JUSTICE 1 COMMITTEE

Wednesday 4 October 2006

Session 2

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JUSTICE 1 COMMITTEE
† 36th Meeting 2006, 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)
Mike Pringle (Edinburgh South) (LD)

COMMITTEE SUBSTITUTES

Brian Adam (Aberdeen North) (SNP)
Bill Aitken (Glasgow) (Con)
Karen Gillon (Clydesdale) (Lab)
Mr Jim Wallace (Orkney) (LD)

*attended

THE FOLLOWING ALSO ATTENDED

Hugh Henry (Deputy Minister for Justice)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERKS

Euan Donald
Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 1

† 35th meeting 2006, Session 2—held in private.

Scottish Parliament

Justice 1 Committee

Wednesday 4 October 2006

[THE CONVENER *opened the meeting at 09:53*]

Criminal Proceedings etc (Reform) (Scotland) Bill: Stage 2

The Convener (Pauline McNeill): Good morning. I welcome everyone to the 36th meeting in 2006 of the Justice 1 Committee.

Agenda item 1 is consideration of the Criminal Proceedings etc (Reform) (Scotland) Bill at stage 2. I welcome the Deputy Minister for Justice, Hugh Henry. I also welcome his team: Alex Gordon, Paul Johnston, Leanne Cross and Noel Rehfisch.

Section 1—Determination of questions of bail

The Convener: Amendment 44, in the name of Margaret Mitchell, is grouped with amendment 45.

Margaret Mitchell (Central Scotland) (Con): Good morning, minister.

Amendment 44 is consequential on amendment 45, which would remove the restriction to grant bail that is specified in proposed new section 23D of the Criminal Procedure (Scotland) Act 1995. The purpose of both amendments is to try to clarify what will constitute "exceptional circumstances". Given that the standard criteria to which courts can have regard are the serious nature of the offence and the fact that the accused has an analogous previous conviction, the current criteria seem to go quite far towards covering most circumstances. The purpose of my amendments is to get a little more information from the minister on what he believes would constitute "exceptional circumstances".

I move amendment 44.

Stewart Stevenson (Banff and Buchan) (SNP): Perhaps I have failed to understand the purpose of amendments 44 and 45 but, on first reading them, I was rather alarmed that they seek to delete a provision that would ensure that a person who is accused of a violent or sexual offence will be unlikely to be given bail. The amendments seem to open the door to such a person being granted bail. Without reference to any particular on-going case, I think that few of us will have read recent newspapers without being aware of the difficulties that exist with particular categories of offences. If the minister cannot enlighten me and persuade me otherwise, I might support Margaret Mitchell—although I am certainly not disposed to doing so at the moment.

Margaret Mitchell: I should probably make it clear that amendment 45 is a probing amendment, the purpose of which is to try to clarify the provisions in the bill. I think that it will be useful to hear the minister's explanation, which I hope will strengthen the bill.

The Convener: I want to put on record the fact that I welcome proposed new section 23D of the 1995 act, which is one of the strongest provisions in this part of the bill. However, whenever we are discussing matters at stage 2, it is always welcome to have absolute clarity about how it is intended the provisions will operate. Therefore, it will be helpful if the minister can clarify how the phrase "exceptional circumstances" will be applied and how broad in scope the provisions concerning analogous offences are meant to be.

The Deputy Minister for Justice (Hugh Henry): I share the reservations that the convener and Stewart Stevenson expressed about amendments 44 and 45 and I agree that proposed new section 23D of the 1995 act is one of the strongest provisions in the bill. It is designed not only to send out a clear message but to provide a certain degree of assurance to the wider public. That is consistent with everything else that we are doing in the bill.

Notwithstanding the fact that they are probing amendments, amendments 44 and 45 seek to remove from the bill proposed new section 23D of the 1995 act. Proposed new section 23D will provide that a person is to be granted bail in certain solemn cases only—the "only" is important—if exceptional circumstances exist. The provisions will apply where the accused is charged with a violent or sexual offence and has a previous indictment conviction for a similar offence or where the accused is charged with drug trafficking and has a similar previous conviction on indictment.

We have made it clear that public safety is at the heart of our proposals—we will return to that issue later this morning—and proposed new section 23D of the 1995 act will reinforce that. Although the courts will be directed by proposed new section 23C to consider previous convictions whenever they determine a question of bail, the section makes it clear that a particular carefully defined category of accused will be granted bail only in exceptional circumstances. In the interests of clarity and of ensuring that the public understand the factors that are taken into account when bail decisions are made in the most serious cases, proposed new section 23D should—as the convener and Stewart Stevenson suggested—remain as a significant part of the overall package of provisions on bail.

I know that Margaret Mitchell's amendments are merely probing amendments, but I believe that the bill will provide in statute clear direction that in serious cases bail should be granted only in exceptional circumstances. In a sense, it would be hard to be more prescriptive without interfering with the proper independence of the courts to make the ultimate decision. We have provided a clear indication in statute of the direction in which we want to move. If we were to remove proposed new section 23D as amendments 44 and 45 suggest—I know that Margaret Mitchell probably does not intend this—then that clarity would be reduced, which could result in less consistent decisions and could lead to a decision to grant bail to an accused who might otherwise have been remanded.

If the question is about how we define "exceptional circumstances", we cannot by definition know what those circumstances are. Exceptions have to be exceptions. If it is possible to list them, they are, in a sense, no longer exceptions because something else might come up that has not been listed. The courts are not only best placed but are more than able to determine what "exceptional circumstances" are. I think that proposed new section 23D of the 1995 act is correct and that amendments 44 and 45 would weaken its clarity.

10:00

Margaret Mitchell: It is clear that the minister does not have a particular situation in mind. I welcome the fact that proposed new section 23D of the 1995 act tries to redress the balance of the incorporation of the European convention on human rights directly into Scots law. There is a general feeling of unease that bail is being granted in cases in which it would previously have been refused. If proposed new section 23D of the 1995 act seeks to alter that, I am more than happy for the provision to remain in the bill.

Hugh Henry: Convener, may I clarify something? I would not want it to be left on the record that we are proposing new section 23D of the 1995 act in order to dilute or weaken the ECHR—the provision will not do that. It will help the courts and it will also reassure the public because it describes the circumstances that can be considered in determining whether bail may be granted. The suggestion that the ECHR means that people must be granted bail is a fallacy. The courts can still decide not to grant bail if the judge so determines. In a sense, we are attempting to be more prescriptive in order to clarify for everybody when bail may or may not be considered. It was possibly mischievous or maybe unconscious that the ECHR was brought into the discussion, but it is a red herring as far as proposed new section 23D is concerned.

The Convener: I will let Margaret Mitchell comment on that if she wants to, but it is helpful to have that clarified. The committee's position at stage 1 was that we were clear that proposed new section 23D of the 1995 act was about refusing bail except in certain circumstances. It is almost the opposite of proposed new section 23B, which states that bail is to be granted except in certain circumstances. We welcomed those provisions.

We have not asked directly whether the provisions are in tune with the ECHR, but we presume that they are, because you did not say that there are any ECHR issues. I do not have any concerns about that. However, it is helpful that we have had a debate about what we expect of the courts, given the provisions.

Does Margaret Mitchell want to say anything to wind up?

Margaret Mitchell: I thank the minister for his response. Despite what he said, it was not my intention to be mischievous. I am comforted that the provisions might help to counter the perception that bail has been granted in circumstances in which it should not have been granted. Therefore, I am happy to seek to withdraw amendment 44.

Amendment 44, by agreement, withdrawn.

The Convener: Amendment 1, in the name of the minister, is grouped with amendments 3 to 7, 21 and 41 to 43.

Hugh Henry: Amendments 1, 5 and 6 are technical. They will simply make it clear that the whole of proposed new section 23B of the 1995 act deals with bail for an accused at the pre-conviction stage, even though some of the subsections do not refer specifically to accused persons. The Executive's policy is that, when a court is considering a question of bail, it should be clear that the court's discretion is not constrained by the prosecutor's stance. Proposed new section 23B sets out that position in relation to pre-conviction bail. The position as regards post-conviction bail will be clarified by amendment 21, to which I will return.

Amendments 4 and 7 will help to ensure that the policy applies to questions that the courts face in relation to the imposition of bail conditions, as well as to the question whether bail should be granted. Amendment 4 confirms that the prosecutor's attitude will not restrict the court's discretion in relation to the imposition of bail conditions. Amendment 7 confirms that the court may request information from the prosecutor or the accused's solicitor or counsel for the purpose of determining a question as to the imposition of bail conditions.

Amendments 3, 21 and 41 to 43 will provide consistency and clarity on the right of the prosecutor and the accused to be heard on bail applications. Amendment 3 will put it beyond doubt that the proposed new section 23B of the 1995 act, which will be inserted by section 1 of the bill, will allow both the prosecutor and the accused to make submissions, which would generally be oral, with regard to a question of bail in pre-conviction cases. Amendment 3 picks up on a point that was made by the Sheriffs Association, which underlined the importance of placing beyond doubt the court's right to take the prosecutor's view into account when deciding on bail.

Amendment 3 will also make proposed new section 23B consistent in that respect with proposed new section 32A of the 1995 act, which will be inserted by amendment 21. The purpose of new section 32A(1) is to confirm that, following conviction and where a question of bail is being considered by the court—that includes consideration of bail conditions—the prosecutor and the convicted person will have the right to make submissions on the question of bail. Notwithstanding the right of the prosecutor to make submissions, proposed new section 32A(2) confirms that the court's discretion in determining the question of bail will not be restricted in any way by the attitude of the prosecutor.

Proposed new section 32A(3) refers to section 245J of the 1995 act, which details how the court decides questions of bail where a probationer or offender appears before it in respect of an apparent failure to comply with a requirement of a court disposal, such as a probation order or a drug treatment and testing order. Under section 245J of the 1995 act, the prosecutor currently has the right to be heard in relation to any appeal of the court's decision on bail, but not in relation to its initial determination. Amendment 21 will remove the requirement for the Crown to be heard under section 245J of the 1995 act.

Amendments 41, 42 and 43 are consequential amendments that will remove from sections 112(2), 177(3), 201(4) and 245J(5) of the 1995 act the existing references to parties being heard. Those references are unnecessary in view of the general provision in proposed new section 32A.

Taken together, amendments 3, 21 and 41 to 43 will make the position in relation to the prosecutor's right to be heard more consistent. In all cases, with the exception of the specific circumstances that are caught by section 245J of the 1995 act, whenever bail is sought post conviction or the accused appeals refusal of bail post conviction, the prosecutor will have the right to make oral or written submissions to the court. The prosecutor will, therefore, have the right to make submissions both before and after conviction.

I move amendment 1.

Stewart Stevenson: Unless the minister talks me out of it, I plan to support the amendments. I have a purely technical question. Amendment 3 refers to "the accused person" and proposed new section 32A(1) of the 1995 act, which will be inserted by amendment 21, refers to "the convicted person". I take it that those terms are to be understood as including the person's legal representative.

Hugh Henry: In practice, the submission would be made by the accused's representative.

The Convener: I want clarification of two points. First, you referred to bail being sought "following conviction". Are you talking about the part of the process where a jury has made a determination but sentence has not yet been passed? Does "post conviction" mean that there has been an appeal of some kind after sentence?

Hugh Henry: "Post conviction" could be pending or after sentencing. The answer to your first question is yes.

The Convener: With reference to amendment 21, you used the phrase "following conviction". I presumed that that meant before sentencing. When you used the term "post conviction", I thought that you must mean something different—situations in which the accused is in custody and has lodged an appeal on some grounds, for example. Under previous legislation, the Crown did not have the right to be heard in appeal cases. We have now repaired that.

