JUSTICE 1 COMMITTEE

Wednesday 8 November 2006

Session 2

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JUSTICE 1 COMMITTEE
† 40th 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 4

† 39th meeting 2006, Session 2—held in private.

Scottish Parliament

Justice 1 Committee

Wednesday 8 November 2006

[THE CONVENER *opened the meeting at 09:51*]

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

The Convener (Pauline McNeill): Good morning and welcome to the Justice 1 Committee's 40th meeting in 2006. All members are present and I am sure that mobile phones have already been switched off.

Agenda item 1 is the Criminal Proceedings etc (Reform) (Scotland) Bill. I welcome once again Hugh Henry, the Deputy Minister for Justice, who is accompanied by Alex Gordon, Paul Johnston, Noel Rehfisch and Tom Fyffe, from the bill team.

Section 12—Disclosure of convictions

The Convener: Amendment 52, in the name of Marlyn Glen, is in a group on its own.

Marlyn Glen (North East Scotland) (Lab): Amendment 52 seeks to remove from the bill proposed new section 166B of the Criminal Procedure (Scotland) Act 1995. This is an important opportunity to clarify the proposed new section, which it seems would introduce a fundamental change in criminal procedure by allowing a charge that discloses that an accused person has a previous conviction to be placed on a complaint with other charges. The rationale for the current prohibition on references to previous convictions being made on the same complaint as other charges is to preserve the transparency and impartiality of the system. Judges must not only be impartial but be seen to be impartial. I ask the minister to comment on the issue on the record and to satisfy the committee and outside bodies that there are sufficient grounds for such a departure.

I move amendment 52.

The Deputy Minister for Justice (Hugh Henry): The existing law requires that, if there are several charges against an accused and one charge discloses that the accused has been convicted previously, as Marlyn Glen said, that charge must be on a separate complaint. If the case proceeds to trial, two trials are necessary. The most common example of that relates to road traffic offences. If an accused is charged with driving while disqualified and drunk driving, the charge of driving while disqualified is heard on one complaint, as it reveals the previous disqualification, while the other charge is on a separate complaint. If the charges relate to one event, the judge and witnesses will most likely be the same in both cases.

As members will realise, that process adds to the volume of cases in court. From one incident there can be two separate charges and, potentially, two separate trials. The fact that the charges must be separated in that way leads to increased bureaucracy and additional inconvenience for victims and witnesses, who may be required to give evidence at two separate trials despite the fact that the charges relate to the same incident. Wherever possible, all charges arising out of one incident or course of criminal conduct should be dealt with in a single complaint, so that they can be disposed of in a single trial. That will make the best use of court time and—an important factor—the time of victims and witnesses, and it will reduce the pressure that they are under.

Judges are used to conducting trials where the substance of the charge, such as driving while disqualified, discloses the fact that the accused has been previously convicted. That is in the nature of the charge; it throws up the fact that there is another problem. I do not agree that the provision in any way compromises the ability of the judge to make an independent judgment based on the facts of the case, and to be seen to be doing so.

Stewart Stevenson (Banff and Buchan) (SNP): The minister appears to be addressing his remarks to proposed new section 166B(2)(a) of the 1995 act, which is the paragraph on offences that

"relate to the same occasion".

I hope that he will also address his remarks to proposed new section 166B(2)(b), which encompasses offences that relate to previous occasions and previous convictions. In particular, he may care to comment on the ability of a professionally trained judge to exercise judgment as to facts and relevance, and how that balances with the contrasting situation that might arise where a jury is involved, as jurors might not have the experience to make that discrimination. I am interested to hear what he has to say about that.

Hugh Henry: We are talking about summary cases, so the question of a jury would not arise. That is an important factor. Stewart Stevenson has pointed out the distinction between proposed new section 166B(2)(a), which relates to offences on the same occasion, and proposed new section 166B(2)(b), which relates to offences that

"are of a similar character and amount to (or form part of) a course of conduct."

The principles that I articulated are the same. The fact that the judge has experience of dealing with such factors means that he or she is able to make a decision based on the facts and the evidence.

To give an example of a case in which there could be a number of occasions or crimes, imagine that there is a known thief who is in possession of the tools that are necessary to commit a crime. If he breaks into a house the next day, there could be two separate charges, but both charges could be dealt with together. A judge would be professionally competent, and in a unique position, to determine whether he or she was unduly influenced in such a case, so I do not share the concerns that Stewart Stevenson suggests might arise.

The judge is in a position to make an independent judgment based on the facts of the case, and can be seen to do so. I understand the concerns raised by Marlyn Glen but, in the interests of justice and in the interests of victims and witnesses, it makes sense to deal with everything together at one trial.

The Convener: On the back of Stewart Stevenson's question, I would like to clarify what proposed new section 166B(2)(b) means when it refers to offences that

"are of a similar character and amount to (or form part of) a course of conduct."

Is that what you are talking about? Does it mean that the prosecutor would be able to lead evidence in court, before a judge in any summary trial, that he or she regards that an offence is of a similar character and amounts to a course of conduct?

Hugh Henry: The prosecutor would try both charges together. I refer again to the example that I gave of a known thief being in possession of tools that are capable of being used to effect a theft and then, the next day, breaking into a house. Both charges would be taken together, rather than as separate charges.

The Convener: Proposed new section 116B is about trying charges together. The first example that you gave is well known—the offence of driving while disqualified—and there was some discussion of it last year in relation to the European convention on human rights. Is that the principle behind proposed new section 116B?

Hugh Henry: Yes.

The Convener: I take it that we are not going to move to a situation in which prosecutors generally lead evidence of previous convictions of a similar character.

Hugh Henry: No.

10:00

The Convener: I ask the question because that is the road that England and Wales have gone down and I am opposed to that. However, the circumstances that you describe seem to be a good case for ensuring that, if charges are linked to one another, they are brought before the court together. I want to be clear that that is what we are talking about in proposed new section 166B of the 1995 act.

Hugh Henry: Exactly, convener. I can give you that assurance. Proposed new section 166B(2) states that the charges must

"relate to the same occasion"—

I have given an example of that in relation to a driving offence—or be offences

"of a similar character and amount to (or form part of) a course of conduct."

It is not about taking two totally isolated charges and running them together in one trial. It is exactly as you say, convener: there must be a link. The bill says that the offences must be

"of a similar character and amount to (or form part of) a course of conduct."

The Convener: I just want to be clear whether, if a charge of assault is before the court, a three-year-old conviction, for example, could be raised under proposed new section 166B. Is the principle of the section one of trying together charges that are linked in time?

Hugh Henry: Yes, that is correct.

Mike Pringle (Edinburgh South) (LD): I understand that if somebody commits assault at 9 o'clock, 10 o'clock, 11 o'clock and 12 o'clock at night, all four charges can be tried together.

Hugh Henry: That is correct.

Mike Pringle: However, if the accused assaults somebody on Friday night at 10 o'clock and on Sunday night at 10 o'clock, the charges cannot be tried together.

Hugh Henry: It depends on whether the assaults form part of a course of conduct. Charges can be brought together at the moment in any case, and the example that Mike Pringle gives would not necessarily relate to the disclosure of a previous conviction. Proposed new section 166B is headed "Charges which disclose convictions", and we are talking about bringing such charges together. In the example that I gave of drunk driving while disqualified, although the charges could be linked, one of them would have the potential to disclose the fact that there was a previous conviction. In the case that Mike Pringle gave, the charges could be linked anyway unless there were previous convictions. The other

example that I gave was of a known thief. That is someone who is known to be a thief, so they clearly would have a previous conviction.

Proposed new section 166B is purely about charges that disclose convictions that are being tried together if they either

"(a) relate to the same occasion; or

(b) are of a similar character and amount to (or form part of) a course of conduct."

The Convener: I am not certain that that clears it up.

Stewart Stevenson: We have established that proposed new section 166B applies only if the charge itself makes the disclosure and that it is not about disclosure anywhere else, which is a different matter. That is useful to know.

Would a charge for breach of a post-conviction order where the conviction was from several years previously be an example of a case in which there might legitimately be a substantial interval between the previous conviction and the charge? I think that I am correct in saying that a sexual offences prevention order is one such order. Because the order demonstrably would have been put in place in the context of a conviction, a prosecution for breach of the order would, of necessity, reveal the previous conviction, even if it was several years previously—perhaps even 10 years previously.

Hugh Henry: Yes.

Stewart Stevenson: I suggest that such examples will not unduly concern the committee. Our concern is whether we are missing some other examples in which the relationship between the previous conviction and the new charge that discloses that conviction is not so soundly based. It would be useful if you could assure us that you have not identified any other examples like the one that I have given, in which there would be a distance between the conviction and the charge.

Hugh Henry: I understand what Stewart Stevenson has said. He has given an example where it is disclosed, by necessity, that someone who is charged has a previous conviction. However, we are not just talking about a situation in which a previous conviction for driving while disqualified is, of necessity, disclosed. We are also trying to bring in the fact that, where two charges "of a similar character", as proposed new section 166B(2)(b) of the 1995 act says, are linked together, it makes sense not to try the charges as separate offences, despite disclosing in the trial that there has been a previous conviction.

In response to Mike Pringle's example, this is not about totally separate charges being lumped together. The concern is cases where there is a worry about disclosure potentially prejudicing a trial. There can be occasions when, although a conviction is disclosed, the matters are so intrinsically linked that it makes sense to have one trial rather than separate trials.

The Convener: That is helpful. In the scenario that Mike Pringle discussed, involving several charges, the charges would be rolled up together. It would not be a question of previous convictions. We are talking about situations where it is necessary to disclose a previous conviction in order to prove the current charge. As far as Scots law is concerned, that clears up any issue that has been brought before the European Court of Justice in relation to driving while disqualified, for example.

Hugh Henry: Yes.

The Convener: We were worried that proposed new section 166B(2)(b) might allow the courts to let the prosecutor lead with previous convictions "of a similar character", but it is not about that. We wanted to be clear on that point.

Marlyn Glen: This has been an important discussion. We always want to maintain the balance of fairness between victims and witnesses on the one hand and the accused on the other. It is important that justice is swift, but expediency is not the only concept that we must follow. I thank the minister for his answers.

Amendment 52, by agreement, withdrawn.

Sections 12 and 13 agreed to.

Section 14—Proceedings in absence of accused

The Convener: Amendment 106, in the name of Margaret Mitchell, is grouped with amendments 107 to 114. If amendment 106 is agreed to, I cannot call amendment 107.

Margaret Mitchell (Central Scotland) (Con): Amendment 106 seeks to ensure consistency with provisions that are already in place as a result of the Criminal Procedure (Amendment) (Scotland) Act 2004, which allow trials to be held in the absence of the accused when evidence is led that substantially implicates the accused and when the trial judge is satisfied that it is in the interests of justice so to do.

The bill effectively does away with the long-established principle that trials should proceed in the presence of the accused. My amendment 106 seeks to bring consistency to the provisions for solemn and summary procedure and to strike a balance between, on the one hand, the need to deal with situations where it is clearly unfair that the accused is not turning up and where the interests of justice are not being served and, on the other hand, the interests of fairness in

ensuring that all the necessary factors are taken into account in the case.

I lodged amendment 106 in the light of section 1, which substantially strengthens bail provisions. Bail will now be considered much more thoroughly, which is welcome, because it will send a clear message about the consequences of the accused absconding and not turning up in court.

Amendments 108 and 109 are consequential, but amendments 110 and 111 seek to probe the nature of the client-solicitor relationship in the absence of the accused. Amendment 110 provides that the court must dismiss a solicitor if they are no longer authorised or if they are unable to defend the accused. Amendment 111 allows discretion for another solicitor to be appointed. As the minister will be aware, there has been much concern in the legal profession about where section 14 would leave the profession in relation to its code of ethics. The purpose of amendments 110 and 111 is to draw more information about that from the minister.

