will stop you there—that is absolutely correct. The issue is almost the opposite. The provision is intended to improve public safety because, in some cases, there are no grounds for sheriffs to remand a person to custody, particularly in murder cases. The measures will make sheriffs consider an electronic tag. They will also have to provide justification for not doing so. That goes in the opposite direction to other provisions. It is a good provision that will improve public safety.

There is a second issue—concern about which I share—which is that when a sheriff has refused bail and has remanded a person to custody, that person may ask the court whether they would let them out on bail if the court was to tag them. That is what the court has to consider, so it is almost the opposite provision.

Hugh Henry: For murder and rape?

The Convener: No, we have moved away from murder and rape. For everything else, where a sheriff has remanded a person to custody, that person has to go through a procedure to apply to the court to ask whether they would be allowed out into the community if they were tagged. That is what we are being asked to consider. We are being asked to consider pilots in three sheriff courts and in the High Court. I am not clear about one aspect. I do not know whether it is the loophole that Bruce McFee talked about.

Given that, at the moment, there can be an appeal from any sheriff court if a person is refused bail, does that mean that the High Court would have to invoke section 24A in the same way as a sheriff court? Is it only for appeals from courts at which there will be a pilot that the High Court is expected to adopt section 24A?

Hugh Henry: Yes.

The Convener: So in Glasgow, Stirling and Kilmarnock, if there was an appeal to the High Court on a refusal of bail, the High Court would have to implement that provision. If the court were to refuse bail, the accused could make an application and the court could consider whether an electronic tag would allow the accused out into the community. That would not apply to Paisley sheriff court, for instance.

Hugh Henry: No.

Mr McFee: It might be useful to clarify that. If someone is appealing from a court that is not part of the pilot scheme, the High Court could not say "Yes, we will grant you bail but there will be a monitoring device attached to you".

Hugh Henry: Not under section 24A(1).

Mr McFee: However, section 24A(2) does not require the request.

The Convener: No, the distinction is that without the pilot, the High Court would be duty bound to consider all options when considering whether to remand a person to custody. On application by the accused, the High Court is duty bound to consider a tag. That is the provision that the High Court will be expected to adopt at courts where a pilot is running. Other than that, the High Court would consider it in any case, as would any sheriff; when a court is deciding whether to remand anyone to custody, it is supposed to consider all the options. Section 24A will allow the accused to go to the court and ask whether the court would reconsider its decision if the accused person was tagged.

I am now a bit clearer that the High Court is only required to consider that for appeals from the pilot courts.

Mr McFee: So under section 24A(1), if an appeal comes from someone who appeared at a sheriff court that had that facility, the High Court could consider imposing that condition, but if the accused was referred from Paisley or another court that does not have that facility, the High Court could not grant an accused bail subject to the attachment of a monitoring device.

Hugh Henry: Yes—there would be consequences if we did not do it that way. We do not want sheriff courts in pilot areas to have more powers than the appeal court but—equally—we do not want this to be another way of just extending the pilot throughout the country.

The Convener: I am happier with that. The crucial words in section 24A of the 1995 act are

"on the application of that person".

That makes the big difference.

Mrs Mary Mulligan (Linlithgow) (Lab): I think that the convener has resolved the problem. The confusion was about whether the measure would be another way for people outwith the pilot areas to apply to the High Court to seek that additional measure. The minister has reassured us that that is not the case; in fact, he said that the High Court has to hear cases where appeals are made and in the past, it might have overturned the previous decision and released someone. However, in the pilot areas there is an added safeguard in that the court could offer the monitoring arrangement. The situation is therefore more secure than it would otherwise have been, so we should stop there or we will end up going round in circles. Members' queries have been answered.

Mr McFee: Can I just have something else clarified? My query is answered in the case of section 24A(1). However, under section 24A(2), if someone has been charged with murder or rape and has had a bail application turned down by a court that is not part of the pilot, and if they appeal to the High Court in Glasgow, can the High Court then grant bail with the monitoring device?