Hugh Henry: "Post conviction" would mean following conviction. The matter is set out in amendment 21, in proposed new section 32A(1) of the 1995 act. The wording is this:

"Where—

(a) a person has been convicted in any proceedings of an offence; and

(b) a question of bail (including as to bail conditions) subsequently arises in the proceedings (whether before sentencing or pending appeal or otherwise)".

The Convener: That is attempting to ensure that the bill is clear about the right of both parties to be heard at each stage.

Hugh Henry: That is correct—that is it in a nutshell.

The Convener: I wish to raise a couple of further issues on the phrase "the stance of the prosecutor" and the onus on the court to make the final determination. I fully support the idea of the court having the final say, but the Sheriffs Association characterised this area of the bill as

being about sheriffs having to disregard the position of the Crown. It is important to put on record what the provisions will mean. I presume that any sheriff can continue to take the position of the Crown fully on board if it moves to oppose bail, as it has done in the past. If the Crown does not oppose bail but the court thinks that bail should be opposed, proposed new section 32A of the 1995 act will give it the power to do that. That is the main point.

Hugh Henry: Essentially, that is correct. The final determination is a matter for the court. We want to ensure that there will be no doubt about that. There might be reasons why the Crown would decide not to oppose bail, although a sheriff might think that that position is wrong. We wish to make it clear that the ultimate decision lies with the sheriff.

There have been cases in which there has been confusion about whether bail should have been granted or whether bail had been opposed. I hope that the provisions will not be characterised by sheriffs ignoring the views of the Crown. Equally, however, we want to make it clear that the sheriff will have the final say in determining whether bail is appropriate and might, indeed, decide that bail is inappropriate even though it is not opposed by the Crown.

The Convener: In most cases, sheriffs will not be criticised for continuing to accept the position of the Crown if it decides to oppose bail.

Hugh Henry: If the Crown decides to oppose bail and the sheriff believes that that is correct, the sheriff should act accordingly.

The Convener: So the sheriff will not be expected to weigh up how the Crown has come to its position on the matter.

Hugh Henry: I am sure that when a sheriff makes a determination about whether or not bail is appropriate, he or she will have regard to the circumstances of the case. There might be some inference from how the Crown has come to its decision—I do not know—but I do not expect such decisions to be made lightly. We want it to be clear that the ultimate decision is for the sheriff.

The Convener: I will explain my reason for asking the questions. I fully support the provisions under section 1 of the bill. I want to be sure that the correct interpretation of proposed new section 23B of the 1995 act is that the final decision will be down to the court. I do not want a position to be reached where somebody challenges a decision of the court because it did not assess whether the prosecutor had made the right decision in moving for bail to be opposed or refused. I want to be clear that there will be no requirement on the part of the sheriff to look behind anything that the Crown has to say in relation to bail. Whatever the sheriff's decision, it will be final.

10:15

Hugh Henry: Yes, ultimately the sheriff's decision is final. I refer you to paragraphs 4 and 5 of my letter of 15 September, where I say that

"We recognise that this may result in some further questioning of the Crown by the court"

and that

"the provisions of the Bill give the court considerable discretion to judge which factors are relevant and material in the particular circumstances of the case before it."

Mr Bruce McFee (West of Scotland) (SNP): I am sorry to labour the point. During our visits to Linlithgow and other places, sheriffs gave us the distinct impression that if the Crown had not opposed bail they did not feel that they were in a position to oppose it. Will proposed new section 32A address a situation in which the Crown has not opposed bail but the court or sheriff has taken the view that bail should be opposed or should not be granted, and therefore remove any restriction—real or imaginary—on the sheriff to go along with the prosecution when it has not opposed bail? I do not know if that is clear.

Hugh Henry: One of the amendments makes it clear that the court can consider what the Crown says, but the court is not bound in any way by that. We are trying to make it absolutely clear that it is for the court to make that decision. It is only proper that the court should have regard to what the Crown says—the Crown has the right to be heard—but the court should, having weighed up all the circumstances, make the determination.

Mr McFee: In such situations, it will not just be a question of what the Crown says. The court will not be bound by what the Crown says and will not be bound by what the Crown does not say.

Hugh Henry: That is correct. If a sheriff decides in the circumstances that a different opinion from the prosecution's is appropriate, that will be a matter for that sheriff. The prosecution's submission is always important for the court's deliberation and consideration, and the court would have to take full account of the prosecution's attitude. However, I emphasise again that whether the prosecution opposes bail or says nothing does not bind the court. The court is the referee and the decision-maker.

Margaret Mitchell: We seem to be considering a situation in which the Crown has not opposed bail and the sheriff decides to oppose or not grant it. Although no figures are held centrally, there have been times when the Crown has opposed bail but the sheriff has granted it. Is there anything in the amendments that will help to make a court

more transparent about why it has taken such a decision? That would be extremely helpful, although there are provisions in the bill that will require that reasons be given for granting bail.

Hugh Henry: Margaret Mitchell refers to the wider provisions in the bill. We have just discussed the part of the bill that provides for bail being granted only in exceptional circumstances, but we are moving towards a requirement for the court to give reasons in such cases. When all that is combined, we will have a much clearer determination of the bail process. I hope it will give clarity, and that it will encourage consistency and more confidence in the system.

The Convener: I have two further issues. The right to make submissions makes perfect sense but how does it differ from the current position?

Hugh Henry: In a sense, it is a declaration of what currently happens. With everything else that we are doing in the bill, it would be helpful to have a clear explanation of what already happens.

The Convener: Are the submissions oral?

Hugh Henry: They can be.

The Convener: My final question is on sheriffs being required to give reasons to grant or refuse bail. Again, the proposal makes perfect sense to me, but you will be aware that the Sheriffs Association expressed some concerns on the matter. Am I raising the issue in the right place, minister?

Hugh Henry: The provision is in the bill, but there are no amendments to change it, and you can raise the matter wherever you wish, convener. We believe that the provision makes an important contribution to the bill. I understand the concerns that have been expressed, but the public has the right to know why bail is or is not granted: explanations should be given.

As the committee knows, what happens in cases can often lead to confusion, uncertainty and unhappiness. The provision will help to ensure that the public has the appropriate confidence in the judicial system. Also, the era in which we live is one of greater transparency and explanations; in many cases, it is right that an explanation be given.

The Convener: Is it the Executive's intention to hold discussions with the Sheriffs Association? One of the association's concerns is that additional resources will be required. For example, in a private meeting that we held in Glasgow, we heard that the provision could add a minute to every case in the custody court. The association said that the provision would extend considerably the workload of the custody court.

I think you know that the committee is with you in terms of the concept—it is good—but we need to be clear on whether it will have any implications.

Hugh Henry: I am sure that there will be implications, particularly at the beginning when people are adjusting to new practices. Once people become familiar with the new requirement and incorporate it into their routine of working, the situation will become easier for them. In recognition of the resource and time implications, we have provided extra resources. The bill's financial memorandum shows that £300,000 will be made available for additional judicial time. We will reflect on how the provision is working—experience will give us further information—and, obviously, we will continue to hold discussions.

The Convener: Thank you, minister.

Amendment 1 agreed to.

The Convener: Amendment 2, in the name of the minister, is in a group on its own.

Hugh Henry: Amendment 2 underlines the fact that public safety is one factor in the public interest provision. It does not change the effect of the bill. Our position has always been that public safety considerations are relevant when considering public interest. If amendment 2 is agreed to, public safety will be considered by the court when it takes bail decisions.

One aim of the reforms in the bill is to make the criminal justice system more readily understood by the public at large. We read the helpful comments that the committee made in that regard in its stage 1 report and, on reflection, we agree that an explicit reference to public safety would make it easier for the public to understand the extent of the term "public interest". The addition of the phrase makes it clear that public interest includes public safety.

I move amendment 2.

Stewart Stevenson: I commend the minister and his team for their ability to work with the grain of the committee's view. I support amendment 2.

Margaret Mitchell: Likewise, I support amendment 2. The addition of an explicit reference to public safety will go a long way towards reassuring the public and concentrating minds at the point at which bail is either refused or granted. Amendment 2 is welcome. I appreciate the fact that you took note of the views that we expressed at stage 1, minister.

The Convener: I, too, welcome the inclusion of public safety in the bill. Someone—I do not remember who—suggested that ECHR implications might arise from a sheriff having to make a determination about public safety, which might imply that they had already decided that a

person was a danger to the public. I mention that so that you know that that question has been raised with us.

Hugh Henry: We have no concerns about any ECHR implications. If we think back to the stage 1 debate and evidence, our view was always that the public interest includes public safety. All that amendment 2 will do is specify that. In a sense, it will change nothing for us, because we believe that the provision is ECHR compliant.

The Convener: Does that mean that if public safety were not included and the bill remained as introduced, a sheriff could include public safety anyway when giving their reasons?

Hugh Henry: We have always believed that public safety is an essential component of the public interest, which is much wider than public safety, as members may recall from debates. We acknowledge the concern that, somehow, public safety might be overlooked when the public interest is considered, so we are making it clear that the public interest includes public safety. We believe that the provision is ECHR compliant and that, by definition, considering public safety is also ECHR compliant.

Amendment 2 agreed to.

Amendments 3 to 7 moved—[Hugh Henry]—and agreed to.

The Convener: Amendment 8, in the name of the minister, is grouped with amendment 9.

Hugh Henry: The Scottish ministers want to provide a clear legislative framework for bail decisions. That is why we are making express provision in the bill to set out, as far as is reasonably possible, the grounds on which bail decisions should be taken. An important element of that framework is providing the courts with an illustrative and non-exhaustive list of material considerations that are relevant to the bail decision. Proposed new section 23C(2) of the 1995 act, as inserted by section 1 of the bill, will do just that.

Amendment 8 responds to concerns that Stewart Stevenson and perhaps other committee members expressed at stage 1, by underlining the fact that the listed considerations are examples that do not limit the court's discretion in taking into account any other considerations that are relevant to the case.

The purpose of amendment 9 is to place it beyond doubt that the court can take into account relevant previous convictions in other jurisdictions in its consideration of bail.

I move amendment 8.

Stewart Stevenson: I thank the minister for responding in amendment 8 to the concerns that I expressed at stage 1.

I want a little bit of clarity about amendment 9. It uses the phrase "including convictions outwith Scotland". However, in proposed new section 23D of the 1995 act, the reference to convictions elsewhere is to

"conviction in a member state of the European Union",

which is a more restrictive formulation for considering other convictions. Why does that distinction exist?

I have a point about the phrase "outwith Scotland". I understand how, in a common jurisdiction such as the European Union, processes exist for EU member states to notify one another of convictions and to make information available. However, I am not clear about how a court might know of a conviction in Kazakstan, just to choose a random example of a place that is outwith Scotland. It would be useful if the minister could reassure us that what we are trying to achieve in the bill will not be compromised in any way—I do not expect it to be—by a court failing to take account of a conviction in, for example, Kazakstan.

10:30

Hugh Henry: There are probably three different levels involved here. On the wider issue of Stewart Stevenson's Kazakstan question, we are trying to ensure that we do not limit a court and that it can take into account convictions from elsewhere. It would be foolish not to allow that to happen simply because of an oversight.

The other issue concerns convictions from outwith Scotland but in the United Kingdom. Currently, the police provide details of any previous convictions in England, Wales or Northern Ireland in the schedule of previous convictions served on the accused. However, the European Union dimension is significant for us, given the freedom of mobility that exists in the EU. Indeed, there have been cases in England, if not in Scotland, of people with serious convictions from other parts of the EU. In such circumstances, it is important that, where possible—I stress where possible, because we cannot give an absolute prescription that will pick up everything from anywhere an accused has lived—information about previous convictions in other EU jurisdictions is provided in the police report to the procurator fiscal.