I move amendment 106.

Stewart Stevenson: Will the member point us to the origin of the phrase

"substantially implicates the accused in respect of the offence charged"

in her amendment 106 and tell us whether it is an echo from somewhere else in the legal system, the meaning of which will be properly and fully understood, or whether it is a new construct?

Margaret Mitchell: I understand that amendment 106 more or less reflects the provisions on solemn procedure. We agonised over the issue at considerable length in passing the Criminal Procedure (Amendment) (Scotland) Act 2004. Amendment 106 is a fair and reasonable compromise.

The Convener: Amendment 107 is in my name. Members will recall from our stage 1 report that we agonised over section 14. We were clear that it was important to try to identify the reasons why accused persons did not appear for trial. We know from the McInnes report on summary justice that accused persons failed to appear for trial in 4,000 cases in 2003, which is not an insignificant number.

The committee took the position that if the power to hold a trial in the absence of the accused were to be used at all, it should only happen as a last resort after everything else had been tried. I have tried to reflect that in amendment 107 but, on reflection, I am not convinced that I have achieved that. I suggest in the amendment that the Crown should ensure

"that all other reasonable steps to secure the appearance of the accused at the diet have been taken by the prosecutor or an officer of law".

Arguably, however, the Crown will do that in any case to try to get the accused to the diet. The point merits further discussion because, as Margaret Mitchell rightly said, although there might be justification for proceeding in the absence of the accused, we would be giving up an important principle and further infringing the principle that we conceded during consideration of the Criminal Procedure (Amendment) (Scotland) Bill. I will address that point later.

10:15

As the bill stands, there could be an order to discharge the trial diet when the accused has failed to appear and a warrant to apprehend has been granted. If I understand the provision correctly, where the accused fails to appear a warrant will still have to be issued for that person to be apprehended, even though the trial could proceed in their absence. It appears that, although the court could pass sentence, the court would have to be satisfied that the accused had been properly cited and that it was in the interests of justice to proceed. I am sure that we will continue to debate the meaning of the word "interests" in the phrase "the interests of justice". As the committee said in its stage 1 report, real, practical difficulties arise from the provision. I refer to cases where the identity of the accused is material to the case and the accused fails to appear.

I turn to proposed new section 150A of the 1995 act, which is the provision that concerns me most in terms of the practical implication of the legislation. I am concerned about instances when a solicitor is unable to act. I confess that I do not have a great deal of knowledge of the working of the provision. That said, I understand that, in some summary cases, solicitors get instructions from their client just before the trial starts. How can a solicitor take instructions from a client if they fail to appear? Also, if the court has the power to dismiss a solicitor simply because he or she says that they cannot act—for whatever reason—will the court be able to appoint the Public Defence Solicitors Office in the place of the solicitor, if it is prepared to act? If the solicitor is in a position to act, I fail to see how it could be in the interests of the accused for that to happen. How could that ever be in the interests of justice?

I am also unsure how to get over the hurdle of establishing whether the accused has given instructions to a solicitor. My reading of proposed new section 150A is that that will rest on whether the solicitor is properly able to represent the interests of their client.

I am sure that the minister and his officials will be only too aware of the Anderson case and the resulting fear of many solicitors that they too may be charged with defective representation. My personal belief is that much of the activity that we are seeing in the courts at the moment is driven by a fear among solicitors that their clients may use the charge of defective representation as a ground to sue them. I am interested to discuss whether the Executive thinks that it is inevitable that a range of appeals will result from the use of that charge.

In summary, I am not trying to escape the obvious problem that we are trying to fix. It is unacceptable that any individual whom the court has cited properly to appear for trial should ignore that citation. That is clearly wrong. I realise that we are debating one way of resolving the matter, but there are real, practical difficulties in this approach. I will have to be persuaded that the provision will be drawn narrowly, not widely. I am not in favour of giving the courts carte blanche in summary justice cases and letting them decide whether a provision will routinely be used.

Mike Pringle: My understanding is that, if a person has been ordered to appear for trial, he must have made a previous visit to the court. When he made that appearance—whenever it was; the intermediate diet, for example—he would almost certainly have been represented by a solicitor. In normal circumstances, the solicitor would continue to represent the accused. That means that in most cases in which an accused failed to turn up for the trial diet, he would have been in touch with his solicitor, so the solicitor should have received his instructions and should be well aware of the trial's circumstances and of how to proceed. The situation would obviously be different if, in the interim, the accused sacked his solicitor and requested another. That might be seen as a way of trying to avoid the trial diet. Perhaps the minister can comment on that when he sums up.

Stewart Stevenson: The relationship between the accused and their solicitor is at the heart of matters. In the absence of the accused, I foresee that many solicitors would feel unable to assert to the court that they continued to have the authority to represent their client, given that their client engaged them to represent them in court in their presence. I can envisage endless arguments about that.

According to proposed new section 150A(7) of the 1995 act—which is outwith the scope of amendment 106—the court would have to be satisfied that the solicitor

"no longer has authority to act".

I guess that, in the absence of the accused, the solicitor would be unable to say that he had been told that he could not act. In other words, even though the solicitor might feel unable to proceed, they might be unable to resign from their position as the client's representative because of the client's absence.

Proposed new section 150A of the 1995 act gives rise to many imponderables. Given that amendment 106 goes some way towards addressing them, at the moment I am minded to look favourably on it. It seems to strike a more appropriate balance between the interests of justice and the interests of the accused.

Hugh Henry: Margaret Mitchell's amendments 106 and 108 to 114 would mean that no summary trial could commence in the absence of the accused and that any trial could continue in absence only once evidence had been led that substantially implicated the accused.

As Margaret Mitchell said, she is attempting to mirror the provisions for solemn proceedings that are contained in the Criminal Procedure (Amendment) (Scotland) Act 2004. There is a superficial argument that it would be sensible for the same rules to govern trials in absence under both summary and solemn procedure, but we should reflect on the fact that we are talking about two entirely different court systems. Trials under the summary procedure operate quite differently from trials under the solemn procedure.

Margaret Mitchell's amendments would severely limit the opportunity for a trial in absence to take place in a summary case and would defeat the aim of section 14, which is to reduce the number of accused persons who wilfully fail to attend for trial, safe in the knowledge that proceedings will be adjourned to the inconvenience of the courts, the victim and the witnesses in the case. Such behaviour is often routine.

Unlike solemn trials, a large number of summary trials start and finish on the same day, so we are not talking about situations in which the accused fails to turn up when evidence has already been led that substantially implicates them. The amendments would have the effect of ruling out the possibility of any part of a trial that was to be dealt with in a single day proceeding in the absence of the accused.

The amendments would also rule out the possibility of part of any trial being held in absence. Under the existing provisions, a judge can decide that although the accused should be present for at least part of the case, evidence from witnesses who have turned up at the right time, such as expert or vulnerable witnesses, can be heard in the absence of the accused. That allows progress to be made and saves witnesses the

inconvenience and stress of having to turn up again at a later date. The court can hear the relevant evidence, adjourn the case until a later date and issue a warrant for the arrest of the accused, to ensure that he or she is present for the remainder of the trial.

Stewart Stevenson: In drafting the provisions of the bill, did you consider the alternative of changing the sentencing options that are associated with a warrant for non-appearance, so that there would be a relationship between the sentence that can be imposed for non-appearance and the sentence that would have been imposed had the accused been found guilty at the trial for which they did not appear? I suspect that if it were possible in law to make such provision, any incentive for the accused to be absent would be removed.

Hugh Henry: We are increasing the penalty for failure to appear to 12 months—

Stewart Stevenson: I recognise and welcome that, but I am suggesting that if an accused does not turn up, they would by default go to jail to serve the sentence that they would have served if they had been found guilty of the offence for which they were to be tried. Do you see the difference in principle between the two options?

Hugh Henry: I understand what you are saying, but this is not an either/or situation. We are increasing the penalties for failure to appear. The logic of what you are saying is that if we fail with what we are doing, we should go even further and raise the penalty from 12 months to 24 months, seven years or double in solemn proceedings. Although that approach has a contribution to make, it is not the only thing that needs to be done. At sheriff court level, in particular, there are steps that can and should be taken. Margaret Mitchell's amendments would make hearing parts of trials in the absence of the accused, which happens currently, impossible.

We should bear it in mind that when a trial diet is fixed, the accused will be notified of the date and will be told that, should they fail to appear, the trial may proceed in their absence. The accused will be in no doubt that that will happen. The convener raised and Mike Pringle developed the point that the solicitor might not have been able to be instructed and might have a problem, but by that point there will have been previous contact. The intermediate diet, which should become more significant as the new procedure develops, allows the client to give instructions to the solicitor, so that they can be in no doubt about what the interests of their client are. It should be incumbent on the solicitor to remind their client not only that they have a duty to turn up but of their responsibility to enable the solicitor to carry out their duties. We are not talking about a situation in which a solicitor goes in blind, not knowing what a client thinks and what their instructions are. As Mike Pringle said, that should already have been made clear at the intermediate diet.

We are building in further safeguards. The judge must be satisfied that it is in the interests of justice for the trial to proceed and that the accused is aware of the date and place of the diet. A trial in absence will take place only when the judge considers that that is just and is satisfied that the accused has been made aware of the fact that they should be in court. The judge must be sure that the accused has been notified.

A substantial number of cases have to be adjourned due to the failure of the accused to appear. In 2002-03, about 4,000 summary hearings had to be adjourned for that reason. Can it be right that victims and witnesses attend the court time and time again only to be told that the accused has decided not to turn up and so they cannot give evidence? During stage 1, Elish Angiolini and Mike Pringle said that there is strong anecdotal evidence from multiple-accused cases that often one accused person will not turn up for trial on one date and other accused persons will decide not to turn up on the next date, safe in the knowledge that the trial will not proceed. Cases can sometimes be abandoned as a result, as witnesses are no longer available or are unable to recall the required evidence. Should we allow such things to continue?

10:30

The existing provision is that if a court is satisfied that a solicitor no longer has the authority to act, it may relieve them and appoint another solicitor. That already happens. Margaret Mitchell's amendment 106 proposes that the court "shall" relieve the solicitor of that responsibility, but "may" appoint another solicitor. Therefore, if her amendment were agreed to, it would not be necessary for the court to appoint another solicitor. There is inconsistency in what has been suggested whereas our provisions are consistent.

If the accused has a solicitor who is prepared to continue to act, the court may allow him or her to do so. I think that, as the intermediate diet becomes more robust, cases will continue to trial on the basis that the solicitor has been properly and fully instructed as to the accused person's position and line of defence. Therefore, the solicitor will be in a good position to act in the accused's interests at trial, despite his or her absence. If the solicitor declines to act, the court may appoint a solicitor to act in the interests of the accused. It is right that the court should have discretion to do that and should not, as Margaret Mitchell has suggested, be required to do so. The court can be expected to exercise that discretion

reasonably. We must bear it in mind that courts will always have to decide whether a trial should take place in the absence of an accused and whether it is in the interests of justice to continue with it.

Section 14 was considered carefully prior to its introduction. It is designed to facilitate a wider use of trials in absence while ensuring that appropriate safeguards are in place to protect the rights of the accused. It is part of a range of measures that will lead—I hope—to accused persons turning up when they are supposed to turn up. They will be told the date of the trial at the intermediate diet. If they are not there, they will be sent a letter. They will have given instructions to their solicitor, with whom there will be a relationship, and the solicitor should remind their client of their responsibility to turn up. A range of measures will make it clear to the individual when a trial will take place and what the consequences will be if they fail to turn up for it. We want people to turn up when they are supposed to do so. Agreeing to amendments 106 and 108 to 114 would permit the accused wilfully to continue to frustrate the ends of justice. In a sense, there would be a criminals charter. Rather than the justice system acting in the interests of justice, accused persons would be able to use the system for their benefit. We must reflect on that. The process would frequently be deliberately thwarted, as it currently is.