The Convener: Such people are already out on bail. The provision is for situations such as a murder case, for example, that might come before any court and in which there is no justification for remanding the accused.

Mr McFee: If a person is out on bail, they will not be appealing. If the application for bail has been turned down and an appeal is made to the High Court, could the High Court grant bail with a monitoring device to someone from a court that was not part of the pilot?

10:45

Hugh Henry: In cases of rape and murder, the answer is yes. We are talking only about that purpose. Again, electronic monitoring is the additional condition. To repeat the point that I made earlier, it is only for those cases. The issue is not that the court must consider monitoring but that it must consider bail in the first instance.

If the court decides—for whatever reason—that bail is appropriate, it can then consider electronic monitoring. If the court decides to grant bail in specific cases, for whatever reason, and does not think that electronic monitoring is suitable, it must explain why it will not impose the additional condition of electronic monitoring. I will repeat the point that I made earlier: electronic monitoring is an additional safeguard and in the most serious cases, the provision will increase public safety rather than diminish it.

Mr McFee: I accept that, but just to clear the matter up entirely, I have one final question. I accept what the minister said about the circumstances that he described. However, when deciding whether an individual should be granted bail and released into the community, could one of the considerations that the appeal court makes be that the individual be subject to safeguards on the ground of public safely? If so, could the safeguard be monitoring?

Hugh Henry: It would not be for me to tell or advise a court about how it should come to a conclusion in making a decision to grant bail. The two issues are separate; consideration of bail must happen before any consideration of electronic monitoring. It is therefore unlikely that a court will grant bail simply because electronic monitoring is available. The court is required first to give consideration to the main issue, which is whether bail should be granted.

The Convener: Do you want to sum up?

Hugh Henry: No. If technical issues need to be clarified, we will write to the committee on— [*Interruption.*]

The Convener: I am sorry—I should have switched off my mobile phone.

Thank you, minister. I do not know about anybody else, but the discussion certainly helped me.

We are required to report. Do members have additional points that they would like the report to emphasise?

Margaret Mitchell: I am against the motion. As I said, I am unhappy about the extension of the pilot to four courts; it should be sufficient for the pilot to be run only at Glasgow sheriff court. I am not persuaded by what the minister has said.

The Convener: Okay. The question is, that motion S2M-2292 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stone, Mr Jamie (Caithness, Sutherland and Easter Ross) (LD)

AGAINST

Mitchell, Margaret (Central Scotland) (Con)

ABSTENTIONS

McFee, Mr Bruce (West of Scotland) (SNP)

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

Motion agreed to.

That the Justice 1 Committee recommends that the draft Remote Monitoring Requirements (Prescribed Courts) (Scotland) Regulations 2005 be approved.

The Convener: Does any member have a point that they wish to emphasise in the report?

Mr McFee: I will not apologise for continuing to ask the question, because it was useful in clarifying the situation in some cases. However, there is still a doubt. I heard the phrases, "should not be" and "would not normally be" used in relation to those who have been accused of rape or murder and denied bail by a court that is not part of the pilot system, but who can get bail granted at the High Court if they have a monitoring device attached. That is perfectly understandable. The minister could not answer the question whether in assessing an individual's suitability for

bail the High Court could take into account a belief that the person could be released safely into the community if they had a monitoring device attached. The note from the clerk is clear that a monitoring order is not intended as a means of allowing bail to be granted when it would not otherwise have been granted. However, the message came across that such orders might be used in those circumstances. I understand how they might be used and I want to find out—no answer has been forthcoming—what mechanisms will be in place to ensure that they are not used in that way, and to evaluate and monitor their use. That did not come across.