Police-to-police liaison is a significant factor that might enable relevant information about EU convictions to be provided when the police submit their report. The 1959 Council of Europe

convention on mutual legal assistance in criminal matters provides a formal mechanism for member states to exchange information on a person's previous convictions. That mechanism was enhanced by the adoption of a Council of Europe decision in November 2005 that provides that member states will spontaneously transmit information on previous convictions acquired in a member state in relation to nationals of another member state. A request for information on previous convictions from another member state must be responded to within 10 days of receipt. If information on previous convictions in EU member states is not available when a case is first called—for example, when the accused appears from custody—it is possible, in appropriate cases, to seek a review of bail when the information eventually becomes available.

I hope that by doing what we are doing we are considering all the potential circumstances that might be relevant to the consideration of bail. It would be wrong for us not to consider the possibility of obtaining information from elsewhere. I do not pretend for a moment that the mechanism to which I have referred will give 100 per cent information on everyone, irrespective of where they come from. However, it will make a significant contribution as labour mobility becomes an increasingly significant factor in how our society develops.

Stewart Stevenson: I am not in any sense trying to challenge the policy objective—I very much welcome the minister's useful explanation of the practicalities of how the EU mechanism operates—but I am left wondering, as I suspect the minister is, about the random nature of how a court might end up knowing about a conviction in Kazakstan. I do not have a solution. It is appropriate to leave it open that a court can be made aware of a conviction from Kazakstan or anywhere else equally exotic.

The Convener: I have just one question. We rehearsed at stage 1 that section 1 tries to clarify the factors that can be taken into account in a bail refusal, but it does not provide an exhaustive list, so a sheriff would not be prevented from giving a reason for refusing bail that is not apparent or included in the bill. I just want to get it on the record that it is the Executive's view that if a sheriff gives a reason for refusing bail that is not mentioned in the bill, it will still be valid.

Hugh Henry: That is correct. We use the phrase "the following examples" in amendment 8 so that the sheriff's ability to consider other circumstances will not be limited.

Margaret Mitchell: I welcome amendment 8, which seeks to strengthen section 1 by making it clear that the list of considerations is illustrative rather than prescriptive. Amendment 9 will concentrate minds by ensuring that the court considers offences that have been committed outwith Scotland as well as those that have been committed here. Amendments 8 and 9 are to be welcomed.

Amendment 8 agreed to.

Amendment 9 moved—[Hugh Henry]—and agreed to.

Amendment 45 not moved.

Section 1, as amended, agreed to.

Section 2—Bail and bail conditions

The Convener: Amendment 10, in the name of the minister, is in a group on its own.

Hugh Henry: Amendment 10 seeks to add new subsection (2B) to section 24 of the 1995 act, which deals with bail and bail conditions. It provides that when a court grants bail to a person accused or convicted of a sexual offence in solemn or summary proceedings without imposing any special conditions, it must explain why it did not consider such conditions necessary. It will apply at all stages, both pre and post conviction. That will mean that whenever a convicted sex offender or someone who has been accused of a sexual offence comes before a court and the court decides not to impose any special bail conditions, such as a condition that would require the accused to stay away from a particular place, it will have to explain why no such conditions were considered necessary in the circumstances of the case.

Amendment 10 highlights the important nature of the duty that has already been placed on the court in such cases to consider what additional bail conditions would help to protect the public. Amendment 10 is significant, and I am sure that it will be welcomed warmly and widely.

I move amendment 10.

The Convener: I welcome amendment 10, because it will add weight to new section 23D of the 1995 act. It will remind the court that there is a presumption against bail and that the court should state why it does not think that conditions are necessary if it decides not to apply any.

I have just one question. Given the nature of the offences that we are talking about, will there be any implications if a sheriff says that he does not think that the imposition of special conditions is necessary? There have been some big cases in which the system has got it wrong and released serious and violent offenders into the community. I presume that sheriffs have some kind of immunity. If a sheriff judges that it is not necessary to impose special conditions on the release on bail of a serious sex offender, they will be required to write

down their reasons for that decision. Will amendment 10 have any other implications?

Hugh Henry: No. It does not seek to hold sheriffs to political or public account. Sheriffs must make decisions that are appropriate to the circumstances and must arrive at them independently. Those decisions will be subject only to the usual appeals process in the judicial system. Amendment 10 simply represents an attempt to ensure that, in certain circumstances, the public understand why a particular decision was made. Given some of the serious incidents that have happened, it is important that there is some understanding of why a decision to release a particular offender on bail was reached. However, amendment 10 is not an attempt to second-guess sheriffs or to hold them to account for decisions that have been properly made.

Amendment 10 agreed to.

The Convener: Amendment 51, in the name of Margaret Mitchell, is in a group on its own.

Margaret Mitchell: Amendment 51 is a probing amendment. It would remove the new standard bail condition, which requires the accused not to behave

"in a manner which causes, or is likely to cause, alarm or distress to witnesses".

There are two points behind the amendment. First, I aim to clarify the additional protection that the condition offers, given that such behaviour could currently result in a breach of the peace charge, which would automatically contravene the existing standard bail condition not to commit an offence while on bail. Secondly, the court currently has the discretion to impose additional bail conditions where it thinks that intimidation or harassment is expected or has been experienced, therefore I wonder what extra protection will be added.

In addition, I would appreciate clarification of how the new condition will work in practice. If a court finds an accused person to be in breach of the condition, will there be any requirement to specify whether that person knew that they had been in breach of it? It is almost a subjective matter. The victim or whoever levels a charge could say that they were alarmed or distressed, but the question is, was the accused aware that he was behaving in an alarming or distressing way? I want to tease out those issues in an attempt to strengthen the provision.

I move amendment 51.

Stewart Stevenson: I am sure that cons throughout Scotland are poring over writings to ensure that they understand the common-law effects of breach of the peace.

I will be serious. It will be useful to have as a specific provision that a person will not duff up a witness, whether verbally, through a third party or by any other means. Therefore, unless the minister persuades me that I am wrong, it is likely that I will disagree to amendment 51.

Hugh Henry: Amendment 51 seeks to remove a provision of the bill that will afford more protection to witnesses in criminal cases in advance of the cases coming to trial. Margaret Mitchell explained what amendment 51 would do. I realise that it is a probing amendment.

The bill introduces a new standard condition of bail, which amendment 51 seeks to remove. Doing so would change the bill from being witness friendly to accused friendly—the balance would be shifted towards the accused.

I have heard it argued that the new condition will not provide any additional protection for witnesses because a court can already apply special bail conditions to meet circumstances in cases in which witness intimidation might be an issue. That option will remain in the future, but I contend that ensuring that witnesses are not distressed or intimidated by a person who is on bail and in a position of trust is so fundamental as to justify inclusion of the provision as a standard bail condition.

It has also been suggested—including by Margaret Mitchell—that the condition might be unnecessary because the conduct that it will prohibit would constitute a breach of the peace which, if proved, would contravene the existing standard bail condition not to commit an offence while on bail. We can try to split hairs on the matter if we want to, but try telling what has been suggested to a person who has been the victim of such behaviour and asking them whether we should wait for an offence to happen before there can be a breach of the peace charge or whether we should try to nip things in the bud. I know what response you will get. The fact that the condition will be a standard bail condition means that it will be explained to the accused whenever bail is granted. It is better to warn the accused.

10:45

I come back to the point about whether the accused is aware of the effect that the behaviour is having. It is better to warn the accused that such behaviour will not be tolerated before an offence takes place rather than having to deal with the consequences of an offence because the accused was not aware of the situation. To be honest, can we second-guess whether people who misbehave are aware of the consequences of their actions? By explaining as much as we can to them at the time of bail, I hope that they will be aware of the

consequences, but I am not so foolish as to suggest that we can get into the minds of everyone and ensure that they fully understand the consequences of their actions at all times. People will sometimes have to accept the consequences of what they do.

The provision is not designed to punish innocent behaviour on the part of an accused that unintentionally upsets a witness. For example, if a witness unknowingly walks down the accused's street and is alarmed because he or she sees the accused in the accused's garden, the accused will not be behaving

"in a manner which causes, or is likely to cause, alarm or distress".

That is not an example of something that has been done intentionally. However, if the accused repeatedly walks up and down the street on which the witness lives, you might start to think that they are behaving in a manner that

"causes, or is likely to cause, alarm or distress".

It will be for the police to exercise their functions properly and decide whether the behaviour is accidental or unintentional or whether it is designed to cause "alarm or distress".

The purpose of the new condition is not to criminalise innocent activities; it will encourage a commonsense approach to enforcement. Given everything that we have done in recent years in Parliament to provide support for victims and witnesses, it is important that the bill makes a contribution. We must ensure that we do not unintentionally make a change that shifts the balance towards the accused and against witnesses.

The Convener: I want to be clear in my mind about how the provision is expected to work. You gave an example in which the accused is sighted in the street of the victim. If one of the bail conditions is that the accused cannot go to that street, by being in the street they will be in breach of the conditions anyway.

Hugh Henry: Certainly.

The Convener: How will the provision be applied? Would the accused be in breach both for being in a place where they should not be and, under the new provision, for causing alarm or distress? Can the second condition not be implied by the fact that they have breached the first condition?

Hugh Henry: In the example that you give, the accused could be in breach of both conditions. The first example that I gave—the examples have been mixed up, which might be a bit confusing—was of a witness walking down the street and seeing the accused in the accused's garden. By being in their garden, the accused would be doing nothing that would cause the witness alarm or distress. You could not say that the accused was behaving

"in a manner … likely to cause, alarm or distress".

On the other hand, if an accused was walking up and down a witness's street and it was a condition of bail—as the convener suggested in her example—that they should not, they should not be there. However, even if it was not a condition of bail that they should not to be in that street, by walking up and down the street in a menacing way, peering into the witness's house and almost trying physically to intimidate them, that could be construed—even thought it was not a condition of bail—as behaving in a manner that might cause alarm or distress. In that case, something could be done.

The Convener: Does that mean that that has to be proved? If a witness alleges that the new condition applies and that the accused person caused them to be in a state of alarm, must evidence be taken on that point?

Hugh Henry: There are two different issues. For an offence to be proved, evidence would need to be taken and the case would need to proceed in the normal way. For a review of bail conditions, the standard of proof is different. We are trying to introduce a more flexible system that allows us to review bail without necessarily proving a further offence.

The Convener: If the accused denied that they caused alarm to the victim or witness, presumably they would have to be heard, so there would be a debate.

Hugh Henry: You are absolutely correct. It would be a matter for the sheriff to determine, based on the information that was provided at the review of bail.

The Convener: So proof would be required—it would be necessary to show that the new condition had been breached.

Hugh Henry: It would be a review of bail conditions, so the sheriff would have to hear arguments from both sides when coming to a decision.

The Convener: Another part of the bill sets a much higher penalty for breach of bail conditions. I want to be clear about the fact that the accused person would have a chance to deny that and to represent themselves. I can think of cases in which the power might be abused. The 1995 act already stipulates that the accused cannot interfere with a witness. I take it that the new provision goes further, because of the circumstances that you describe.

Hugh Henry: That is correct. It affords a greater degree of support and protection to witnesses.

The Convener: I will come at the issue from a different angle. For "witnesses", should we read people who are both witnesses and victims?

Hugh Henry: Essentially.

The Convener: Would the provision ever apply in cases where there was more than one accused person and they were incriminating one another? A special defence might be lodged and one accused might say, "It was not me, it was him," even though both of them were involved.

Hugh Henry: Conceivably, if one accused were regarded as a witness and the other were intentionally trying to cause harm or distress to them, use of the provision could be regarded as appropriate. I do not want to be prescriptive and to set out all the types of cases in which the provision could apply.

The Convener: We may want to think about the issue at stage 3. Often when we consider criminal procedures we think of there being one accused person. Sometimes we forget that there are more complex cases in which special defences are lodged. In effect, one accused person can be a witness against another. I can think of cases in which the Crown has taken a plea from one person in order to get them to give evidence against a co-accused. I want to be clear about whether the provision could apply to such cases.