Pauline McNeill has already identified potential problems with her amendment 107, but I want to say something about the principles involved. The amendment would place an unfair burden on the procurator fiscal. We have demonstrated that a number of things will be done to ensure that people will turn up for trials, but agreeing to amendment 107, which aims to ensure that

"all other reasonable steps to secure the appearance of the accused at the diet have been taken by the prosecutor or an officer of law",

would leave things wide open.

We have introduced crucial safeguards in proposed new section 150A. As I have said, first, the court must be satisfied that the citation has been lawfully effected or that the accused has received other intimation of the diet. That means that the court cannot proceed in the absence of the accused unless it is satisfied that the accused has received due notice of the diet and has been told that he must attend.

Under the 1995 act, if the accused is at liberty, what I have just described is the reasonable step that the prosecutor must take to ensure that the accused attends. The accused is told of the trial date and is told about the consequences of failing to appear. Surely it is then the accused's responsibility to turn up. Why should it be the prosecutor's responsibility to ensure that the accused turns up? If the accused is legally represented, their solicitor must play a role in ensuring the accused's attendance at the diet.

Secondly, the court must also be satisfied that it is in the interests of justice to proceed in the absence of the accused. The court cannot proceed with a trial willy-nilly. The test allows the court to consider all the circumstances of the case—those relating to the accused and more general considerations, such as the nature of the offence and the impact of non-attendance on victims or witnesses. The court must take those considerations into account before deciding whether to proceed in absence.

Will the measure be used as a last resort? Yes. Because a minority, albeit a substantial minority, of cases is involved, the measure is a last resort. How many people might it affect? I do not know, because every case is different and the court must have discretion to decide whether the measure is appropriate. It will not just be for the Crown to suggest that it wants to proceed because the accused has not turned up. The judge will have an important role in determining whether it is safe and in the interests of justice to proceed. It is right that that power should exist.

The prosecutor cannot know in advance who is unlikely to turn up. If we placed the burden on the prosecutor, the only safe way for the prosecutor to ensure that something proper had been done would be for them to take the additional set of measures to ensure that the accused was aware in every case that was due to come to court. For all the tens of thousands of cases that go through the summary procedure, the prosecutor would need to take additional steps to ensure that the accused was familiar with what was happening and aware of the date. That would be an unfair burden. We are trialling different measures in different courts. For example, when the accused leaves the intermediate diet in some courts, they are given written notification of the date of their trial. We will see how that goes. In any case, when the accused is in court, the judge tells them of the date.

Mr Bruce McFee (West of Scotland) (SNP): It is right for members to ask questions about how the provision might work and about the number of cases that it could involve, but are we not in danger of losing the main thrust of the section, which is the message that it sends out to people who continually flout the court's authority? That is the important part. If the policy succeeds, it will not result in terribly many cases being held in absence.

Hugh Henry: Bruce McFee hits the nail on the head. I hope that the strong message that the bill sends will ensure that people turn up. I do not want trials to proceed in absence as a matter of

course. To say the least, it would be disappointing and a failure if most cases proceeded in the absence of the accused. However, the message that we are prepared to see justice done in the absence of the accused if it is appropriate to do so might make many people sit up and think of their responsibilities. They cannot—as they try to do at the moment—play the system to ensure that a trial never proceeds because it takes so long to get them into court that witnesses forget the events, become confused and not entirely sure of the details or lose heart and no longer want to turn up to give evidence. That is in no one's interests. We know how long some cases take to reach a conclusion. It is an absolute disgrace that that happens.

Amendment 107 does not specify the "other reasonable steps" that a prosecutor might need to take to secure the attendance of the accused. That is a problem, because reasonable steps would not necessarily be the same in every case. I have mentioned that the only safe approach is to take steps in relation to every accused in case they do not turn up and have mentioned the burden that that might cause. If we take the wrong decisions, there is a danger of putting a huge burden on the prosecution. Furthermore, if we accept Margaret Mitchell's amendments, we would allow the accused to continue to play the system. Whichever way we go, either we will put a burden on the prosecution service that would be almost impossible for it to bear, or we will allow the accused to continue to play the system and we will make no progress on the number of cases—

Marlyn Glen: What concerns the committee is the similarity with the issues of reluctant and obstructive witnesses. There will be accused who deliberately do not turn up and who talk to their co-accused then take turns not to turn up, and there will be accused who do not turn up because they fail to remember, fail to understand or genuinely get mixed up. The committee is aware of the number of people in our prisons and in criminal circles who have lower educational attainment, lack literacy skills and need to be helped to understand that they really do need to turn up and when they need to do so.

Stewart Stevenson: Instead of talking in generalities, would it be useful if the minister could tell us how many cases are abandoned—or are otherwise influenced—because the accused does not turn up?

Hugh Henry: As I said, in 2002-03, 4,000 summary cases had to be adjourned due to the failure of the accused to appear. I do not know how many of them were eventually abandoned. We can take Marlyn Glen's contribution to its logical conclusion and say that some of the people she described might, on the first occasion, fail to remember or might get confused and not turn up, and then might be told again and, on the second occasion, genuinely fail to remember, but how many times do we allow that to happen? We are talking about people who have been told at the intermediate diet the date of the trial or, if they were not at that stage, have been sent a letter. Short of sending someone round to collect them at their house and bring them to the court, we always run the risk of confusion or a failure to remember.

This is a serious matter and the onus should be on the accused to turn up, not on the prosecutor to ensure that administrative steps are taken to collect them and bring them to court. The whole balance is skewed. If someone is alleged to have committed a crime that is against the interests of society, has been charged and has been brought to court to have that charge heard, they have a responsibility to fulfil their obligation.

It is important to remember that the accused cannot be jailed in their absence. They still need to be present in the court for that to happen. As was suggested, if someone believes that justice has not been served, there is still the potential for an appeal. In the circumstances, what the Executive is proposing is consistent and right.

The convener's amendment 107 raises important principles but, as she accepted, it would not deliver what she seeks and would impose a significant burden on the prosecution service. Margaret Mitchell's amendments in the group, apart from being inconsistent, would shift the balance to allow criminals to continue to play the system and thwart justice, which is not what the Parliament should deliver.

10:45

The Convener: I am glad that you made that point about sentencing, because it is important for members to be aware that a warrant for the person will have to be brought before the court before any sentence is issued.

Hugh Henry: That is correct.

The Convener: So trial in absence will be accompanied by an apprehension warrant.

Hugh Henry: There will be whatever is required to bring the accused to court.

The Convener: I thought that it would be possible to hold a trial in absence only when an apprehension warrant had been issued. Will you clarify that?

Hugh Henry: The court will be able to impose a fine in absence, but not imprisonment.

The Convener: If the accused fails to appear, will an apprehension warrant automatically, or usually, be asked for at that point?

Hugh Henry: In the normal run of things, yes. Proposed new section 150A(11) of the 1995 act states:

"Nothing in this section prevents—

(a) a warrant being granted at any stage of proceedings for the apprehension of the accused;

(b) a case subsequently being adjourned (in particular, with a view to having the accused present at any proceedings)."

There is nothing in the section that prevents the course of action that you have outlined.

The Convener: I want to respond to some of what the minister said—I am sure that other members will, too. As I said, I know that amendment 107 would not achieve my intention. It is certainly not my intention to place additional burdens on the Crown, although it is a fact that, at present, it is the Crown's responsibility to cite the person. The committee agrees that it is not acceptable for people not to turn up for their trial, but the issue is how far we go in moving away from a fundamental principle and what we will achieve at the end of that. I am still concerned that the provisions are pretty wide. The minister said that the measure will be a last resort—which is what it should be, if we are to have it—but there is nothing in the bill to prevent courts from using it routinely. As a parliamentarian, I am not prepared to give the courts such wide discretion. I would prefer the bill to be far more prescriptive.

To date, there has been no discussion about whether courts should have the discretion to conduct trials in absence at the first failure to appear or perhaps thereafter. The minister mentioned the type of cases that cause the problem—witnesses can turn up on a second and third occasion but still no trial takes place. However, the bill will allow a court, on the motion of the prosecutor or at its own hand, to move to a trial the first time that an accused fails to appear. I am not prepared to give the courts such wide discretion. I ask ministers to think further about the issue and return to it at stage 3.

I am sympathetic to Margaret Mitchell's amendments but, as the minister rightly outlined, the problem is that summary trials tend to last for only a day. I am not sure that we can simply transpose provisions from the Criminal Procedure (Amendment) (Scotland) Act 2004 into the bill. As we are moving away from a fundamental principle, we should be absolutely clear about the discretion that we are giving the courts.

My amendment 107 uses the word "reasonable", which is well understood. The Executive thinks that it is okay for the Parliament to sign up to a provision under which courts will be able to proceed with trials in absence if they believe that it is just to do so, although with very little detail about what "just" means, but the minister argued that we cannot sign up to a measure that contains the term "reasonable". It is a bit unfair of the Executive to say that it will leave the provision wide open and let the court decide what is just, but that words such as "reasonable" are too open-ended. That seems to be an unfair criticism.

Mike Pringle: I have a lot of sympathy for what Pauline McNeill has just said. However, from the beginning I have thought that section 14 will help two groups of people who often miss out in criminal trials: witnesses and victims. I have cited the example of a court case that went on for months in which my son and two of his friends had to appear on three different occasions. It was a travesty. At the end of it, they were unsure what had happened because the incident had happened about 11 months previously. Section 14 makes the accused aware that they have a responsibility.

Often, if I was appearing in a trial for somebody who had committed an assault or whatever it was, almost certainly the day before the trial my secretary would contact the accused to remind them that they were due to appear in court at 10 o'clock the next morning. Solicitors take an active role in ensuring that their clients know that they are due to appear in court but, as we have heard, many accused fail to appear thereafter, despite the fact that they have been reminded.

We are in danger of losing sight of the issue in section 14. We must do more for witnesses and victims, which is what we have been trying to do in other bills.

In my view, section 14 strikes the right balance, and the minister has given his assurances. The courts are run by sensible judges and lawyers who will use their judgment sensibly. As we heard when we visited Linlithgow, they are not going to carry out trials willy-nilly in the absence of the accused, but they will do so when people flout the system, which is the problem that section 14 addresses.

Hugh Henry: The convener said that although we pose doubts about the need to ensure reasonableness in what the prosecution has to do, we are asking Parliament to accept that it is just to allow a trial to proceed in the absence of the accused. I do not think that it is as simple as that. As I said, before a trial in absence can proceed, the court must, first, be satisfied

"that citation of the accused has been effected or the accused has received other intimation of the diet".

That is important. The court must assure itself that the accused knows that a trial is to take place. A trial cannot proceed in the absence of the accused unless the court is satisfied that the accused knows that.

The judge must also satisfy himself or herself

"that it is in the interests of justice to proceed"

in the absence of the accused. That allows the court to consider all the circumstances of the case—for example, whether a solicitor has pointed out that the person has domestic problems or that the accused has learning difficulties. A relationship will have been established between the solicitor and their client at an earlier stage, and the court should be made aware of anything that might have prevented the accused from turning up. A further consideration for the court is whether not proceeding will cause significant inconvenience to victims and witnesses. The court must take account of all those factors in its deliberations.

Mike Pringle was right to point out that justice can be denied simply because of the length of time that a case can take and the number of postponements that occur because the accused fails to turn up. However, with regard to Bruce McFee's comments, I hope that this policy will reduce the number of people who fail to appear. After all, they should be aware that failing to turn up will not be enough to stop the trial from proceeding. I hope that, if the bill is passed, people will turn up because they realise that it is in their interests to do so and that they cannot remain safe in the knowledge that the longer they fail to turn up the more likely it is that the case will collapse. The bill puts the onus back on the people that it should be on.