The Convener: It did to me, because all murder and rape cases are already dealt with at the High Court. I presume that when judges consider whether to grant bail in a murder case, they have to take into account what you outlined. It took a while for us to have that point explained and you are right that it was worth probing the matter further. We are talking about appeals against a decision to grant bail, which are heard in the High Court, rather than bail in murder cases that start there. The judge is already duty bound to consider whether to release a person into the community, with or without a tag. The provisions will force a court to consider the orders when bail has been refused. That will not apply to every High Court case; it will apply only to cases in the courts in the pilot where there has been an appeal to the High Court against refusal to grant bail.

Mr McFee: The appeals situation concerned me.

Margaret Mitchell: Even with regard to the High Court, a lot has been made of the provision increasing public safety. It is clear from section 24A(2) that the timing of the pilot and the additional bail condition will make it more likely that bail will be granted than would otherwise have been the case. Our note says that a person could be released when they would "otherwise have been remanded." I have real concerns about that.

The Convener: Are you referring to section 24A(2)?

Margaret Mitchell: Yes. Our note states:

"This provision is intended to be used as a means of tightening conditions attached to the granting of a bail order and not to allow an accused person to be released on bail when he or she would otherwise have been remanded."

Mrs Mulligan: I do not read the provisions in the way that Margaret Mitchell does. The minister said clearly that a court would consider the tagging arrangement only where bail was being offered. He did not say that it would be taken into account in considering whether to grant bail. The situation is the reverse of what Margaret Mitchell is suggesting. The orders are an added protection, rather than an alternative that will make the granting of bail happen.

Margaret Mitchell: You might hope that they will be an added protection, but—

Mrs Mulligan: You cannot prove to me that they will not be.

The Convener: I want members to tell me what they would like the report to cover that they have not already discussed. What we have discussed already will obviously go into the report. Have any points not been covered that members feel strongly should go in our report to Parliament?

Stewart Stevenson: The key message that I took from the discussion was that the minister, quite properly, was unable to give us a guarantee about how judges will behave. I would be most alarmed if he were able to give us such a guarantee, given the independence of the judiciary.

The committee appears generally—there is some dissent—to have concluded that the policy intent is that deciding whether bail should be granted is the first step in the process and, if bail is granted, the second step is to decide whether to put in place a monitoring device. On that basis, I think that the committee has concluded that what the minister proposes in the pilot will continue to protect public safety and has the objective of increasing public safety, but that only the pilot will tell us whether that objective is met. The minister has indicated clearly that if the analysis after the pilot shows that public safety has not been improved or has been jeopardised, the Executive will think again. It is valuable for the committee to make those points.

I also think that it is perfectly proper that we note in our report to Parliament that two committee members were, to varying degrees, not entirely convinced by the minister's proposed steps. Our report to Parliament will not refer to the policy issue, because that is for another occasion. What we are discussing is whether practical operation of the pilot will improve public safety. The sense that I take from the considerable amount of time that we have spent on the issue, which is rather more than I thought we would spend, is that the majority of the committee is persuaded by the argument for the pilot, but a couple of members are not so persuaded. Our report to Parliament should simply reflect that in whatever way the clerks can write it up.

The Convener: Okay. Time is moving on and I can see that—

Mr McFee: I will be brief.

The Convener: Yes—I will let you in, in a minute.

I can see that there is obviously more to discuss for the report. Therefore, we will shift the date for publishing the report from 7 February to 20 February. It is open to the committee to have another discussion on the report before we complete it.

Stewart Stevenson: That will be with a draft report before us.

Mr McFee: Can I clarify something? I listened carefully to what Stewart Stevenson said. If I paraphrase him correctly, he described a two-stage process in which it will be decided, first, whether bail is appropriate and, secondly, whether the monitoring condition is to be imposed. However, that description is entirely at odds with paragraph 2 of the briefing paper, which says:

"The policy objective is to reduce the number of accused persons held on remand in custody who, subject to safeguards in respect of public safety, can be released on bail into the community."

That is not a two-stage process.