Hugh Henry: We think that the provision, as constructed, is a useful addition, but if we need to strengthen it at stage 3 we will do so.

Margaret Mitchell: I thank the minister for his explanation. This morning's discussion has been useful, as it has indicated what added protection the new standard bail condition will provide. You have said clearly that we could reach the same point through breach of the peace provisions and imposing an additional condition, but that specifically introducing a new standard condition is a more effective way of dealing with the widespread problem.

The minister's answer convinced me that new subsection 24(2A) will put to the forefront of the accused's mind the fact that behaviour that causes alarm or distress is not acceptable even if they are not aware of it. The subjectivity that we were concerned about will therefore be ruled out, because the accused will be firmly made aware of the condition under standard bail conditions. I am therefore happy to withdraw amendment 51.

Amendment 51, by agreement, withdrawn.

The Convener: Amendment 11, in the name of the minister, is grouped with amendments 12, 47 and 48.

Hugh Henry: Amendment 11 simply places it beyond doubt that an oral explanation of bail by the judge is required only when the person who is being bailed is in court. Amendment 12 makes it clear that, in all cases in which a person is bailed, a full explanation of the bail conditions and the consequences of breach must be given.

Amendment 12 was lodged in response to the committee's concern, which it expressed in its stage 1 report, that more needed to be done to reinforce in writing the messages on bail that are given orally by the judge. Bail hearings are brief and there is a good deal of information for the individual who is being bailed to take in. Bail orders that contain the conditions that have been imposed are already given to every bailee, but the bill makes it clear that, in future, the bail order must also specify that breach of a bail condition is an offence that will render the bailed individual liable to arrest, prosecution and punishment.

Amendment 12 adds to the existing provisions by making it clear that, whenever bail is granted, the person who is bailed must receive a written explanation in ordinary language of all the issues that are covered in new section 25(A1) of the 1995 act. That means that everyone who is bailed must get a plain-language explanation of the effect of the bail conditions and of the new requirement for them to obtain court authorisation when the domicile of citation—that is, the address to which the case papers are sent—ceases to be their normal place of residence. They will also get a full explanation of the consequences of a breach of bail.

Amendment 47, which was lodged by Margaret Mitchell, would add the next court date to the information to be provided in a bail order. We support the aim of the amendment, which is to reduce the number of accused persons who fail to appear at court. In this instance, however, we are not convinced that legislation is the best way forward. If the accused was issued with a new bail order that included the next court date after every court appearance, there could be considerable resource implications. Cases can be adjourned from one trial date to another and perhaps to further deferred sentences, all while the accused is on bail. If a new bail order was required in every such case, that would lead to a huge amount of extra work in the system.

Having said that, we are prepared to explore the idea. The Scottish Court Service is considering ways in which accused people can be given a separate sheet of paper with their next court date before they leave the court. If that proves to be practical and effective, an administrative change could be made. However, if we included such a provision in the bill, we would run the risk of saddling the system with a resource-consuming

mechanism that is still to be proved. It is not clear whether it would lead to a reduction in failures to appear.

The provisions in sections 10 and 21 make it clear that the accused and/or their solicitor will be informed of the dates set for the trial diet and the intermediate diet. We should let those new provisions take effect and evaluate the work that the SCS is undertaking so that we have evidence before there is any further legislation in the area. If new administrative measures prove to be effective, we will combine them with the changes in the bill to ensure that we tackle the failure to appear from every angle—legislative as well as administrative. For that reason, I hope that Margaret Mitchell will agree to not move amendment 47.

11:00

I understand the sentiment behind amendment 48. Indeed, we thought long and hard about introducing an Executive amendment along similar lines, as I indicated in my letter to the committee dated 25 August. However, the result of our considerable deliberations on the matter was that we concluded, very belatedly, that such an amendment would be of no benefit.

Amendment 48 seeks to place in legislation a requirement that the accused sign the bail order to acknowledge that it has been read and understood. The bill already introduces a range of measures which will ensure that the accused understands the effect of the bail conditions to which he or she is subject and the consequences of breaching those conditions. The court will be required to explain to the accused in ordinary language the effect of the bail conditions imposed and the consequences of breach. That is backed up by the requirement to provide the accused with a copy of the bail order that will provide a written explanation of bail conditions and the consequences of breach. I am sure that the accused will be under no misunderstanding as to the conditions in force and the effect of non-compliance with them.

In practice, the accused is already asked to sign the bail order to acknowledge receipt and, in the vast majority of cases, that is what happens; we need to consider the implications that the amendment would have if the accused did not sign the bail order. Does requiring in law that the accused sign the bail order actually add anything? In what way does signing the bail order help the accused understand it any more when it has already been explained to him by the judge and he has already been given a copy of it?

I support the principle that individuals should be as actively involved in the bail process as possible, but ultimately bail is not a deal between the court and the person bailed. Under no circumstances do we want to create the impression that bail is a deal between two parties. Bail is a court order that takes effect as soon as it is imposed, not if and when the accused decides to sign the order. It is also important that we do nothing that might be seen to erode the sovereignty of the court or undermine the current certainty about when bail takes effect. As I said, bail is a court order; it is not a deal between two parties.

When we sought to draft a similar amendment, it became clear to us that if we included on the face of the bill a requirement for the individual to sign the bail order, we would also need to state on the face of the bill the consequences for the bail order of its not being signed. We were unsure whether the bail order would have no effect until it was signed or whether the bail order would be suspended if it was not signed. We had to consider what a lack of signature would mean in practical terms. We took the view that there was little point in putting on the face of the bill an obligation to sign the bail order while at the same time making clear that failure to do so would have no effect on the bail order. We could not see any useful way out of that.

I hope that Margaret Mitchell will accept that, although we were sympathetic to what she is trying to achieve, we could not come up with a practical amendment that would achieve the desired effect.

I move amendment 11.

Margaret Mitchell: As the minister said, amendment 47 would require the date of the diet when the accused is next required to attend court to be stated on a bail order. The purpose behind the amendment is to emphasise in the mind of accused persons the date when they should next appear in court. It is one of the most important pieces of information they can get and they must be aware of it: many cases are adjourned because the accused fails to appear. The idea behind amendment 47 should be welcomed.

I do not agree with the minister that the courts would find amendment 47 unduly cumbersome. Having been a bench JP, I know that such matters are determined there and then by clerks. Simply adding the date to the bail order will not involve that much more administration and, in any case, the fact that it emphasises to the accused the date of his or her next appearance in court surely outweighs such considerations. After all, failure to appear at a later hearing will have many more administrative consequences. I will seek to move amendment 47 because I believe that it will add something to the bill, and I hope that the minister will reflect on my comments.

On amendment 48, the minister has a point when he says that if the order is not signed, that will have no effect on the order itself. The question is whether the accused has read, understood and been given a full explanation of the bail conditions, the domicile requirements—many cases fall either because the accused changes address and cannot be tracked down or has no fixed abode—and the consequences of any breach. Amendment 48 seeks to provide confirmation that that has happened.

As amendments 47 and 48 seek to stress the importance of understanding a bail order—and, indeed, to aid that understanding—I will move them.

Mrs Mary Mulligan (Linlithgow) (Lab): I welcome the proposal to provide the accused with a copy of the bail order but, as we know, the level of literacy of many accused persons is not what we might want it to be. Would it be possible for a solicitor, for example, to be given a copy of the order, to enable them to discuss it with the accused? I realise that that would create yet another administrative burden, but I am concerned that people with literacy problems will not benefit from the system as we hope.

I am sympathetic to amendment 48, in which Margaret Mitchell proposes that the bail order include the date of the next court appearance. I realise that that too would add to the administrative burden but, earlier, we agreed that despite sheriffs' concerns about the time involved, they should offer an explanation of what is happening because of the benefits that such a move would bring. I am interested to hear whether the minister will come back at stage 3 with proposals on this matter, because we are all anxious to ensure that, once the date of the next hearing is set, the accused appears for it. All doubt about that should be removed, if possible.

I understand what Margaret Mitchell is trying to do in amendment 48, but what would happen if the accused, for whatever reason, refused to sign the order? Moreover, who would be responsible for securing the signature? Would it be the police or a court official? We must think through not only the reasoning behind, but the consequences of, such a measure.

Mr McFee: Many of us are sympathetic to the intention behind amendment 47 in particular, and to some elements of amendment 48, but I remain to be convinced that they should be in the bill.

I suspect that someone who has been granted bail will sign an order as quickly as possible to get out of the court as quickly as possible. I fail to see what amendment 48 would achieve if any refusal to sign an order were not backed up with some form of penalty, such as ensuring that bail does not apply.

I wonder whether the minister has considered the effect of amendment 47; it does not explain what would happen if the court could not, for some reason, provide the date of the next diet, or if it had to change the date of the next diet. As amendment 47 would add to section 2, page 4, line 11, would it have any unintended effect on breaches of conditions imposed on bail? Would it be better if the Executive and the other appropriate authorities took cognisance of some of the good practice we saw on our visits? That good practice was being applied and seemed to be having some effect along the lines of what Margaret Mitchell has proposed, but whether learning from good practice should be included in the bill is another matter. I am not convinced at this stage.

Marlyn Glen (North East Scotland) (Lab): The committee is really concerned about this issue. The drive behind the proposal was an attempt to make the courts more efficient and their workings more transparent—not to take up more resources, but to save resources. I know that lots of people sign documents without reading and understanding them, but the aim of the exercise is to do everything possible to ensure that the accused does understand. The minister said that the vast majority of accused persons sign at the moment, so I wonder why a minority do not sign. Do they simply refuse to sign? I am not sure what that means. A layperson who has no experience of court would expect people to have to sign for something like that, but I understand the difficulty involved in putting such a requirement in the bill.

A layperson would also presume that, if a court date is given, it is given in writing. If you put yourself in the position of an accused person—whether someone who has been to court many times or someone who has never been to court before—you will appreciate that it must be difficult to remember everything that is said to you. People will presumably be delighted just to get outside again; I imagine that many completely forget what they have been told.

As Bruce McFee said, we saw people being given the date of the next court appearance in writing. I am sure that the committee would be much more content if the minister could consider, if not an amendment to the bill, a way of ensuring that that is done administratively, so as to cut resources rather than use up more resources.

Stewart Stevenson: On the face of it, amendment 11 sounds quite sensible, but I have a couple of questions. First, if the accused can be present via a video link, does that mean that in law they are present, or are they considered to be absent although participating? Secondly, is it still open to

the court to provide an explanation when the accused is not present?

I wonder whether, instead of inserting

"if the accused is present",

it might be better to replace "to the accused" with "for the accused". Even if the accused is not present, there might well be value in the explanation being proffered to the court, so that the legal representative of the accused, if one is present, can hear it and, more particularly, so that friends and family who may be present can hear it.

Amendment 11 looks quite straightforward and obvious, but I wonder whether it might create some difficulties in policy terms. However, I am not trying to diverge from what the minister is trying to achieve and those are my comments on the amendment.

The issue of whether the accused is present arises once again with amendment 48: it does not appear to cover situations when the accused is not present. If Margaret Mitchell intends to move amendment 48, I invite her to clarify that. The other issue, which Mary Mulligan raised, is whether "read" includes "have read to them", so that if the accused is illiterate and incapable of reading, they can make their mark. It would be useful to understand what, legally, is included in the wording that has been used.

11:15

The Convener: I note the minister's comment that if signing for bail were specified in the bill, the consequences of such a requirement would also have to be covered. It is worth discussing this. Why could it not be a condition of bail that the person reads the order and understands its contents before they sign it? There are some non-custodial sentences that people must agree to, otherwise they do not get them—people must agree to undertake community service, for instance.