The Convener: I do not disagree with you, but would you be concerned if the court used the provision routinely to try 4,000 cases a year in the absence of the accused? What if the court simply said, "Right, we're going to use this provision regularly to send a message to people who don't turn up"?

Hugh Henry: I would certainly be concerned about that. However, sending out a message will be an important consequence of our proposals, and we cannot underestimate the significance and implications of doing so.

That said, I do not expect the courts to use the provision simply to send out a message. After all, a substantial burden has been placed on them to give wider consideration to any move to continue with a trial in the absence of the accused. As I said earlier, the court must be satisfied that the citation has been lawfully effected and that the accused knows that their trial is taking place.

However, a second and more onerous burden for the court is that it must consider whether continuing with the trial

"is in the interests of justice".

It is, of course, important for the court to consider whether such a move is in the interests of victims and witnesses. We cannot underestimate the amount of damage that the system suffers when it fails to act on behalf of victims and witnesses and when justice is not seen to be done. However, in the interests of justice, the judge must balance such considerations with the rights of the accused. For example, the judge needs to find out why the accused did not turn up and, having listened to the solicitor and bearing in mind all that he or she knows about the accused, needs to decide whether it would be right for the trial to go ahead.

I would be worried if, for example, in each of the 4,000 cases that had to be adjourned in 2002-03 because the accused did not turn up, the court had decided to go ahead with the trial in their absence simply to send out a message. However, I do not think that a judge would do that. I believe that judges will discharge the duty that we are placing on them and strike the proper balance. After all, "the interests of justice" is a very wide provision to take into consideration.

We need to bear in mind Bruce McFee's important point about the political message that the provision sends out. We are not prepared to see justice denied or thwarted just because people use the system. I hope that the bill will substantially reduce the number of people who fail to turn up at court. It is not right that people who commit crimes should get off scot free simply because a witness loses heart or can no longer remember things clearly or because the system has been manipulated in such a way that everyone runs out of steam. Instead, it should be up to the court to find people not guilty. With proposed new section 150A to the 1995 act, we want to ensure that justice is properly done and that the interests of justice are, quite rightly, balanced.

11:00

Margaret Mitchell: I agree with the minister in so far as solemn procedure and summary procedure are not comparable. Clearly the volume of cases in summary procedure is greater, but having said that, I think that there must be consistency between the two for the following reasons.

On the message that would be sent out by trial in absence, we are already sending out a clear message by strengthening the bail provisions and the penalties for breaching bail. That is very much to be welcomed. It should be remembered that there are limited circumstances in summary and other procedures in which the accused can be tried in their absence, for example statutory offences under the Criminal Procedure (Scotland) Act 1995 that do not attract a prison sentence.

However, the bill increases the penalties available to and sentencing powers of the sheriff courts, so we are potentially including cases that would have been dealt with under solemn procedure and which would have involved the trial of the accused in their absence only if the provisions in my amendment kicked in—in other words, only if a substantial amount of evidence that implicated the accused had been led.

That is a crucial point. Whatever way we look at it, deciding whether

"it is in the interests of justice to proceed"

is a subjective call. Will we know all the reasons why the accused has failed to appear? We may think that we do, but that is not necessarily so. Amendment 106 would cover a situation in which the accused has been present, realises that they are substantially implicated and then chooses not to appear again; to me, that is a clear indication that the absence is wilful. The courts and the public would have confidence in the trial continuing on that basis. That is an important point that should not be missed, especially as the sentence could ultimately be severe, given that we have increased the sentencing powers in sheriff and district courts.

The committee and the Executive would be serving victims and witnesses poorly if we agreed to proposed new section 150A of the 1995 act and there were many more appeals as a result of the accused not being present at any part of their trial—and there is no reason to assume that there would not be. In effect, the new section could have the opposite effect from what we want, which is to send out a strong message to the accused, to strengthen the system for witnesses and victims, and to ensure fairness.

I am minded to press amendment 106, because it would provide fairness and consistency with solemn procedures. That is especially important for offences that may have been tried under solemn procedure in the past but which will now be tried in the sheriff court, as the new system will open up the possibility that a provision that would have been followed under solemn procedure will not kick in. The amendment would provide the checks and balances that people need to be assured are present in our criminal justice system, especially when the fundamental principle that no one should be tried in their absence has been tinkered with.

The Convener: The question is, that amendment 106 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)
Pringle, Mike (Edinburgh South) (LD)

ABSTENTIONS

Stevenson, Stewart (Banff and Buchan) (SNP)

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

Amendment 106 disagreed to.

Amendment 107 not moved.

The Convener: Does Margaret Mitchell wish to move amendments 108 to 114?

Margaret Mitchell: No. They were probing amendments.

Amendments 108 to 114 not moved.

Section 14 agreed to.

Sections 15 to 17 agreed to.

After section 17

The Convener: Amendment 115, in the name of Margaret Mitchell, is grouped with amendment 116.

Margaret Mitchell: Amendment 115 seeks to oblige the prosecution to disclose to the accused or their representatives all material evidence at the earliest stage. It seeks to strengthen the principle of early disclosure and ensure that the facts are known as soon as possible so that an early plea can be given with full knowledge of all the available facts. That should help to make the court more efficient.

Amendment 116, which also relates to early disclosure, seeks to introduce what I believe is a crucial reform. It proposes an element of judicial management such that, at the interim diet, the court would be asked to ensure that the provision in amendment 115 had been adhered to and that all the relevant information had been disclosed to the accused and their solicitor. That would enable a dialogue to take place so that all parties are ready to progress and any decision or plea is taken with the fullest information as early as possible.

I move amendment 115.

Stewart Stevenson: Will the member clarify proposed new section 147A(1)(a) of the 1995 act, which would be inserted by amendment 115? Within the timescale that is specified in the succeeding subsection (2), would the prosecutor know the defence of the accused and therefore be in a position to make a judgment about whether

the evidence supports the accused's defence of the case?

Margaret Mitchell: Are you asking whether the prosecutor knows what the—

Stewart Stevenson: You seek to place on the prosecutor an obligation to

"provide to the relevant person all material obtained during the course of the investigation which is likely to … support the accused's defence".

The prosecutor can make that judgment only if they are aware of the accused's defence. I seek to establish whether you think that the prosecutor will know what the accused's defence is within the timescale that you specify, which is

"within seven days of the date of the pleading diet in custody cases and within 28 days of the date of the pleading diet in all other cases."

Margaret Mitchell: The amendment aims to encourage dialogue between the accused's defence and the prosecution service. Whatever relevant material the fiscal has would be discussed in that dialogue. Obviously, it would be in the interests of the defence and the accused to disclose their defence in order to obtain that relevant material. If they did not do so and the prosecution was not aware of the defence, they could not be accused of not releasing relevant information.

Hugh Henry: I support what Margaret Mitchell says about the principle of early disclosure in summary cases. It would allow the parties to be well prepared and might increase the number of cases that can be resolved at an early stage. It would cut down on unnecessary court hearings and reduce the inconvenience that they cause for all concerned. However, I cannot support amendment 115 for a number of reasons, although they are not differences of principle.

One of the success stories of the High Court reform programme was that, even before the legislation was in force, the Crown had set about changing its practices on disclosure. The Crown made its position clear in a published statement, which went beyond what Lord Bonomy's report asked for, and has kept its promises on disclosure in High Court cases.

Margaret Mitchell is right that an effective early disclosure regime will be an essential part of the summary justice reform programme as well. We have acknowledged that it is vital that an accused's solicitor is fully aware of the case against their client at the earliest possible stage. The Crown has already given a clear commitment to the committee that a new summary disclosure regime will be introduced as one element of the summary justice reform programme. A commitment has been made to provide a summary of the evidence with the complaint so that the defence can take instructions and prepare the case much more fully at an early stage. That summary will be provided to the accused when the complaint is served, irrespective of the manner in which proceedings are commenced.

The Crown has made it clear to the committee that it will deliver a disclosure regime that closely mirrors the duties and timescales that are set out in amendment 115 in respect of cases that go to trial to ensure that the material that is required for the purposes of the trial is available to the defence in good time. That will involve a change in how the police report cases to the Crown Office and Procurator Fiscal Service. Work is already under way on that; I understand that the committee heard about that from representatives of the Association of Chief Police Officers in Scotland at an informal meeting on 25 October.

The committee will appreciate that disclosure is a highly complex area of law. I am not opposed to setting out the current common-law regime in statute but, if that is to be done, it must be done systematically rather than provided for as a small addition to the bill, because the regime is substantial. Elish Angiolini stressed that point when she gave evidence to the committee on 31 May. Recent decisions that were made by the court of appeal and the Privy Council demonstrate that disclosure is a live area that needs detailed consideration.

Committee members will be aware that, last week, the Rt Hon Lord Coulsfield agreed to conduct a review of the law and practice of the disclosure of evidence in the Scottish criminal justice system. The review will be comprehensive and will take account of all the interests involved to secure continuing confidence in the system. It will take views from all interested parties, which includes the police and defence practitioners, and is expected to report next summer.

Therefore, I hope that the committee will agree that the best course of action is to await the recommendations of Lord Coulsfield's review and proceed on the basis of those recommendations. That will give us the advantage of the early action to which the Crown has committed itself and the added advantage of being able to give proper consideration to a complex area of law once Lord Coulsfield's review is complete. I hope that Margaret Mitchell agrees that that is a sensible way to proceed and that there is no need for her to press amendments 115 and 116.

Margaret Mitchell: The key point is that amendments 115 and 116 would insert in the bill the obligation to disclose evidence. In other words, they would ensure that, in a busy fiscal's office where time is of the essence, a vital step towards improving the efficiency of our summary courts

would be taken. It is worth while grasping the opportunity that the amendments provide to ensure that that happens. Therefore, I will press amendment 115.

11:15

The Convener: If the Crown could not meet the timescale in amendment 115, what would happen?

Margaret Mitchell: If the Crown did not meet the timescale, I imagine that that would be explained at the intermediate diet. That would be the element of judicial management, with the court taking due cognisance of the reasons for the delay. If the explanation was reasonable and the court was satisfied of that, that would be allowed. If not, the court would point out that it was unacceptable that the timescale had not been met.

The Convener: If the court was not satisfied with the explanation, would the case fall?

Margaret Mitchell: No. It would be a case of highlighting the fact that the fiscal had failed in their duty and that the court took that seriously. That is the approach that we sought to adopt with the solemn proceedings when we considered the issues of front loading and encouraging early dialogue.

Mr McFee: I understand what Margaret Mitchell is trying to achieve, but I do not think that her amendments would achieve it. We are told that it is important for proposed new section 147A of the 1995 act to be included in the bill, but I do not think that it would be satisfactory for the committee to imagine what would happen if, once we had put it in the bill, that prescriptive section was not adhered to. I find it strange that the committee should be adamant about one set of events happening if we can imagine what the conclusions might be if it did not happen. I do not find that convincing.

Stewart Stevenson: I cannot put my finger on the point at the moment, but I know that one of Margaret Mitchell's subsequent amendments would delete the power of the court to excuse irregularities. However, amendment 115 appears, de facto, to excuse procedural irregularities in relation to what she proposes. That seems somewhat at odds with the principle that she espouses in her later amendment—I cannot recall what number it is.

Margaret Mitchell: Amendment 115 is a probing amendment. It looks at the principle and seeks some kind of certainty about what would or would not be allowed. It is not necessarily contradictory.

Stewart Stevenson: It is merely an observation on my part, but it seems somewhat at odds with the other amendment, which I have now found is amendment 118.

Margaret Mitchell: I appreciate that a crucial part of the bill—and a subject that the minister has sought to address with other amendments—is the fact that there should be an element of judicial management, and that there should be a discussion that involves more than lip service or tokenism between the prosecution and defence agents at an early stage, to try to secure the best information for both parties, to encourage an early plea and to ensure that pleas are made on the basis of an informed decision.