Stewart Stevenson: I do not think that Bruce McFee and I differ at all on that; that is, indeed, the policy objective. However, it is not what will happen during the pilot. I believe that that is the key distinction that I extracted from the minister. The policy objective is, after a successful pilot and its extension to the rest of Scotland, to deliver the benefit to which Bruce McFee referred. However, the pilot is a different thing, which will seek to keep the basis on which bail is granted the same as it is at present, but will add to appropriate cases—in which bail is the decision of a court—the additional monitoring control to improve public safety and to assess whether people who are tagged behave more stringently in relation to bail conditions in the four courts for which the pilot is proposed, compared with the courts for which it is not proposed. If the pilot shows that those who are tagged behave better and conform to bail conditions better, we will move to a position in which, after the pilot, the policy objective of extending the number of people who are granted bail because of the existence of tagging will be implemented.

I think that the minister may not have made that clear at times, but that is what I took from what he said. However, at the end of the day, if we are going to get a draft report from the clerks that the committee will consider further, I suggest firmly that we move on to the next agenda item.

The Convener: I do not disagree with Stewart Stevenson's summary that the policy intent is to reduce the number of people remanded to custody. However, the minister clearly said that public safety will be part of the consideration of that. I am not endorsing that policy—I have made that clear previously—but I am willing to consider the pilot to see whether there is any benefit in a tagging system. I am certainly satisfied, given the clarification on the High Court, for the four courts to carry out the pilot, with the proviso that a parliamentary committee, whether this one or a future justice committee, should see the findings of the pilot.

I said that we might be able to discuss our report to Parliament at a future meeting, but that may not be possible. Members might want to read the *Official Report* of this meeting and a draft report by the clerks, which would allow them to comment, by way of e-mail at least. Are members satisfied with that?

Members *indicated agreement*.

Mr McFee: Should we e-mail the clerk or the convener? I presume that you will sign off the report.

The Convener: I will sign the report off, subject to members' comments.

Interests

11:00

The Convener: Jamie Stone is now with us, so we will move back to agenda item 1.

I welcome you to the Justice 1 Committee, Jamie, and invite you to declare any relevant interests.

Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD): It is a pleasure to join the Justice 1 Committee. I apologise for being late. As the clerks may have told you, I was on stage last night in a University of Edinburgh production of "The Gondoliers". Therefore, what with one thing and another, I find myself not quite myself this morning.

I have no interests to declare.

The Convener: Thank you, Jamie. I think that I can safely say that that is the best excuse we have had yet.

Subordinate Legislation

Solicitors (Scotland) Act 1980 (Compensation for Inadequate Professional Services) Order 2004 (SSI 2004/550)

11:01

The Convener: Item 3 is subordinate legislation. The Solicitors (Scotland) Act 1980 (Compensation for Inadequate Professional Services) Order 2004 (SSI 2004/550) is subject to the negative procedure. I remind members that the previous Justice 1 Committee recommended that the maximum compensation level be increased to £5,000, with a mechanism for annual updating in line with inflation. We have a letter from the Minister for Justice in which she acknowledges that, if the order is approved, the Executive will implement that recommendation.

Stewart Stevenson: I very much support the order. I understand that the Law Society of Scotland is foursquare behind it. I have one brief comment for the record. I note that the most recent edition of *Which?* magazine states that the order has been implemented. That might strictly be true, given that it was laid on 22 December 2004. However, magazines and organisations should be careful about assuming Parliament's consent before the 40 days are up. It is useful to have that on the record in the *Official Report*.

The Convener: Absolutely. Are members happy to note the order?

Members *indicated agreement*.

The Convener: The committee agreed at a previous meeting to consider in private the draft report on the inquiry into the effectiveness of rehabilitation programmes in prisons, and the draft report on the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. I suspend the meeting to allow us to prepare for the private session.

11:03

Meeting suspended until 11:09 and thereafter continued in private until 12:38.

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