We had a discussion at Glasgow sheriff court about whether the proposal in amendment 47—that the date of the next court appearance should appear on the bail order—would be helpful. We did not seem to come up against any particular obstacles, but I suppose that we must hear what the minister has to say about the resource implications of that.

As the minister will know from our stage 1 report, the committee is interested in why the accused might not turn up at court. We wondered in our report whether we should nail that down and ensure, when bail is granted, that everything possible is done to impress on everyone the importance of turning up at court for the trial on the right date.

Margaret Mitchell: Nothing that I have heard weakens my strong belief that amendment 47 would add a great deal to the system. We know that a lot of these people have very chaotic lifestyles, and I know from personal experience that when they are in the dock—

Stewart Stevenson: In the dock?

Margaret Mitchell: Yes, when they are in the witness—whatever—their main aim is to get out of there as quickly as possible. That often means that they are not taking in what is said. The court system can be a bit bewildering, and it can be difficult to pick up exactly what is happening. Accepting amendment 47 and clearly showing on the bail order the date of the next court appearance would go a long way to improve efficiency and the accused's understanding of what is expected of him or her.

If the accused refuses to sign the bail order, they are refusing to buy into the order and the conditions and they clearly should not be released. There would be a question about their intent. Why are they not signing the order? Do they not understand the domicile provisions? Amendment 48 would aid understanding. There would have to be a very good reason why the accused did not sign the order.

If it was discovered that the accused was illiterate and could not sign the order, there should be intervention as early as possible to identify the problems they might have when appearing before the court. That would be a positive measure to aid them, and it might help them to stop reoffending. Their illiteracy might have contributed to their offending. I see all those proposals as positives, so I intend to move amendments 47 and 48.

Hugh Henry: Bruce McFee was right to ask whether there could be circumstances in which the date would not be determined. The answer is yes. In some cases, the next court date might not be available at that time and it might not be known until the indictment is served. When a person is released on bail in a petition case, no date is fixed for the accused to appear next. Inadvertently, we can start to cause complications because of that. I agree that, where possible, it is better if someone can be given a date. Equally, however, I would not want the system to become—[*Interruption.*]

The Convener: Sorry, my phone is ringing and I do not know where it is.

Hugh Henry: I thought it was an MP3 player and that we were about to get some musical accompaniment.

There could be circumstances in which it could be right for a date to be given, but we would not want the system to grind to a halt or to become so

inflexible or bureaucratic that nothing could happen until a date could be determined.

Good work is already being done to try to encourage dates to be given. My argument is that that should be done administratively rather than in the bill. Pilot projects are under way in Edinburgh and Airdrie and we will consider their evaluation reports. Other courts have adopted the practice in recent years, although their work has never been evaluated. We would need to consider what the benefit has been and how the practice is being used. There is a willingness to view the practice as a useful tool. However, I think that making it a matter of law would be the wrong approach, given that, in some circumstances, we cannot set the date.

Mary Mulligan talked about literacy. There is already a requirement to give an oral explanation in ordinary language. That should help people to understand what is being expressed. I can understand the problems that people might have with a written explanation but there is a general duty on solicitors to explain to their clients what is happening in terms of due process. The solicitor is best placed to explain to the client exactly what is happening and what the implications might be. If someone is in court, a combination of the oral explanation and the support of the solicitor can be effective.

Stewart Stevenson: Not all accused people are represented. Could you expand your remarks in that context?

Hugh Henry: My understanding is that it is extremely unusual for someone to appear in a bail hearing without representation. If people appear without representation, they will get a copy of the bail order and will be given an oral explanation. If it becomes apparent to the court that the person has a literacy problem and cannot read any written explanation that has been given, I am sure that appropriate advice would be given to them—for example that they should get a solicitor to represent them.

The date on the bail order can sometimes change, so if we insist on what is being described there could be a degree of confusion and uncertainty; the accused could argue that they only followed what was on the bail order and ignored any subsequent change. I would not want to give anyone an excuse not to turn up.

A refusal to sign does not mean non-acceptance; it means that the person has refused to sign. The bail order has been granted; it was granted when the sheriff decided to grant bail. The signature is subsequent to the granting of the bail order. If we require a signature, what are we saying? Are we saying that the person can be perverse and thwart the sheriff's decision to grant bail by saying, "No, I am not accepting what you have decided"? I assume that most people would be only too glad to be released, but we could imagine some bizarre circumstance where someone decides that they are just going to sit there when the sheriff has already granted a bail order. What do we say to the sheriff? Do we ask him to revoke the bail order because the person has decided that it is not appropriate? As I said earlier, this is not a deal between two parties; it is an order made by the court and the sheriff. I am not convinced that an ability to second-guess the sheriff is right.

Are we saying that the bail order will have no effect until it is signed? No, because the court order has already been made. Is the bail order suspended if it has not been signed? No, because the order has already been made. In a sense, the lack of a signature has no practical impact, unless we decide that the person will be detained until they decide to sign, in which case we are second-guessing a decision that has already been made by a sheriff.

I am not persuaded that amendment 48 would be of any significant benefit. What it seeks already happens in most cases, and if some individuals are so thrawn, perverse or behaving in such a bizarre manner that they decide that it does not matter what the sheriff says and they decide not to sign, requiring a signature is the wrong principle.

We do not want to do anything that will erode the court's authority or create uncertainty about the point at which bail comes into effect. The lack of a signature has no practical impact and the bail order remains in force as imposed by the court. It does not matter whether the person signs the order: it is in force.

As Mary Mulligan asked, what else could we do if someone does not sign? It would be good if people signed the bail order to indicate that they fully understand and are willing to comply; we would encourage that as a matter of practice. As a matter of law, however, giving someone the option to say, "Nuh, sorry, don't agree with the sheriff" is just wrong.

The Convener: What is the norm for issuing the date for someone's next court appearance? We know that some sheriff courts issue a date and some do not.

Hugh Henry: I am sure that the court will do that if it can, although I have described some circumstances in which it would not be possible to issue a date. Airdrie and Edinburgh courts, and others, have been conducting pilots and issuing dates as a matter of practice and I think that it will become the norm, but putting on the face of the bill a requirement from which it would be impossible to deviate—given that, for whatever

reason, a date cannot be determined in some cases—would create untold confusion.

11:30

The Convener: Does the Executive expect giving the date to become the norm?

Hugh Henry: Yes. As I explained earlier, we are already moving in that direction. We need to evaluate the pilots that have been undertaken in Edinburgh and Airdrie and we need to reflect on what improvements have been made in those courts where the practice has already been established. However, the issue can be addressed administratively; it does not need a change to the bill.

The Convener: I do not doubt that but, to be honest, I would be unhappy to leave the matter without getting some assurance that the Executive expects the courts to work towards that. The resources question is a legitimate issue, especially in Glasgow, given that we do not want to tie the courts too tightly into giving dates if that could bring the system to a halt. Equally, I would like to know that that is where we would ideally like the system to be. On the whole, it seems to make sense that, when the accused is in court and is told the bail conditions, they should also be told the expected trial date, notwithstanding the fact that the date might be changed for some reason. Is it the Executive's position that it expects that we will move towards that being the norm once the pilots have been evaluated?

Hugh Henry: We are moving in that direction and that is increasingly the practice across Scotland. Our objection to amendment 47 is based not on principle but on practicality. We should reflect on what is being achieved in areas where the practice already exists and then roll out what has been identified as good practice.

Stewart Stevenson: Will the minister respond to my point about whether the accused is present?

Hugh Henry: Essentially, when an accused contributes by video link, the accused is regarded as being present.

Stewart Stevenson: Also, notwithstanding the formulation in amendment 11, would it still be possible for the court to provide the information even if the accused were absent? In other words, if we were to agree to amendment 11, would the court be prohibited from giving the information when the accused was absent?

Hugh Henry: There would be nothing to stop the court providing that information.

Stewart Stevenson: I just wanted that on the record.

Amendment 11 agreed to.

Amendment 12 moved—[Hugh Henry]—and agreed to.

The Convener: We will have a short comfort break of seven minutes.

11:33

Meeting suspended.

11:45

On resuming—

The Convener: Amendment 46, in the name of Margaret Mitchell, is in a group on its own.

Margaret Mitchell: Amendment 46 seeks to ensure that the accused will be given a copy of the bail order before being liberated. Its aim is to add to the efficiency and clarity of the process and to emphasise the importance of the bail order.

I move amendment 46.

Stewart Stevenson: In the light of our discussion on amendment 11, I wonder whether amendment 46 is adequately constructed. The accused might not be physically present—although they might be legally present—so there could be practical difficulties with the implementation of the provision in amendment 46. I will be interested to hear the minister's comments.

Hugh Henry: Amendment 46 is superficially attractive. In most cases, accused persons are given a copy of the bail order before they are released, but the 1995 act does not stipulate that that must happen.

As we have discussed, the bill includes a range of measures that will ensure that the accused understands the effect of the conditions in the bail order and the consequences of a breach of those conditions; for example, the court will be required to explain to the accused in ordinary language the effect of the bail conditions and the consequences of breaching them. That will be backed up by the additional requirement to provide a written explanation of the bail conditions and the consequences of breaching them in every case.

Amendment 46 would require that a copy of the bail order be given to the accused before he was liberated, as already happens in the vast majority of cases. I understand the desire for such a requirement to be included in the bill, but it could create difficulties in circumstances in which there was a delay in the production of the bail order. It is not always possible to have the bail order ready to give to the accused immediately. If the judge has, for example, imposed a number of special bail conditions, those need to be drafted into the order and checked for accuracy. In such circumstances,

a person who has been granted bail and who is not being held in custody will be asked to wait in the court building until the order is ready, but if they choose to leave the court, the order can be sent on by post.

That brings us back to the point that I made earlier, which is that a bail order takes effect when it is granted. A person is legally entitled to liberation as soon as the court admits that person to bail. We have required that when bail conditions are imposed, the judge must explain them to the accused in ordinary language so that the accused is aware of them immediately.

Margaret Mitchell's proposal could have serious resource implications. The more we add to the process, the more time consuming it becomes. If amendment 46 were agreed to, a person who had been admitted to bail might need to be detained pending receipt of their bail order if there was a delay in its production. There is a risk that that could result in an unnecessary and—this worries me more—unlawful delay in their liberation, to which they are legally entitled as soon as the court has decided to grant bail.

The law already makes it clear that the accused will be given a copy of the bail order and there is no evidence to suggest that that part of the process is not working in practice. Given the complexities that can be faced in individual cases, it is best that the practical arrangements that govern how the bail order is given to the accused be left to the people who work in the court. Although her proposal is superficially attractive, I hope that Margaret Mitchell will reflect on some of its practical consequences and seek leave to withdraw amendment 46.

Margaret Mitchell: The minister said that the imposition of a number of special bail conditions might hold up the bail order, but the example that he gave emphasised the need for the accused to have a copy of the order before they are liberated, so that they are aware of special bail conditions. The importance of the conditions would be reinforced by the physical presence of the order in their hands.

An explicit requirement in the bill to provide the bail order would concentrate minds in the administrative system on the importance of having the order ready, and it would ensure that priority was given to making the order available to the accused on liberation. The approach would have a worthwhile effect in the longer term, because the accused would leave the court with a piece of paper that explicitly set out what was expected, which would help to reduce later delays in the system. I will press amendment 46.

The Convener: The question is, that amendment 46 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Glen, Marlyn (North East Scotland) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

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

Amendment 46 disagreed to.

Amendment 47 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 47 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Glen, Marlyn (North East Scotland) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

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

Amendment 47 disagreed to.

Amendment 48 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 48 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Glen, Marlyn (North East Scotland) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

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

Amendment 48 disagreed to.

Section 2, as amended, agreed to.