However, amendment 115 might perhaps be best left to stage 3, when we can thrash out the issue fully. I take on board what the minister said; I will not press the amendment now, but perhaps we can revisit it at stage 3.

Amendment 115, by agreement, withdrawn.

Section 18—Intermediate diets

Amendment 116 not moved.

The Convener: Amendment 53, in the name of the minister, is grouped with amendments 117, 54 to 59, 68 and 100.

Hugh Henry: Following publication of the committee's stage 1 report, we promised to consider whether any further changes could be made to the law to ensure that intermediate diets operate as effectively as possible. Amendments 53 to 55 and 68 propose three further changes to the intermediate diet procedure in response to the recommendations in the committee's report.

The main purpose of the intermediate diet is to assess the state of preparation of the Crown and the defence. It is important that, where possible, only essential witnesses should be cited to attend court for the trial. We are of the view that, if parties are properly prepared, by the intermediate diet they will have identified the witnesses whom they wish to call to trial.

Amendment 53 will ensure that, as part of the intermediate diet process, the court will ascertain how many witnesses each party to the case intends to call to trial. Given that the parties will be aware that the question will be asked of them, the amendment will help to ensure that both parties give the issue real and full consideration before the intermediate diet. As well as reducing the number of unnecessary witness citations, the amendment will ensure that both parties to the case engage with the case in some detail before the intermediate diet takes place. A similar provision that was introduced for the handling of solemn cases has already assisted in reducing the number of witnesses that require to be cited.

The main purpose of the intermediate diet is to assess the state of preparation of the Crown and defence. Section 148(4) of the 1995 act currently provides that, at the intermediate diet, the court "may" ask the prosecutor and the accused any question with a view to establishing the state of preparation of the parties in order to ascertain whether the trial is likely to proceed on the date assigned. Amendment 54 will replace the current section 148(4) of the 1995 act with an amended subsection to provide that the court "shall" ask questions of the parties in order to ascertain their state of preparation. That small but important change should help to promote greater consistency of approach among courts and to emphasise the role of the court in ensuring that the intermediate diet is a meaningful process in every case. In turn, the change will help to ensure that parties are properly prepared for the intermediate diet as they will be aware that the court will question them on their state of preparedness and will expect those questions to be answered.

Amendment 55 will make our third proposed change to the intermediate diet procedure in summary cases and amendment 68—which relates to sheriff and jury cases—will ensure that the benefits of the change will apply across all forms of criminal case. Although the Crown and the defence are already under a duty to take steps to agree evidence that is not in dispute in a case, there is currently no specific deadline by which that duty is to be met in summary or sheriff solemn cases. The High Court reforms that the committee considered in 2004 introduced an obligation on parties to take those steps before the preliminary hearing. Building on those reforms, amendment 55 will oblige parties in summary cases to take steps to seek the agreement of evidence before the intermediate diet. That will ensure that the court can ask meaningful questions about the agreement of evidence at that diet. Amendment 68 promotes consistency by putting sheriff and jury cases on the same footing as summary and High Court cases. In sheriff and jury cases, parties will be obliged to take steps to agree evidence before the first diet.

Taken together, the amendments will ensure that the pre-trial hearing will, in all cases, be the diet by which both the Crown and defence will be expected to have applied their minds to the agreement of evidence that is not in dispute, with a view to excusing the attendance of witnesses from the trial where possible and allowing the court to focus on the matters that remain in contention. Both the court and the parties to the case will be aware that they are under a duty to seek to agree evidence by that stage. That should facilitate proper preparation for the pre-trial diet and allow it to be as meaningful as possible.

Amendment 117, in the name of Margaret Mitchell, seeks to remove from the bill a provision that will enhance the role of the judiciary in managing intermediate diets. The 1995 act provides that, if the judge at an intermediate diet concludes that the case is unlikely to proceed to trial on the assigned date, he or she shall postpone the trial unless, having regard to previous proceedings in the case, it is not appropriate to do so.

Section 18 of the bill as introduced seeks to amend the 1995 act to give the judge greater discretion by providing that, when it seems unlikely at the intermediate diet that a case will be ready to proceed to trial, the judge "may" postpone it. That recommendation was made by the McInnes committee, which took the view that such a change of emphasis would enable the court to take a greater role in managing a case and ensuring that cases are resolved as quickly as possible. The change will make it easier for the court to conclude that the best course of action to take might be to fix a continued intermediate diet rather than postpone the trial diet. The continued intermediate diet could be used to get things back on track and ensure that the trial takes place on the date that was initially set. That would allow the case to be resolved quickly and avoid the need for the trial to be rescheduled, which would cause greater inconvenience to all involved.

The provision is in keeping with the committee's call for intermediate diets to be used as effectively as possible and to give the judiciary an enhanced and more proactive role in the management of court business. Amendment 117 would remove that provision, which would go against what the committee has previously asked for.

Amendments 56 to 59 make minor technical changes to section 21. They have no effect on the policy in the section, but correct a numbering deficiency in the bill as introduced. Section 21, which allows the service of documents on an accused's solicitor in summary cases, provides for the insertion of new sections 148B and 148C into the Criminal Procedure (Scotland) Act 1995. However, section 9 of the Vulnerable Witnesses (Scotland) Act 2003 already provides for a new section 148B to be inserted into the 1995 act. We need to ensure that both sets of provisions will be properly accommodated in the 1995 act. Amendments 56 to 59 make the appropriate numbering changes to achieve that aim.

Amendment 100 amends sections 72F and 72G of the Criminal Procedure (Scotland) Act 1995 to provide that any item that requires to be served on the accused may be served on the accused's solicitor at any stage in solemn proceedings.

Currently the sections provide only for service of items

"in any proceedings on indictment",

which means that they cannot be relied on for service of any item that requires to be served on the accused prior to service of the indictment in solemn proceedings.

Amendment 100 will provide for service on a solicitor at any stage in solemn proceedings, whether before or after service of the indictment. Having the facility to serve documents on an accused's solicitor can be beneficial for both parties to a case. It ensures, where possible, that the parties are informed as soon as possible when documents require to be served; it allows the accused maximum notice; and it allows the accused the maximum time for preparation of his or her defence.

I move amendment 53.

Margaret Mitchell: Amendment 117 is a probing amendment that seeks to address the removal of certainty that the discretionary power that the bill gives to the court has brought about. Under the current system, there would be certainty that the trial date is set and that the trial is expected to continue on that date. How will the minister counterbalance the uncertainty that is created in that provision?

Stewart Stevenson: I will raise a little technical point that has exercised me in the dark small hours of the morning. Does the bill not give you power to do what is provided for in amendments 56 to 59 by virtue of the commencement order under section 71? In essence, it provides—as all bills do—for

"such transitional, transitory or saving provision".

Hugh Henry: We have spotted the point that Stewart Stevenson raises and we are fixing it.

The effect of Margaret Mitchell's amendment 117 would be that the trial could not go ahead; it would not introduce any further degree of certainty. We are ensuring that there is flexibility. I think that what we are doing is in line with the committee's call for the intermediate diets to be used as effectively as possible. I do not know whether that is the intended effect of Margaret Mitchell's amendment 117, but I think that it would be detrimental.

Amendment 53 agreed to.

Amendment 117 not moved.

Amendment 54 moved—[Hugh Henry]—and agreed to.

Section 18, as amended, agreed to.

Section 19 agreed to.

Section 20—Proof of uncontroversial matters

Amendment 55 moved—[Hugh Henry]—and agreed to.

Section 20, as amended, agreed to.

Section 21—Service of documents through solicitor etc

Amendments 56 to 59 moved—[Hugh Henry]—and agreed to.

Section 21, as amended, agreed to.

The Convener: We are making reasonable progress, so I propose that we have a five-minute break.

11:31

Meeting suspended.

11:45

On resuming—

Section 22—Transfer of proceedings

The Convener: Amendment 60, in the name of the minister, is grouped with amendments 61 to 63 and 69.

Hugh Henry: Section 22 inserts proposed new section 137C into the 1995 act. It provides that if there are exceptional circumstances leading to an unusually high number of summary custody cases in a particular sheriffdom and if it is not practical for the sheriff courts in that sheriffdom to deal with all the cases, the prosecutor may apply to the sheriff principal for an order allowing proceedings in some or all of those cases to be taken at a sheriff court outwith the sheriffdom. Section 29 inserts into the 1995 act proposed new section 34A, which makes the same provision but in relation to first callings of cases on petition in a particular sheriffdom.

Amendments 60 and 69 are technical. They do not change the policy of sections 22 and 29; they simply put it beyond doubt that any order granted by the sheriff principal under those sections provides the authority for custody cases to be taken at a sheriff court outwith the sheriffdom where the accused would normally have appeared from custody. As it is currently worded, the bill could be misconstrued as suggesting that the court's order will order the prosecutor to take proceedings in another sheriffdom. That would not reflect what is intended, which is that the order should give the prosecutor the authority to raise proceedings in the other sheriffdom, not require him to do so.

Section 23 provides for the law on time bar as it relates to transferred cases. It inserts into the

1995 act proposed new section 136A, which provides that when proceedings have been transferred from one sheriff court to another and those proceedings are contained in a new complaint, the date of commencement of the proceedings is taken as the date on which proceedings on the initial complaint commenced.

Amendments 61 and 62 are technical and do not change the policy behind section 23. References in proposed new section 136A to the orders made "under" sections 137A and 137B are amended to refer to orders made "in pursuance of" those sections. The revised form of wording is technically more accurate, as the orders concerned are made by the court in pursuance of the relevant section as a whole, not under a particular part of it.

Amendment 63 is also technical and does not change the policy behind section 23. It reformulates the wording used in proposed new section 136A(2)(b), which ensures that the wording used to refer to relevant time limits in other enactments is consistent with similar references made elsewhere in the 1995 act.

I move amendment 60.

Stewart Stevenson: I support what the minister is trying to do with this group of amendments. I invite him to put on record some reassurance that, in rural areas in particular, sheriffs will be aware of the need to avoid transfers that could involve unreasonable travelling for witnesses and victims. In some cases, the transfer could involve a significant distance, unlike a transfer in the central belt. It would be useful to have it on record that that will be taken into account in practice.

The Convener: Is there any existing provision for the transfer of cases to another sheriff court, or does the bill contain the first proposed provisions for that?

Hugh Henry: I will start with the convener's question. There are already certain circumstances in which such transfers might happen. Section 137B is entitled "transfer of sheriff court summary proceedings outwith sheriffdom". As amended previously by the Criminal Justice (Scotland) Act 2003, it provides for when

"(a) an accused person has been cited to attend a diet of the sheriff court; or

(b) paragraph (a) does not apply but it is competent so to cite an accused person,

and the prosecutor is informed by the sheriff clerk that, because of exceptional circumstances which could not reasonably have been foreseen, it is not practicable for that court or any other sheriff court in that sheriffdom to proceed with the case".

It goes on to give further details. The short answer is yes, it can happen. We are widening the provision.

As for Stewart Stevenson's point, our intention is not to transfer cases from rural Scotland to urban settings as a matter of course—for the very reason he outlined, which is that it would not be fair to do so. We do not expect the power to be used often, but it would allow business to continue to be processed efficiently when, for example, a large number of people have been arrested at a demonstration and a sheriff court is unable to cope. It makes sense to share the burden of business across the system to deal with such unusual circumstances.

Amendment 60 agreed to.

Section 22, as amended, agreed to.

Section 23—Time bar for transferred and related cases

Amendments 61 to 63 moved—[Hugh Henry]—and agreed to.

Section 23, as amended, agreed to.

Section 24—Reports about supervised persons

The Convener: Amendment 64, in the name of the minister, is grouped with amendments 65 and 66.

Hugh Henry: Amendments 64, 65 and 66 are technical. They seek to ensure that the policy behind section 24 can be delivered. At present, when an offender is the subject of a statutory supervision requirement, the court must obtain a social inquiry report before it disposes of a case. Section 24 provides that when a previous social inquiry report has been prepared within three months of the date of conviction, the court is not required to obtain a further report, although it may do so if it considers it appropriate. The provisions will reduce the number of unnecessary social inquiry reports that need to be produced in cases where they have no bearing on the disposal.

Section 24 as introduced provides that a recent report that is made available to the court will be of the kind that is specified in section 203(1) of the 1995 act. Section 203(1)(a) of the 1995 act makes clear that the report must cover the circumstances of the offence. Clearly, it is not possible for a report to be produced before the further offence is committed; the circumstances of the new offence cannot be covered until that time. The point was made by the Sheriffs Association in its submission to the committee. In my letter to the convener of 15 September, I promised to resolve the matter by way of amendment at stage 2.

Amendment 64 corrects the deficient cross-reference in proposed new section 203(1A)(a) to refer specifically to section 203(1)(b) of the 1995 act. The amendment makes clear that any report that is already available to the court needs to refer only to the character of the offender and his or her behaviour while on supervision and not to the circumstances of the current offence.

Amendments 65 and 66 are consequential amendments. Amendment 65 removes a further reference to section 203(1), as it is no longer appropriate. Amendment 66 is a grammatical change to proposed new section 203(1B) necessitated by amendment 65. Taken together, the amendments in the group will ensure that the policy intention of section 24 is delivered.

I move amendment 64.

Margaret Mitchell: Amendment 64 is an excellent amendment. In the district court, I often had to require a social inquiry report when one was not necessary.

Amendment 64 agreed to.

Amendments 65 and 66 moved—[Hugh Henry]—and agreed to.

Section 24, as amended, agreed to.

Section 25—Summary appeal time limit

The Convener: Amendment 67, in the name of the minister, is grouped with amendments 101 and 104.

Hugh Henry: Section 25 provides that the High Court may, on the application of the appellant, extend the 14-day period in which the appellant may apply to the High Court for review of a single judge's decision to refuse to grant leave to appeal in a summary case. The policy intention was to make that provision apply to all types of summary appeal, but section 25 currently provides only for appeals against conviction and for appeals against conviction and sentence. At the moment, the section does not provide for appeals against sentence only.

Amendment 67 rectifies the position by extending the provision to appeals against sentence only in summary proceedings by inserting proposed new subsection (3A) into section 187 of the 1995 act. The proposed new subsection would make identical provision for appeals against sentence as has been made for other forms of summary appeal. It would correct an oversight and ensure that the provisions on the extension of the time limit by which leave to appeal must be sought are consistent, irrespective of whether the appeal is against conviction, sentence or both.

Amendments 101 and 104 alter the existing timescales for the process of seeking leave to appeal in a criminal case. When an appellant seeks to found an appeal on grounds that have been deemed to be unarguable either by a single High Court judge at first sift or by three High Court judges at second sift, the appellant must currently seek leave of the High Court to do so not less than seven days before the date fixed for the hearing of the appeal. Amendments 101 and 104 change that by providing that the appellant must seek leave of the High Court within 14 days of the intimation on whether leave to appeal has been granted. The amendments make corresponding changes to the timescales for notification of that application to the Crown Agent.

Amendment 104 also provides the court with a discretionary power to consider such applications outwith the new timescale "on cause shown".

The changes to the timescale were proposed last year by the then Lord Justice General to resolve a potential cause of delay in the criminal appeal procedure. When applications are made at any time up to seven days in advance of the appeal hearing, they often lead to the hearing being delayed or continued until a later date.

The second change, which will provide the court with discretion to consider applications for leave outwith the 14-day period, was suggested by the Law Society of Scotland during consultation on an act of adjournal that had been drafted with a view to making the initial change. Having considered the issue further, the Executive has identified the bill as the most appropriate way of making the changes. That removes the need for an act of adjournal.

I move amendment 67.

Stewart Stevenson: In preparing to speak to the amendments, I had thought that they were relatively straightforward. The minister used one expression that I would like to probe further. He referred to the decision of "a single judge". Will the proposed provisions also apply to cases that have gone before a justice of the peace court, in which the bench might include several people rather than a single judge?

Hugh Henry: The issue relates to appeals, not to JP courts. In the bill as introduced, section 25 provides that the High Court may, on the application of the appellant, extend the 14-day period in which the appellant may apply to the High Court for review of a single judge's decision to refuse to grant leave to appeal in a summary case. That relates to cases that have gone from a sheriff court to the High Court or from a JP court to the High Court.

Stewart Stevenson: I see now that the amendment relates to that second stage of the

process. That is a useful explanation. As I said, I had thought that the issue was straightforward but I then got a little warning in my mind.

The Convener: I seek clarification on proposed new subsection (3A). It states:

"The High Court may, on cause shown, extend the period of 14 days".

How long may that period be extended? Is it a matter for the court to decide?

Hugh Henry: Yes. The court will need to consider what is necessary.

The Convener: How is it intended that such extensions should operate? I suppose that the appellant would first need to make a case on why the 14-day period could not be met. Will the length of the extension be based on the circumstances that are put before the court to allow the court to determine whether to extend the appeal period beyond the 14 days?

Hugh Henry: The court would need to consider what is appropriate in the circumstances. The court will be able to extend the 14-day period only on cause shown. Having listened to the arguments and having found that cause has been demonstrated, the court would need to decide what that extended period should be.

12:00

The Convener: You have probably already explained why the provision is needed and I simply did not follow you. What is the problem that requires the court to be able to extend the period of 14 days "on cause shown", which seems to be quite a low test? Why does the Law Society think that the existing period needs to be changed?

Hugh Henry: The Law Society argument is not about amendment 67; it is about the other amendments.

The Convener: Who is arguing that there needs to be a change?

Hugh Henry: We made the change for solemn procedure in 2002, but we missed out summary procedure. We are taking the opportunity to introduce consistency.

The Convener: I forget why that was done. I just want to be clear about why the change is being made. We are always highly prescriptive when it comes to time periods, especially when they relate to appeals. Under the proposed provision, the court could extend the period of 14 days "on cause shown", which is quite a low test. To me, the application of such a low test to the extension of the usual period seems unusual. I do not know what problem we are trying to fix, although I appreciate that you have probably rehearsed your argument with us on a previous occasion.

Hugh Henry: To which amendment are you referring?

The Convener: Amendment 67. It states:

"The High Court may, on cause shown, extend the period of 14 days mentioned in subsection (3) above, or that period as extended under this subsection".

If we agree to amendment 67, we will give the High Court the power to extend the usual period of 14 days, once cause has been shown. I am not sure why that is necessary.

Hugh Henry: We are not seeking to introduce the provision in response to an issue that the committee has raised. It is simply that we realised that we had not changed the summary appeal time limit. We are merely bringing it into line with what we have done elsewhere.

The Convener: I am asking why we made the change in the first place. Perhaps I am on the wrong track, but it seems that under amendment 67, if a solicitor can show to the sheriff court that they cannot meet the 14-day period—which is quite a low test—the appeal time limit will be extended. In other words, more appeals will be allowed. Why is the change necessary?

Hugh Henry: It will introduce a degree of flexibility for the appellant. The High Court asked for the change to be made because it used to be the case that such situations could be resolved only by an approach being made to the nobile officium. Amendment 67 is a response to an issue that the High Court identified as being a problem and the proposed provision will ensure consistency.

The Convener: You seem to be saying that the High Court wants to ensure consistency with the arrangements under solemn procedure, but I cannot remember why we made the change in that context. I do not want to make a big deal of it; I just do not know what problem we are trying to fix. You are correct to say that the committee has not previously addressed the issue, but that does not prevent us from raising it now. I want to know why the High Court thinks there is a problem with the 14-day period. I wonder whether it would be possible for that to be clarified between stage 2 and stage 3.

Hugh Henry: Essentially, the High Court asked for the change because it would give the accused more rights, greater protection and more flexibility, but I will certainly attempt to give a more detailed explanation in a letter to the committee.

The Convener: That would be helpful.

Mike Pringle: I want to be clear on the issue. You say that the provision will not result in more

appeals and that the result will be that somebody who has appealed will be able to say, "Sorry, we have not had enough time to prepare our appeal—can we have a bit more time?" Is that correct?

Hugh Henry: That is correct. The issue is how long people have to challenge a refusal of the right to appeal.

Mr McFee: That answer does not appear to be correct. The issue is about the length of time people have to say that they are appealing.

Hugh Henry: No; it is about the time limit on the period within which they can appeal against the refusal of leave to appeal.

Mr McFee: I was wondering whether I should take a 50:50 or ask the audience on this one.

Hugh Henry: I am quite sure about the issue and I will explain it in more detail.

Mr McFee: Great stuff.

Amendment 67 agreed to.

Section 25, as amended, agreed to.

Sections 26 to 28 agreed to.

After section 28

Amendments 39 and 68 moved—[Hugh Henry]—and agreed to.

Section 29—Petition proceedings outwith sheriffdom

Amendment 69 moved—[Hugh Henry]—and agreed to.

Section 29, as amended, agreed to.

After section 29

The Convener: Amendment 70, in the name of the minister, is grouped with amendments 71, 99 and 103.

Hugh Henry: Amendment 70 introduces a new section in the bill which, in turn, will insert proposed new section 102A into the Criminal Procedure (Scotland) Act 1995. That section will not be an addition to the rules of criminal procedure; rather, it will set out in statute the regime for the operation of warrants to apprehend an accused person who fails to appear at a diet in solemn proceedings. The proposed new section will supersede the current equivalent common-law procedure and make the law clear and accessible in the 1995 act. It will also achieve consistency with other apprehension-warrant procedures in the 1995 act. Amendment 70 is largely technical and will provide an improved and more efficient process for dealing with accused persons who fail to appear at diets in solemn proceedings.

Proposed new section 102A will make it an offence for an accused person to fail to appear at a diet of which the accused has been given due notice. It sets out the power of the court to grant a warrant to apprehend the accused in those circumstances. Under proposed new section 102A, when an accused is apprehended under a warrant, wherever practicable, they will have to be brought before a relevant court not later than in the course of the first day on which that court sits after the accused is taken into custody, and the court will have to make an order either detaining the accused in custody or releasing them on bail.

Proposed new section 102A will ensure that those who are apprehended for failing to appear in a serious case are brought back to court quickly. That contrasts with the current practice. At present, when an accused is arrested under a common-law warrant, he or she is taken straight to prison without appearing in court and is remanded until his or her case is re-indicted and brought to trial. Under the new system, when an accused appears in court and is remanded in custody, any previous period of time spent in custody will not count towards the custody time limits that are applicable from the date of the accused's appearance in court. Currently, when an accused is arrested and automatically remanded in prison under a common-law warrant, the custody time limits that are imposed by section 65(4) of the 1995 act still apply. When necessary, the Crown will apply for one, or possibly numerous, extensions of one or more of the custody time limits, which can result in multiple applications for extension of the time limits. That is not an effective use of court time or of prosecution resources.

Normally, the Crown obtains a petition warrant in respect of an accused's failure to appear and seeks to have the accused remanded following arrest. The effect is that the accused is subject to the full custody time limits under section 65(4) of the 1995 act but, once again, that is more work for those dealing with the case, necessitated by the accused's failure to appear.

Overall, the practical effect of amendment 70 is to replicate in statute the current common law system of warrants, with the exception that the accused will be held in police custody immediately following arrest and then brought before a court for consideration of bail, as opposed to being taken straight to prison. I consider that to be appropriate—such a person has failed to appear for a serious case and the court should be able to consider the matter as soon as possible.