Section 3—Breach of bail conditions

The Convener: Amendment 13, in the name of the minister, is in a group on its own.

Hugh Henry: Amendment 13 will change proposed new subsection 1A of section 28 of the 1995 act, which will be inserted by section 3(2) of the bill. Section 28 provides that an accused on bail may be arrested without warrant if the police have reasonable grounds to suspect current, past or likely future breach of bail. The accused may then be brought back to court for the terms of bail to be reconsidered. New subsection 1A will extend the power to detain an accused and bring them back to court for reconsideration of bail to situations in which an accused has been arrested under another power, but in circumstances that give rise to a reasonable suspicion of bail breach.

Amendment 13 makes it clear that if an accused is arrested under another power, but the police have reasonable grounds to suspect that he or she has breached or is likely to breach his or her bail conditions, the accused can be brought before the court for reconsideration of their bail position without the need for the police formally to rearrest the person under section 28 of the 1995 act.

The effect of amendment 13 will be that the circumstances that give rise to the suspicion of past or future bail breach will not need to arise from the incident or circumstances that led to the original arrest. For example, they could arise from statements that were made by the accused following his arrest.

I move amendment 13.

Stewart Stevenson: I seek clarification of what is meant by "is likely to breach" bail conditions. The bald words on the page look rather like they would provide a blank cheque, although I suspect that that is neither the intention nor how the provision would work in practice.

We would find it useful for the minister to give some examples of what he expects would be caught, and—if he so chooses—would not to be caught by the phrase. That would give us some comfort that the provision is not intended to be a black cheque for a constable who, for some reason, has formed a view on an individual.

Margaret Mitchell: I share that concern. The use of the word "likely" seems to introduce a subjective element. I ask the minister to expand on how the provision will work in practice.

Hugh Henry: One example is of a person who is making threats. Let us say that the police receive a call from a terrified woman whose husband has been charged with domestic abuse and is barred by his bail conditions from approaching the matrimonial home. The woman says, "He's outside the house. He's shouting abuse and making threats." If, when the police arrive at the house, the individual is slightly outside the area from which he is barred—perhaps at the corner of the street or in the next street—they will be able arrest him for an alleged breach of the peace, but they have a problem in that regard. If, for example, the only people who witnessed the incident were the woman and her three-year-old child, the police would have a problem in securing the corroboration that they require for a breach of the peace charge. In that example, it would be difficult for the procurator fiscal to proceed on a substantive charge of breach of the peace, although there may be enough evidence to give the police reasonable suspicion that the bail order was breached—corroboration is not required in "reasonable suspicion".

Amendment 13 would allow the police to detain the individual, bring him—in this case, the example is a man—back to court, where bail would be reconsidered or the bail conditions reviewed. In other words, in addition to the bail conditions that have been set, under which the man could not go near his wife, he would also be barred from the three or four streets adjacent to the house. The court may decide to extend his bail conditions or remand him in custody because of the serious nature of the breach. We can conceive of circumstances in which the provision in amendment 13 would be a useful tool; the police would not simply have to rely on using a breach of the peace charge.

I turn to circumstances in which the provision would not be used. One example would be when a breach of the peace had occurred but there was corroboration, in which case there would be no point in the police using the provision. We are talking about real events and the requirement for reasonable suspicion, but we are also trying to imagine a hypothetical situation. If there was nothing in the behaviour of the person, or nothing that they were doing that suggested in any way that they were not complying with their bail order, there would be no need to use the provision.

In the example that I gave, the woman's complaint was reasonable. However, if she had made the complaint and the man had been found to have been passing through her street on the way to visit his mother who lived in the next street, it might not have been found to be reasonable.

12:00

Stewart Stevenson: I hear what you say, but I want to discuss one difficulty in greater detail. You propose to delete from the bill the words

"incident or circumstances to which the arrest related involved the breaking by the accused of".

What is being deleted is specific. Although the person is being arrested for a certain reason, it is being shown that the "incident or circumstances" involved the actual breaking of the bail condition.

That is what is in the bill at the moment. The proposed addition to the bill will add "likely to breach" to an actual breach.

That is fine, but let me take the minister to another point in the bill. Proposed new subsection (1B)(b) of section 28 of the 1995 act says that proposed new subsection (1A)

"applies even if release of the accused would be required but for that subsection."

If somebody is detained simply on the basis that they are likely to breach their bail conditions, but have not done so—perhaps being 1m outside the proscribed zone as specified under those conditions and looking as if they are heading into that zone—it is not clear how they would get released again. The suspicion of the policeman that the person is likely to breach the conditions appears to continue to allow for that person to be held, judging from the wording in proposed new subsection (1B)(b). I know exactly what we are trying to achieve—I am with the minister on this—but I am not at all clear that the words and the way in which the bill is constructed will not introduce some significant difficulties.

You are, of course, being advised by lawyers, minister, and it may well be that you are able to explain that the legal position is different from the layman's reading of the words.

The Convener: It would be helpful to hear an explanation. It would also be helpful to hear further clarification of what will happen if amendment 13 is included in the bill. The situation that the minister described—it was the first situation that we would think of—was a domestic abuse case. I want to be sure that if the words "likely to breach" are included, the police will still test such a story. If persons can be detained in custody because it is "likely" that they have breached a bail condition, I want to be sure that you will impress upon the police the importance of testing the evidence at that point, rather than simply acting on a phone call saying that the person is about to breach bail for reasons X, Y and Z. I will be much more comfortable with the proposal if its purpose is to alert the person that they should think more carefully about how they deal with their obligations to comply with their bail conditions. It would be helpful if you could reply to any of those points.

Hugh Henry: The principle is not new. The 1995 act contains the wording:

"breaking, or is likely to break any condition imposed on his bail."

We are attempting to reflect that principle in the bill for circumstances in which the accused is arrested for a substantive issue, but not the one that was the immediate cause of the action that is being taken. For example, if a person was arrested for a breach of the peace and it became apparent to the police that that person was not only drunk and behaving in a manner that was likely to constitute a breach of the peace, but that he was also issuing threats against his ex-wife—if he was clearly about to do something in breach of a bail order—he could be brought back to court. He would be taken to court as soon as was practicable—probably the next day—and the court would deal with the matter appropriately.

It is not a new principle; we are merely trying to introduce circumstances in which we know that there is a threat to a bail order because of something else that the person is doing that would give the police cause to be concerned that the person is likely to breach the bail condition.

Stewart Stevenson: What charge will be laid when the person is taken back to court, given that it is accepted, under the circumstances that you have described, that he has not breached the bail order?

Hugh Henry: There is not a charge, as such. If there was a breach of the peace, the person would be charged with breach of the peace.

Stewart Stevenson: But the specific power that we are discussing will enable a police constable to continue to detain an individual even after the breach of the peace has been disposed of.

Hugh Henry: Yes.

Stewart Stevenson: How will that person get back out of the system again? By what process will that happen? If the person is taken to court, what will the court do?

Hugh Henry: The person will not be charged. The process is that they will go back to court to have the order reviewed, and the court will review the bail order. I refer you to section 28 of the 1995 act, which states:

"An accused who is arrested under this section shall wherever practicable be brought before the court to which his application for bail was first made not later than in the course of the first day after his arrest, such day not being, subject to subsection (3) below, a Saturday, a Sunday or a court holiday",

and so on. What we are proposing relates to something else for which such a person has been arrested. If there is a worry or concern that there could be a breach of bail, the person can be brought back to court for bail to be reviewed.

The Convener: Before we move on from that point, I just want to be clear that we are talking about section 3, on breach of bail conditions.

Hugh Henry: The provision that we are talking about will be inserted into section 28 of the 1995 act.

The Convener: You are telling the committee that the principle behind the amendment to the

1995 act is already contained in the 1995 act, that there is therefore no change and that amendment 13 is specifically designed for circumstances in which another offence is committed.

Hugh Henry: That is right. Amendment 13 will widen the provision, but the principle is essentially the same.

The Convener: I wonder why there is not in the bill a separate heading to identify that the provision is specifically to address that issue. It is quite hard for the committee to consider an amendment to the bill that will amend the 1995 act and to understand what it will do. It deals with more than breach of bail conditions, does not it?

Hugh Henry: No. It deals only with breach of bail, which is why—

The Convener: In relation to another offence.

Hugh Henry: Yes, but it is to be used where someone has been arrested for another offence and it becomes apparent as part of that process that there is a likelihood that bail will be breached. That is the issue that we are addressing—the breach of the bail conditions. That is why, for drafting purposes, amendment 13 is being used to insert that measure into section 28 of the 1995 act.

The Convener: I shall leave it there. From my point of view, you have now explained it pretty well, but if we had not had that discussion I would not have known that that is what section 3 is designed to do.

Margaret Mitchell: I am curious about the scenario that the minister outlined. Would not causing distress and alarm or making threats be covered by what will now be the standard bail condition?

Hugh Henry: It would apply where it is believed that there is likely to be a breach. Even if that was the case, if it was believed that a person was likely for any reason to breach bail, they could be brought back to court for the order to be reviewed, extended, strengthened or whatever might be considered appropriate in the circumstances. The principle of doing that already exists in the 1995 act, and amendment 13 merely addresses the situation in which someone has been arrested for something else and where, in the course of that process, it becomes obvious or apparent that there is a potential for breach of a bail condition. The amendment is designed to address that potential breach while the authorities have got the individual for another offence.

Margaret Mitchell: In the scenario that you outlined, would there be an actual breach of the standard condition prohibiting behaviour that might cause alarm or distress, which the bill will introduce?

Hugh Henry: There could be, but there might also be circumstances in which there was no such breach but it was thought that a breach was likely, perhaps because of the person's behaviour or something that they said. Those are the circumstances that amendment 13 attempts to address.

Margaret Mitchell: It would greatly aid my understanding if you could give an example of a situation in which the standard condition prohibiting behaviour that is likely to cause alarm or distress would not apply, such that the provision in amendment 13 would kick in.

Hugh Henry: It might not be necessary for the police to arrest the person. I will return to the example that I gave earlier. If a police officer arrested a person for a breach of the peace a couple of streets away and because of what they said during the course of the arrest—without the woman's knowledge—it became obvious to the police officer that there was reason to fear that the person was likely to breach his bail conditions, the policeman could immediately ask for the bail order to be reviewed. The court might prevent the accused from using not only a particular street but the adjacent two or three streets, or it might order him not to go there at certain times.

The court could do whatever it thought was appropriate to strengthen the bail conditions, if it had become apparent to the police officer, while dealing with a breach of the peace that ostensibly had nothing to do with the offence in relation to which bail had been granted, that if the situation was not addressed the person might well breach his bail conditions and cause alarm and distress to someone. The approach is precautionary and preventive and the principle behind it is no different from the principle that pertains in the 1995 act.

Margaret Mitchell: That is helpful. You are talking about the fact that the person who might feel alarmed or distressed would not have knowledge of threats that had been directed at them via a third party.

Hugh Henry: The threats might not necessarily be made to the woman, so she might not be aware of the person's behaviour. However, a police officer might be concerned about a potential breach of bail conditions.

The Convener: That is helpful.

Amendment 13 agreed to.

Section 3, as amended, agreed to.

Section 4—Bail review and appeal

The Convener: Amendment 14, in the name of the minister, is in a group on its own.

Hugh Henry: Amendment 14 will place beyond doubt the right of a person who has accepted their bail conditions to seek a bail review.

Provisions on bail review are set out in section 30 of the 1995 act. Section 30(1) of that act provides that a person who has been bailed can seek a bail review only if they have

"failed to accept the conditions imposed".

In practice, however, most people who seek a bail review recognise their obligation to comply with bail conditions, but simply want those conditions to be removed or varied. That might be because they have been offered a job that they can take up only if a curfew condition is altered, or because they seek review of a condition that bars them from the matrimonial home because there has been a reconciliation.