Amendment 99 is consequential on amendment 70 and makes technical amendments to sections 65(2) and 71(4) of the 1995 act. The amendment to section 65(2) is simply a change to the terminology to maintain consistency with other

provisions in the 1995 act. The amendment to section 71(4) repeals a provision concerning the right of the court to issue a common-law warrant. That provision is superseded by proposed new section 102A.

Amendment 103 is consequential on amendment 70 and makes two technical amendments to section 135 of the 1995 act. The amendment to section 135(3) is simply a change to the terminology to maintain consistency with other provisions in the 1995 act. Section 135(4) is repealed as proposed new section 102A supersedes it.

Amendment 71 inserts proposed new section 297A into the 1995 act. The proposed new section concerns the operation of apprehension warrants in all proceedings and makes specific provision in support of the new solemn warrants system introduced by amendment 70. Amendment 71 enables the police to reapprehend an accused person who absconds from police custody having been arrested on a warrant. When an accused person absconds, we do not think that it should be necessary for a new warrant to be sought in order to reapprehend the accused. That amounts to extra work for the system and could lead to delay in the apprehension of the accused. Proposed new section 297A also clarifies what should happen when it is not practicable to bring an accused person before a court on the next court day following arrest.

Amendment 71 also provides a mechanism by which the police can retain appropriate control over an accused person who is arrested under the new solemn apprehension warrant while ensuring that they receive any necessary medical treatment or care should they take ill and it is not practicable to bring them before a court on the next court day.

Those provisions enable the police quickly and efficiently to retain, and regain control over, an arrested person who has absconded, while providing sufficient flexibility so that a person who has been arrested on a solemn warrant can receive medical attention notwithstanding that arrest.

The provision for release on undertaking of persons arrested on a summary warrant—as made by proposed new section 22(1B) of the 1995 act, inserted by section 6 of the bill—is unaffected.

I move amendment 70.

Stewart Stevenson: The minister has explained the translation of existing provisions from common law into statute law, but can he assure me that any warrants executed under the statute provision will have effect beyond the boundaries of Scotland? I am thinking of other jurisdictions within the United Kingdom but also of jurisdictions beyond the United Kingdom.

Hugh Henry: There is no change to the way existing common-law warrants operate. Sorry—there is no change to the jurisdiction.

Stewart Stevenson: I am not trying to catch anybody out, but proposed new section 102A(9) talks about the powers of officers of law. I wanted to be sure that we are not inadvertently removing the possibility of applying for extradition orders, for example. No specific references are made. I would happily accept an assurance that what you are seeking to do simply augments the existing law while leaving it intact.

Hugh Henry: In relation to jurisdiction, there is absolutely no change to the current procedure. An application would have to be made and it would then be considered by a judge in England and appropriately signed.

12:15

The Convener: Perhaps the minister explained this already, but does that mean that, when people are detained in custody because the court has issued a warrant for their arrest for their failure to appear in court, the period in custody currently counts towards the 140-day time limit?

Hugh Henry: At present, the time limits continue to run, so the Crown must seek an extension to the time limits.

The Convener: Amendment 70 could make quite a big difference, given that such timescales are regarded as being quite tight. If someone was apprehended for, say, three days under proposed new section 102A of the 1995 act, those three days would not count towards the 140.

Hugh Henry: Yes, the amendment could make a big difference.

Amendment 70 agreed to.

Before section 30

Amendment 71 moved—[Hugh Henry]—and agreed to.

The Convener: Amendment 72, in the name of the minister, is in a group on its own.

Hugh Henry: Amendment 72 will insert a new section into the bill before section 30. In turn, that new section will insert proposed new section 267B into the 1995 act, which will allow the prosecutor, in both summary and solemn cases, to apply to the court for an order requiring the accused to participate in an identification parade or other identification procedure.

We anticipate that legislation that was introduced to protect the interests of vulnerable witnesses will have the effect of increasing the use of identification procedures, in both solemn and

summary cases. Where special evidential measures are to be used at trial for such witnesses—for example, where a screen or closed-circuit television is to be used—dock identification may not be appropriate and the Crown may need to deal with identification of the accused in another way. Most commonly, that is done by prior identification through the use of an identification procedure. Such procedures ensure that vulnerable witnesses can benefit from the special measures that are available under the vulnerable witnesses legislation and participate in the identification of the accused with the minimum of trauma. However, such procedures can take place only if the accused can be compelled to attend and participate in them.

Amendment 72 provides that, on the application of the prosecutor, a court may make an order requiring the accused person to participate in an identification parade or other procedure. The provision will also make it an offence for a person to fail to comply with such an order without reasonable excuse. The provision will allow the prosecutor the flexibility to apply for an order requiring the accused to participate in an identification procedure regardless of whether the accused is on bail. The benefit of such a procedure is that, regardless of whether the accused is on bail or has been remanded in custody, it will be possible for them to be made subject to a court order requiring them participate in an identification procedure and it will be an offence for them not to comply with the order. In addition, where an accused is on bail, the procedure will avoid the need for the prosecutor to apply for a bail review to have a special condition imposed if attendance at an ID parade or other identification procedure was not imposed as a special condition when bail was granted.

I move amendment 72.

The Convener: I want to explore a couple of issues with the amendment that I think are worth clarifying. Will the Vulnerable Witnesses (Scotland) Act 2004 potentially result in an increase in the number of identification parades that are required?

Hugh Henry: Yes, it is theoretically possible that that might happen.

The Convener: I want to raise an issue that arises in connection with the amendment. I have picked up that there is some debate on the issues around identification parades and, in particular, whether it should be disclosed to the defence that the victim failed to pick out the accused from an identification parade. There are weaknesses in such a process. Although such procedures should generally be available as an option for dealing with vulnerable witnesses in the criminal justice system, other implications could arise from relying on them entirely. Resource implications will also arise if identification is to be made by means of an ID parade rather than identification in court.

I realise that those issues are not absolutely pertinent to today's debate, but, given amendment 72, I just want to be clear that we do not necessarily expect heavier reliance on such identification procedures.

Hugh Henry: That is a separate issue. Amendment 72 deals with some of the problems that exist when special evidential measures are to be used in a trial. As I explained, where a screen or CCTV is to be used, dock identification is not possible. Amendment 72 will allow the identification process to be done in advance, so that the trial can proceed and not be impeded simply because special evidential measures are required.

The police are fully engaged with the potential impact of the 2004 act. I accept that the provisions of the 2004 act can be resource intensive, but amendment 72 will simply provide a mechanism that will facilitate an efficient and effective way of requiring the accused person to participate in an ID process when necessary.

The Convener: I am satisfied that amendment 72 will provide an order requiring the accused to participate in that process; the Crown will not necessarily have to rely on it. Perhaps that debate is for another day.

Amendment 72 agreed to.

Section 30—Evidence on commission

The Convener: Amendment 73, in the name of the minister, is grouped with amendments 74 to 85.

Hugh Henry: Taking evidence on commission is one of the special measures for which the 2004 act provides that is intended to make it easier for child witnesses and people who have been identified as adult vulnerable witnesses to give the best evidence that they can. The amendments in the group are intended to make that special measure operate as effectively as possible and to ensure that it is used appropriately.

The bill as introduced provides that the commissioner in all sexual offence cases must be a judge or a sheriff, to permit the commissioner to determine the admissibility of questioning and evidence. Amendments 73 to 85 will clarify the commissioner's role and that of the presiding judge when evidence is being taken on commission, and will extend the provision in the bill so that, in all criminal cases in which evidence is to be taken on commission, the commissioner must be a judge in High Court cases and a sheriff in all other cases. The change will also apply to

circumstances other than vulnerability in which section 272 of the 1995 act allows evidence to be taken on commission.

As the committee knows, people who are accused of committing a sexual offence are prohibited from conducting their own defence. At the start of proceedings, they are given notice that they must be represented by a lawyer at any trial. Amendments 73 and 74 will extend that so that the notice must specify that the accused person is to be represented by a lawyer at any related proceedings at which evidence is taken on commission.

Amendment 75 is a minor drafting amendment to section 30(1) of the bill to avoid repetition of the reference to the 1995 act. It has no effect on the substance of that act's provisions.

Amendments 76, 77, 80 and 81 specify the sections of the 1995 act in which references to a trial, to a trial diet and to the court are to be read as including references to proceedings before the commissioner and to the commissioner. That means that some protections that apply to people who give evidence at a trial will apply equally in proceedings before a commissioner. These technical amendments will ensure that that aim is achieved. Some other references are still to be taken to apply only to the trial court, which will ensure that some functions continue to be exercised exclusively by the court, even when evidence is taken on commission.

Amendments 78 and 82 amend the time limits within which an application must be made if some lines of questioning that would otherwise be prohibited are to be advanced in sexual offence cases. That will enable such applications to be submitted up to seven days before proceedings before the commissioner are due to commence.

Amendments 79 and 83 will provide that a commissioner must always be a judge in High Court cases and a sheriff in other criminal cases. That will ensure that the commissioner can make an immediate determination as to the admissibility of questioning, which will avoid the need for witnesses to answer all the questions that are put to them, even if the questions are inadmissible. Answering such questions would be likely to cause distress to witnesses, particularly if they are vulnerable and evidence is being taken on commission as a special measure under the 2004 act.

Amendment 84 provides that where a commissioner and, not as at present, a trial judge allows certain evidence or questioning, the prosecutor must disclose the accused's relevant previous convictions to the presiding judge. At present when a trial judge permits questions to be asked or evidence to be led that would otherwise be prohibited by the 1995 act, any relevant previous convictions of the accused person must be laid before them. Although the scope of the provision is to be extended to cover situations in which the decision to allow such evidence or questioning is taken by a commissioner, the requirement to lay relevant previous convictions before the presiding judge will remain unchanged.

Amendment 85 extends the duty of the court to appoint a solicitor for an accused person who is prohibited from conducting his or her own defence to cover proceedings before a commissioner in certain sexual offence cases. The effect of the amendment is that in such circumstances the commission will be adjourned and the case referred back to the court to allow a solicitor to be appointed.

I move amendment 73.

Amendment 73 agreed to.

Amendments 74 to 85 moved—[Hugh Henry]—and agreed to.

Section 30, as amended, agreed to.

After section 30

The Convener: Amendment 86, in the name of the minister, is in a group on its own.

Hugh Henry: Amendment 86 corrects two deficiencies in the Criminal Justice (Scotland) Act 2003, both of which affect the way in which the interests of children under the age of 14 are handled by the victim notification scheme.

The victim notification scheme allows the victims of certain crimes for which offenders have received a sentence of four or more years to be given information on the offender's release and to make representations to the Parole Board for Scotland. If the victim is under the age of 14, those rights can be exercised by the child's carer at the time of the offence. Although the carer at the time of the offence and the current carer might be the same person, there might be occasions when that is not the case. Amendment 86 therefore provides for the current carer of a child to apply to the victim notification scheme on the child's behalf. When children attain the age of 14, those rights pass to them in their own right.

The second deficiency relates to cases in which the victim has died. In such cases, certain near relatives may apply to join the victim notification scheme. At present, however, neither children under the age of 14 nor their carers may apply to join the scheme. That is clearly wrong, and the amendment will ensure that children are given the same rights as other victims, albeit that those rights are to be exercised through their current carer until the child reaches the age of 14.

I should explain that we have taken a conscious decision not to make similar changes to the victim statement scheme, which is covered by section 14 of the Criminal Justice (Scotland) Act 2003. That is partly because decisions have not yet been made about introducing a national scheme in light of the pilot that ended last year. The main reason, however, is that the issues involved are substantially more complex, and it is not certain that it would be in a child's best interests to have a statement made on their behalf; it is also not certain who would be best placed to make that statement. If a national scheme is thought to be appropriate, we will consult on how best to protect the interests of children in relation to victim statements.

I move amendment 86.