Section 4 of the bill amends section 30(2) of the 1995 act to provide that the court can alter bail conditions only if the circumstances of the person bailed have changed or if there is new information to place before the court. Amendment 14 will further amend section 30, making it clear that a bail review is available to a person who accepted their bail conditions but wants them to be removed or varied because their circumstances have changed. Whether such applications should be granted will, of course, continue to be a matter for the court, which will take account of all the circumstances of the case.

I move amendment 14.

Amendment 14 agreed to.

12:15

The Convener: Amendment 15, in the name of the minister, is grouped with amendments 16 to 20 and 22.

Hugh Henry: Amendments 15 to 20 change the practical arrangements that are set out in section 4(2) for the lodging and processing of bail appeals. The changes are being made to ensure that the process operates as efficiently as possible. They relate particularly to the way in which bail appeals from the sheriff courts and district courts are to be processed, placing a greater onus on the clerk in the local court to process matters associated with the appeal.

The bill as introduced provides that the clerk of justiciary in the High Court should request reports from judges in all cases where bail appeals have been lodged. Given that most bail appeals come from the sheriff courts and district courts, and that the notice of appeal has to be lodged at those courts, it makes more sense for the clerks of those courts to request a report from the judge on the bail decision and to be responsible for transmitting it to the High Court, along with the note of appeal.

Amendment 15 provides that a notice of appeal against bail decisions is to be lodged with the clerk of the court in which the decision regarding bail was made.

Amendment 16 provides that it is the clerk of the court in which the decision regarding bail was made who is responsible for sending a copy of the notice of appeal to the judge whose decision is being appealed. That must be done without delay.

Amendment 17 provides that the clerk of the court in which the decision regarding bail was made is to request that the judge whose decision is being appealed should provide a report of the reasons for that decision.

Amendment 18 provides a new subsection (3B) of section 32 of the 1995 act, which makes it clear that the judge whose decision is being appealed should, as soon as reasonably practicable, provide the clerk of the local court with a report of the reasons for the bail decision.

Amendment 19 introduces three new subsections into the 1995 act. These provide that the clerk who receives the notice of appeal should send it without delay to the clerk of justiciary, except where the clerk of justiciary has received that note of appeal directly; that the clerk who receives the judge's report should send it to the clerk of justiciary before the end of the day after the day on which the notice of appeal was received—which will ensure that the clerk does not delay onward transmission; and that the clerk of justiciary is to fix a diet for the hearing of the bail appeal without delay once the notice of appeal has been received.

Amendment 20 is consequential on amendment 19 and simply changes a cross-reference to take account of the amendments.

With regard to amendment 22, in almost all cases an appeal against refusal of bail in the sheriff or district courts is lodged with the court that dealt with the bail application. There are two exceptions: where the accused, or a probationer or offender, has been remanded in custody to allow inquires to be made into the most suitable method of dealing with the case under sections 201(4) or 245J of the 1995 act. In those cases, the appeal against refusal of bail is lodged with the High Court, which then has to refer back to the original court for the papers. That could cause delay. Amendment 22 brings the process for appealing against the refusal of bail in the sheriff or district courts under sections 201(4) or 245J in line with the others in the 1995 act. It provides that the appeal must be lodged with the clerk of the court from which the appeal is taken.

I move amendment 15.

The Convener: I seek clarification on the judge's report for the appeal. I take it that the normal procedure at the moment is that the judge would provide some kind of report for an appeal case.

Hugh Henry: We are not seeking to change the fundamental principle of what the judge is required to do; we are merely seeking to change the route by which the report reaches its final destination.

Amendment 15 agreed to.

Amendments 16 to 19 moved—[Hugh Henry]—and agreed to.

The Convener: Amendment 49, in the name of Margaret Mitchell, is grouped with amendment 50.

Margaret Mitchell: Amendment 49 seeks to ensure that both the accused and their solicitor if they are being represented by a solicitor should receive a copy of the judge's report. Notifying both would aid efficiency.

Amendment 50 seeks to ensure that information on the intermediate trial diet is intimated to the solicitor of the accused as well as to the accused. Again, the purpose is to aid efficiency and encourage the procurator fiscal and the solicitor of the accused to communicate as early as possible so that an early plea can be tendered.

I move amendment 49.

Hugh Henry: Currently, the bill provides that the clerk of justiciary may send the judge's report to the accused or to his or her solicitor. I understand that the current practice is to send reports to the solicitor who is acting for the accused in all cases in which the accused is represented. There are no plans to depart from that approach, which ensures that those who represent the accused have access to the report as quickly as possible. However, the legislation needs to make provision for service of the report on the accused in cases in which the accused is conducting his or her own defence.

The provisions in the bill have been framed to allow the most appropriate method of service to be used in each case. There is no evidence to suggest that the current absence of a requirement for the report to be served on both the accused and his or her solicitor leads to any difficulties. To build into the legislation a requirement to issue the report twice when there is no evidence of problems with the existing arrangements would create an unnecessary administrative requirement and build inefficiency into the system. Such matters are best left to those who are involved in individual cases. Amendment 49 is therefore unnecessary.

Section 10 aims to ensure that accused persons attend court for subsequent appearances after the pleading diet by ensuring that the dates of those diets are intimated by the court and that the court makes it clear to the accused that if he or she should fail to appear at one of those diets, the case may proceed in his or her absence. The effect of amendment 50 would be that intimation of future court dates would have to be made both to the accused and to his or her solicitor in every case in which the accused is legally represented. However, making such double intimation an absolute requirement in law would not be sensible. The court would be forced to intimate future dates both to the accused and to his or her solicitor even where it was clear that intimation to one of those parties would be sufficient. What would be the point of doing so? We must give people who work in the courts every day the flexibility to do their jobs properly. It is essential that robust procedures are in place for ensuring that intimation takes place, but that does not mean that procedures should force the intimation to take place twice.

Section 21 already makes provision for allowing anything that requires to be intimated to the accused, with the exception of the initial complaint, to be intimated through his or her solicitor where that solicitor has informed the court that he or she is acting for the accused. Therefore, it will be possible under the bill to notify the accused, his or her solicitor or both—if that is thought to be appropriate in the circumstances—of forthcoming court dates. The provisions balance the need to ensure that the accused is properly notified of forthcoming hearings with the need to ensure that the court is not subject to unnecessary procedural requirements that would simply clog up the administrative system. Therefore, I see no need for amendment 50.

Margaret Mitchell: I am confused. The bill highlights administrative things that courts will be directed to do. You have made it clear that those measures will speed up efficiency and concentrate minds and that they should be done as a priority. However, you do not support amendment 49. The thinking behind the bill is confused if it is thought that direction is desirable at some points but that the courts should be left to get on with things in other circumstances.

It has been suggested that only the accused should be notified of diet or trial dates, but we know that many accused persons lead chaotic lives. Informing them and their solicitor if they are represented by a solicitor at the same time about what is happening can only aid their ability to remember and concentrate on things and to appear when they are supposed to appear. Amendments 49 and 50 would therefore improve the efficiency of the court system, which the bill

seeks to do. For those reasons, I will press both amendments.

The Convener: The question is, that amendment 49 be agreed to. Are members agreed?

Members: No.

The Convener: There will be a division.

FOR

McFee, Mr Bruce (West of Scotland) (SNP)
Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 2, Against 4, Abstentions 0.

Amendment 49 disagreed to.

Amendment 20 moved—[Hugh Henry]—and agreed to.

Section 4, as amended, agreed to.

After section 4

Amendment 21 moved—[Hugh Henry]—and agreed to.

Section 5—Time for dealing with applications

Amendment 22 moved—[Hugh Henry]—and agreed to.

Section 5, as amended, agreed to.

Section 7—Electronic proceedings

The Convener: Amendment 23, in the name of Hugh Henry, is grouped with amendments 24 to 39.

Hugh Henry: The committee will have to bear with me as I go through the detail of these amendments.

Amendments 23, 28, 34 and 35, which are technical, seek to alter the structure and position of the provisions relating to electronic proceedings both in section 7 of the bill and in the Criminal Procedure (Scotland) Act 1995 into which they will be inserted. They have no effect on the substance of the provisions relating to electronic proceedings.

Amendments 24, 26 and 27 seek to extend the range of situations in which the use of an electronic signature will satisfy the requirement for a document to be signed, allowing the prosecutor and clerk of court to make appropriate use of electronic signatures in the interests of efficiency.

Amendment 24 seeks to make it clear that an electronic signature will be regarded as a valid signature on all complaints. This amendment, along with amendment 29, which seeks to extend the definition of electronic signature, will mean that the printed signature on the hard copy of the complaint will be valid.

Amendment 26 seeks to allow the requirement for citations served by post to be signed to be satisfied by an electronic signature that is subsequently printed, and amendment 27 seeks to allow the clerk of court to sign with an electronic signature the documents listed in section 172(2) of the 1995 act, which must be signed before they are executed.

Amendments 25 and 39 seek to extend the use of electronic communication in the courts by allowing for jurors to be cited by electronic means, which will ensure that business can be carried out as effectively as possible and that the process of jury citation can keep up with changes in technology.

Amendment 25 seeks to allow citations to be legally effective where an electronic signature is applied by or on behalf of the sheriff clerk. That will allow not only electronic citations but the hard copy citations that are currently posted to jurors to be validly signed with an electronic signature that is subsequently printed.

Amendment 39 seeks to introduce the provision necessary for the electronic citation of jurors by allowing for a juror to be cited by or on behalf of the sheriff clerk by means of electronic communication. Such a citation will be sent to the home or business e-mail address of the juror. The amendment also seeks to set out what constitutes an electronic citation and what the sheriff clerk needs in order to establish that an electronic citation is a legal citation. I stress that there are no immediate plans to move to wholesale electronic citation of jurors, but amendments 25 and 39 increase the options open to the courts.

Amendment 29 seeks to support the existing policy in section 7 by providing that, under the provisions of the 1995 act, an electronic signature on a document is valid if it is subsequently printed on a paper version of the document. That point should be made clear because although an electronic signature might be valid while the document remains in electronic form, a further manual signature will be required as soon as the document is printed. We want to avoid such a situation, as it will largely defeat our attempts to introduce efficiency by allowing through the bill the increased use of technology.

Amendments 30 to 33, which are technical in nature, seek to ensure that the powers contained in section 7 are comprehensive—indeed, the

committee asked us to do as much at stage 1—and that the terms used in section 7 are properly defined.

Amendment 30 seeks to extend the order-making power in section 7(2) to include the power to make further provision in relation to the formality and validity of electronic documents.

Amendments 31 and 32 provide that, under the order-making power in section 7(2), ministers may make provision in relation to the authentication of all documents, records and information mentioned in that section, not just those in electronic form. That is an important inclusion, as provisions under that power may need to apply to signatures on hard copies of a document, not just the electronic version.

12:30

Amendment 33 ensures that the terms "electronic complaint" and "electronic communication", which are used in section 7(2) of the bill, are clearly defined. The amendment is being made in response to a call from the Subordinate Legislation Committee.

Amendments 36 to 38 are minor, technical changes to the amendments that section 8 of the bill makes to section 141 of the 1995 act and are being made for the sake of clarity. The phrase

"an electronic communication in legible form"

is amended to read:

"a legible version of an electronic communication".

Amendments 36 to 38 ensure that it will be competent to use in court a legible version of an electronic communication taken from, for example, a sent items folder.

I move amendment 23.

Mr McFee: I have one small point on amendment 39. What consideration has been given to proof of delivery to ensure that the citation has been received?