The Convener: The victim notification scheme is a welcome provision and I fully support amendment 86; it makes perfect sense to me.

Amendment 86 agreed to.

Section 31 agreed to.

After section 31

12:30

The Convener: Amendment 88, in the name of the minister, is in a group on its own.

Hugh Henry: Amendment 88 inserts into the bill a new section after section 31; the new section itself inserts proposed new section 298A into the Criminal Procedure (Scotland) Act 1995. The proposed new section makes provision in relation to methods of intimating bills of suspension and advocation, which are types of criminal appeal, and petitions to the nobile officium, a form of appeal to the High Court that may be used if no other remedy is available to the appellant.

The law governing intimation of appeals by way of bills of suspension and advocation, and petitions to the nobile officium, is mainly common law. The practice is that the principal copy of bills of suspension and advocation and the associated deliverances, and petitions to the nobile officium, are served personally on the respondent.

Amendment 88 will enable parties to serve a copy of the relevant bill or petition rather than the original document. It will also allow service by a variety of means rather than having to serve personally on the other party. That will provide for a more efficient and flexible means of service on the respondent in respect of those appeals, and is in keeping with the flexibility introduced in other parts of the bill. I should stress that the amendment relates only to service of the documents; it does not change the procedures governing those appeals in any other way.

I move amendment 88.

The Convener: It seems fairly straightforward, although I suspect that most members, like me, do not really know exactly what the nobile officium is, so we shall just have to trust you on that. Where did amendment 88 come from? We have not had any discussion about the matter.

Hugh Henry: The amendment was Crown Office led. As you are aware, the Crown Office has direct experience of the way in which the law relating to those matters applies, and we have been guided by drawing on the Crown Office's experience.

The Convener: It is purely about intimation and service. It is a big amendment, but that is all that it is about.

Hugh Henry: That is correct.

Amendment 88 agreed to.

The Convener: Amendment 87, in the name of the minister, is grouped with amendments 89 to 95 and 118.

Hugh Henry: Amendment 87 introduces a new section into the bill, which inserts proposed new sections 75B and 137ZA into the 1995 act. The proposed new sections provide that, in both solemn and summary proceedings, a court can, of its own motion, alter a diet that has been fixed for a day on which the court is not sitting. Currently the court has the power to alter a diet only on the application of the Crown, the defence or both parties jointly. It cannot exercise that power of its own accord.

There are instances when it would be useful for the court to be able to alter a diet without relying on an application by the parties. For example, a court may inadvertently fix a diet for a date when it is not sitting. Fixing a diet for such a date is not incompetent in itself—there is nothing to prevent a court from sitting on a Saturday, Sunday or court holiday—but in practice the court will seldom do so.

Currently, on discovering that a diet has been fixed for a non-sitting day, the clerk of court has to contact the Crown and the defence and seek the agreement of both parties to have the diet altered. In practice, agreement is normally forthcoming, but the process can be time consuming. Sometimes such errors are discovered shortly before the date on which the diet is fixed and time may be of the essence in securing an alteration. If agreement cannot be reached and the diet does not call on that day, the case falls. If such errors can be spotted in advance, we believe that it should be possible for the court to correct them so that the case can continue without the need to start again, and without the risk of losing the proceedings through time bar.

Amendment 87 will ensure that, in those circumstances, the court can reschedule the diet itself. Where that happens, either party to the case will be entitled to an adjournment of the new diet fixed, if the court is of the view that it would not have been practicable for them to proceed with the case on that date. That small addition to the package of measures in the bill should improve the efficiency of the administration of court business and reduce the impact of administrative errors.

Proposed new section 300A of the 1995 act, to be inserted by section 32 of the bill as introduced, gives the court a power to excuse procedural irregularities in certain circumstances. Amendments 89 to 91 make minor changes to the operation of the section, in order to ensure that it operates effectively.

Amendment 91 introduces a provision requiring the court to give the party that is not making the application for excusal of the irregularity the opportunity to be heard on the merits of the matter. The bill as introduced did not require the court to hear the other party. In view of the fact that the excusal of an irregularity may have an impact on either party to the case, it is prudent to ensure that both parties have the right to be heard before the court decides whether or not to exercise the power that is available to it. Amendment 89 is consequential on amendment 91.

Amendment 90 allows the High Court, when dealing with an appeal, to use the power to excuse a procedural irregularity that took place in the earlier proceedings before another court that are the subject of the appeal. The bill as introduced permits a court to excuse only irregularities that took place in proceedings before that court. If that were to remain the position, the High Court would have to remit cases back to the originating court, if it considered that the power should be exercised, leading to greater delay in resolving those cases and further churn of cases for no substantial benefit.

The purpose of amendments 92 to 95 is to put it beyond doubt that the power of the court to excuse procedural irregularities includes the power to alter the date of a future court diet, where that diet has been set in error for a non-sitting day, such as a Saturday, Sunday or court holiday. On occasion courts inadvertently fix diets for non-sitting days. If the diet does not call on that day the case falls, unless action has been taken to alter the diet. Amendment 92 adds the fixing of a court diet for a non-sitting day to the list of examples of irregularities that can be excused under the new power. Amendment 93 adds the power to alter a diet to the list of examples of actions that a court may take to correct a procedural irregularity. Amendment 94 defines "non-sitting day" for the purposes of proposed new section 300A of the 1995 act. Amendment 95 is consequential on amendments 92 to 94 and clarifies that the power to alter the date of a diet under the provisions is without prejudice to any other provision of the 1995 act entitling a court to alter a diet.

I turn to amendment 118, lodged by Margaret Mitchell, which seeks to remove section 32 from the bill. As I have set out, section 32, by inserting proposed new section 300A into the 1995 act, gives the court the power to excuse procedural irregularities in certain circumstances, provided that the court is satisfied that it is in the interests of justice to do so. In the course of a case, the court, the prosecutor the accused or the accused's solicitor may inadvertently make a small technical or procedural mistake that can have considerable consequences, perhaps even leading to the case falling. For example, a deferred sentence may be adjourned for a day too long or a problem may be discovered with the granting of warrants at intermediate diets. Members may recall that the Parliament had to pass emergency retrospective legislation to deal with the second situation. If it had not, a large number of people would have escaped justice. In such situations, it is surely right that the court should be able to consider whether it is in the interests of justice that the procedural irregularity be excused. If it is not, relatively minor procedural technicalities of the justice system could be seen to frustrate its ultimate purpose—to convict the guilty and to acquit the innocent.

I have heard it suggested that the existence of the power might lead to sloppiness and delay, because the parties to a case would know that they could make a mistake and just get it fixed under the power. I do not believe that to be the case. It is important to stress that no party to a case will have the right to have errors corrected. It will be for the court to decide whether to excuse an irregularity, and it will be able to do so only after having considered the facts of the case and decided that the interests of justice would be served by that. I have faith that the Scottish legal profession will not take the risk of relying on a discretionary power such as this to drop the standard of its work.

Section 32 provides a simple mechanism for ensuring that genuine problems caused by genuine procedural mistakes can be addressed, without there being a manifest injustice or the need for emergency legislation to deal with an unforeseen procedural difficulty. I believe that it is an important part of the process of convincing the law-abiding public that the justice system is on their side and is not a system that allows its purpose to be frustrated by inadvertent procedural errors. The provision will ensure that procedural technicalities are not allowed to result in acquittals

that are seemingly disproportionate in light of all the circumstances of a criminal case. I hope that Margaret Mitchell will consider not moving amendment 118.

I move amendment 87.

Margaret Mitchell: Amendment 118 is a probing amendment, because I understand and am very supportive of the rationale for the provisions in section 32. There have been occasions when a trial has been abandoned because of a very minor irregularity, which is clearly in no one's best interests.

The purpose of amendment 118 was to probe a little further the extent to which procedural irregularities will be excused, given that criminal procedure plays a hugely important part in the criminal justice system in ensuring that courts are fair, certain and efficient. However, I am satisfied with the amendments that the minister has lodged, as they set down exactly where he envisages the provisions kicking in. On that basis, I will be happy not to move amendment 118.

Stewart Stevenson: I am delighted that Margaret Mitchell will not move amendment 118, which would leave out section 32. However, will the minister assure committee members that if a member asks a year after the provision is implemented how many times the powers that have been granted under the section have been exercised, the answer will not be, "This information is not held centrally"? Can he assure us that he sees the monitoring and recording of the operation of the power of the court to excuse procedural irregularities as being part of the Justice Department's brief? I strongly support the provision and do not seek to disrupt its operation; I merely want to ensure that its use is monitored.

Hugh Henry: We will seek to monitor what has happened as closely as we can, but I hesitate to give the committee a commitment that would have significant procedural implications for how the court system works and how statistics are collected. We will do everything in our power to monitor, but I cannot be as specific as Stewart Stevenson has requested me to be.

Stewart Stevenson: Can the minister assure us that the powers in the section will always be exercised in public?

The Convener: I sympathise with what Stewart Stevenson has proposed. I have no difficulty with the idea of ensuring that the courts have the power to fix minor technical or procedural problems, but there will be boundaries and there could be arguments in the future about whether it is the Parliament's job or a court's job to fix a problem that is probably not so minor. We must be absolutely sure about the boundaries. With respect to the emergency legislation that the Parliament passed in 2002—the Criminal Procedure (Amendment) (Scotland) Act 2002—I think that the minister is saying that the proposed power would have allowed the courts rather than the Parliament to correct the problem that arose. I do not have any difficulty with excusing minor technical or procedural mistakes, but we need to know that boundaries exist. The courts are a check on the Parliament, but the Parliament is also a check on the courts, and it must ensure that they do not abuse the powers that it gives them. I would like the minister to say that he will not leave decisions to be taken totally at the discretion of the courts. One can understand why people are already getting exercised about the matter. Nothing in the bill defines what would be regarded as a minor irregularity. I would like the Executive to confirm that it will not simply let matters go and say, "Just let the courts get on with it," because controversial issues may arise. There should be safeguards.

Hugh Henry: In answer to Stewart Stevenson's question, the powers will be exercised in public. In answer to the convener's question, there will be boundaries and exclusions. Section 32 will insert proposed new section 300A into the 1995 act. Proposed new section 300A(2) states that a court may excuse a procedural irregularity if

"it appears to the court that the irregularity arose because of … mistake or oversight; or … other excusable reason; and … the court is satisfied in the circumstances of the case that it would be in the interests of justice to excuse the irregularity."

Proposed new section 300A(4) states:

"Subsection (1) above does not authorise a court to excuse an irregularity arising by reason of the detention in custody of an accused person for a period exceeding that fixed by this Act."

Proposed new section 300A(5) states:

"Subsection (1) above does not apply in relation to any requirement as to proof including, in particular, any matter relating to—

(a) admissibility of evidence;

(b) sufficiency of evidence; or

(c) any other evidential factor."

Therefore, there will be boundaries and exclusions. I hope that they satisfy the convener's concerns.

12:45

The Convener: They do a bit, but will you clarify whether the problem that led to the emergency legislation that was passed in 2002 could have been dealt with under the new provisions or whether the Parliament would still have had to deal with it?

Hugh Henry: It is possible that a court could have dealt with it under the new powers.

The Convener: Will there be anything to prevent the Parliament from dealing with a procedural irregularity if it takes the view that the irregularity is on the borderline of being a wee bit more than a minor procedural matter?

Hugh Henry: No.

Amendment 87 agreed to.

Section 32—Power of court to excuse procedural irregularities

Amendments 89 to 95 moved—[Hugh Henry]—and agreed to.

Amendment 118 not moved.

Section 32, as amended, agreed to.

The Convener: That brings us to our target for today. The target for the next meeting will be announced in tomorrow's *Business Bulletin*. I remind members that the new deadline for lodging amendments is noon on Friday 10 November.

I thank the minister, whom we will see next week, for attending the meeting.

Meeting closed at 12:47.

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