Hugh Henry: A juror's citation is sent to the address—or, in future, the e-mail address—that the potential juror gives in the schedule that the sheriff clerk sends to them, so a potential juror would have provided a valid address. If the juror does not attend in answer to the citation, the court can impose a fine. Wholesale citation of jurors by e-mail is not anticipated, but there are means of establishing that something has been validly sent. Proposed new subsection (4B) that the bill would insert into section 85 of the 1995 act under amendment 39 says:

"Citation under subsection (4A) above is a legal citation if the sheriff clerk possesses a legible version of an electronic communication which …

(c) bears to have been sent to the home or business email address of the juror being cited",

so it is legal if the sheriff clerk is able to establish that that has been done.

Mr McFee: I am clear that the sheriff clerk could establish that he sent it to what he believed was a reasonable address. However, if a juror does not turn up, I am not clear how the sheriff clerk proves that the juror received the citation. I can give you a couple of practical examples: what happens if a server has gone down or if more than one individual has access to the e-mail account? My concern is that somebody who has not received a citation may have some action taken against them and may be fined. My question remains: what work has been done to ensure proof of delivery? I understand that, if a citation is served on somebody at the moment, there is some form of proof of delivery but, although I understand what you said about proof that the citation has been sent, I do not see any provision for establishing proof of delivery in the amendments. That is crucial.

Hugh Henry: I understand what Bruce McFee is saying. He makes a point about more than one person having access to an e-mail address, but if an individual wishes to be communicated with by e-mail, it would be incumbent on them to ensure that they give an e-mail address to which they have access and which allows the citation to be served properly.

We are not moving to wholesale use of e-mail citation; we are legislating for the potential to use it at some point in the future. However, the circumstances that Bruce McFee describes could apply to the situation that currently obtains. When we send stuff by post, we have proof of posting but no proof of receipt. If a juror does not turn up, how do we know that they have not received the citation unless it was sent by recorded delivery? In a sense, we are no further forward or back from the current situation.

The Convener: You talked about people wishing to be communicated with by e-mail. Does that mean that a juror can opt into such communication?

Hugh Henry: Yes. We are trying to anticipate the changes that might be made in future. There are people—although I am not one of them—who prefer to receive their communications by e-mail. If that makes it easier for them to receive things, perhaps because they travel about—

The Convener: Will you give us an assurance that the provisions are about providing options? I use e-mail for a lot of different things, but I will not use it for my bank statements, although I know that Stewart Stevenson disapproves of that. I would be concerned if we moved towards making

it compulsory for information to be sent electronically, because I think that more can go wrong with e-mail.

Hugh Henry: We are talking about someone opting in to receive information electronically. Bruce McFee asked how we can be sure that a person receives such information, but we cannot be sure that they receive a letter unless it is sent by registered post or recorded delivery.

Mr McFee: What is the current position on the serving of citations on jurors? I want to see whether your argument stands up.

Hugh Henry: Citations are normally sent by recorded delivery, but—

Mr McFee: Indeed, so they would be required to be signed for.

Hugh Henry: No. Sending something by recorded delivery does not require it to be signed for by the person to whom it was sent. I have received things at home that were sent to me by recorded delivery, which have been signed for by my wife, son or daughters.

Mr McFee: Okay, but there would be some indication that the citation had been received by an individual at the address in question—

Hugh Henry:—although not necessarily by the individual on whom the citation was served.

Mr McFee: I understand that. I said that there would be an indication that it had been received at the address by an individual.

I understand that the system for serving citations electronically is an opt-in system and that it would be rare for it to be used. However, I suspect that, as time goes on, the system might not remain an opt-in system and that it would be used more widely; otherwise, there would be little point including a provision for it in the bill.

I do not think that the Executive has thought through some of the things that could go wrong for an individual who might wish to sign up to receiving a citation by e-mail. I do not see any protection in the bill for those who are the innocent victims of an e-mail not reaching their machine or who do not receive it for some other reason. There are more reasons for that than just that someone else might have access to their in-box.

I am not opposed in principle to electronic citation. However, I do not want to agree to a provision that does not contain basic safeguards. You cannot simply argue that a registered letter might not have been received by the individual by whom it was intended to be received. I suppose that the equivalent of deleting the e-mail would be putting a letter in the bin. However, if a letter is sent by recorded delivery, at least there is proof that it got as far as the house. We would not have such proof in a system of electronic citation.

I am not minded to support this group of Executive amendments unless the minister indicates that at stage 3 the Executive will provide for some system of verifying that such e-mail citations have been received.

Stewart Stevenson: Amendment 29 refers to:

"a version of an electronic signature which is reproduced on a paper document."

I ask the minister to confirm that an electronic signature is simply a sequence of numbers, not a facsimile of what we would recognise as a handwritten signature.

Hugh Henry: Yes. An electronic signature could be a sequence of characters.

Stewart Stevenson: I will be fussy and say that it would be hexadecimal numbers.

Hugh Henry: I bow to Stewart Stevenson's technical knowledge. He is correct that we are not talking about a facsimile signature.

Stewart Stevenson: Therefore, it would not be immediately visually verifiable as meaning anything, but, with the intervention of a computer system, it would be capable of being verified in a different way. I just wanted to be clear about that. I am quite content with amendment 29.

Hugh Henry: I believe that Stewart Stevenson is correct—I hesitate to disagree with him.

I turn to the issue that Bruce McFee raised. We are talking about an opt-in provision. It is not the thin end of the wedge. If any change was made in future that required a compulsory route to be taken, further legislation would be required. We would need to come back to the Parliament on the matter.

Notwithstanding Bruce McFee's point that it might be possible to establish that a piece of documentation was delivered to a particular address, with which I agree, we cannot establish that that documentation was delivered to a particular individual. He also raised the issue of the electronic communication that the person had opted into receiving not being delivered for whatever reason. In the circumstance of the court deciding whether to impose a penalty on someone for failing to appear in court, it would have to inquire into the reasons for such a failure and take a flexible approach. In other words, if the individual concerned could establish that they did not receive the electronic communication because a server was down or because this or that did not happen, the judge would have to take account of that. I cannot for the life of me conceive of a judge taking action if a juror was able to establish that there

was good reason why they had not received the communication.

Similarly, if a person failed to turn up because they had not received a recorded delivery letter, I would expect the judge to take account of the fact that the person had not seen the letter. Perhaps another individual in their house with whom they had been arguing had signed for the letter and ripped it up. If someone could establish such a course of events, it would be perverse for the court to punish them.

The present situation allows for someone to be punished—or not to be punished; the decision will depend on the circumstances. The same situation will pertain in respect of electronic versions of documentation.

Margaret Mitchell: My point is a relatively mundane one. Amendment 36 says:

"In section 8, page 11, line 19, leave out 'an electronic communication in legible form'".

I think that the reference should be to line 20.

Hugh Henry: The word "an" is at the end of line 19.

Margaret Mitchell: I stand corrected.

Stewart Stevenson: The minister made reference to coming back and making amendments—I am referring not to the amendments that we are debating today, but to other occasions and other circumstances. I ask him to reflect on the fact that many of the issues that relate to electronic communication and its definition are not covered by legislation that is devolved to the Scottish Parliament.

In particular, I refer to the definitions of things such as electronic signatures. It would be useful if the minister were to acknowledge that the changes that he proposes may not be as simple to effect as he suggests. In asking him to do that, I recognise the likelihood that other parts of the United Kingdom would be similarly affected. Unless we move rapidly ahead—which I would encourage—there will be that difficulty.

Hugh Henry: As Stewart Stevenson rightly says, the definitions of electronic signatures and related certificates are contained in the Electronic Communications Act 2000. However, my point about needing to come back for further parliamentary approval related not to the definitions or to the use of the electronic signatures per se but to the issue of compulsion and removing the element of opt-in. Clearly, it is within our competence to do that.

If necessary, should we need to take account of a different set of considerations for electronic signatures, we would be able to use legislation other than the Electronic Communications Act 2000, but that is a separate matter. The principal issue is whether we need to return to the issue of opt-in or compulsion, and that is clearly within our competence.

12:45

Mr McFee: I seek clarification, as I am not convinced by your argument that the difficulties that might be encountered by a person receiving an e-mailed citation are the same as those that might be encountered by a person receiving a recorded delivery or registered letter. Do you intend to return at stage 3 with some further amendments on proof of delivery, or are you content with the amendments as drafted?

The Convener: Before you answer that question, minister, I would like to add something. I think that we should anticipate that things will change in the next 10 years, and I am okay with that. What I am not okay with is allowing the courts carte blanche to decide how the electronic provisions will work. I am reassured by what you have said about electronic communication being optional. At the moment, that is fundamental, and I would want there to be further consideration if we were to move to a compulsory system of electronic communication. There is only one other thing that I would ask for. I hear what you say about the current system not being foolproof in any case, but I would welcome some assurance at stage 3 that there would be broadly equivalent checks, particularly for a citation.

You said that you can never really show that something has been received, but you can show that a paper citation has left the office, and I wonder whether we could get equivalent evidence for an e-mail citation. I accept your point that, whether it is a paper version or an electronic one, you cannot prove whether someone has received a citation—they will have to present their case in court at the end of the day. Before stage 3, could you give some further thought to what checks and balances the Parliament could put in place before giving a lot of flexibility to the courts for the next few years in relation to the use of electronic processes?

Marlyn Glen: I know that, when an e-mail is sent, the system can be set up so that you can see that it has gone and when it has been read. Would that be helpful?

Hugh Henry: I have no idea.

Stewart Stevenson: I would like to make a helpful comment. The only unambiguously secure way of knowing that an e-mail has been received is to have a receipt returned that is itself electronically signed. Doing so is unusual in the present technological environment, but it is something that some of us choose to do in certain

circumstances. It would be perfectly possible for a potential juror to sign up on the basis that that would be the way in which the electronic communication between court and juror would operate, and such a method would be technologically capable of removing ambiguity. However, the great majority of people do not happen to have a technologist sitting at their shoulder to advise them, so although electronic notification is probably operationally more efficient—and I support it—we are probably no worse or better off with regard to absolute certainty about delivery if we use the Post Office as the medium for those communications.

Hugh Henry: I hope that Stewart Stevenson intended to reassure us rather than criticise the Post Office. I accept his point that under the current system there is the potential for problems. Our worries about what might happen if we use electronic communication often reflect our fears and ignorance as much as they reflect the practicalities of electronic communication. I confess that I am completely ignorant about how electronic communication works, so I can offer no detail on that.

I will consider the points that the convener and Bruce McFee made and if we need to do more at stage 3 we will do so—I say that without making a firm commitment, because I will do more only if it is absolutely necessary. I give an assurance that there will be no carte blanche, given that we are talking about an opt-in approach. However, I will reflect on whether that approach would allow changes to be made without proper scrutiny or the required detail. We intend merely to make it possible for people to receive communications by electronic means if that is what they prefer; we are not imposing a fundamentally different means of communication. Notwithstanding the fact that many people choose to communicate electronically, many of us still choose more traditional means of communication.

Amendment 23 agreed to.

Amendments 24 to 33 moved—[Hugh Henry]—and agreed to.

Section 7, as amended, agreed to.

Amendments 34 and 35 moved—[Hugh Henr]—and agreed to.

Section 8—Manner of citation

Amendments 36 to 38 moved—[Hugh Henry]—and agreed to.

Section 8, as amended, agreed to.

Section 9 agreed to.

Section 10—Intimation of diets etc

Amendment 50 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 50 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

McFee, Mr Bruce (West of Scotland) (SNP)
Mitchell, Margaret (Central Scotland) (Con)

AGAINST

Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 2, Against 4, Abstentions 0.

Amendment 50 disagreed to.

Sections 10 and 11 agreed to.

The Convener: I thank Hugh Henry and the bill team. We will see you again to consider the bill in the second week after the recess.

The next meeting of the committee will take place after the recess, on Tuesday 24 October, when we will consider a draft report on our Scottish Criminal Record Office inquiry.

Meeting closed at 12:54.

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