JUSTICE 1 COMMITTEE

Wednesday 10 March 2004
(*Morning*)

Session 2

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JUSTICE 1 COMMITTEE
9th Meeting 2004, Session 2

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

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

COMMITTEE MEMBERS

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

*attended

COMMITTEE SUBSTITUTES

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

THE FOLLOWING ALSO ATTENDED:

Nicola Sturgeon (Glasgow) (SNP)

THE FOLLOWING GAVE EVIDENCE:

Hugh Henry (Deputy Minister for Justice)

CLERK TO THE COMMITTEE

Alison Walker

SENIOR ASSISTANT CLERK

Claire Menzies Smith

ASSISTANT CLERK

Douglas Thornton

LOCATION

Committee Room 2

Scottish Parliament

Justice 1 Committee

Wednesday 10 March 2004

(*Morning*)

[THE CONVENER *opened the meeting at 10:02*]

Justice (Northern Ireland) Bill

The Convener (Pauline McNeill): Good morning, everyone. I welcome members to the Justice 1 Committee's ninth meeting of 2004. I ask members to do the usual by switching off their phones and anything that buzzes and which might interrupt the meeting. That would be helpful.

I have received apologies from Margaret Smith, who is unwell. We might be joined by Mike Pringle, who is the Liberal Democrat substitute on the committee. I welcome Nicola Sturgeon to the committee.

I refer members to the note that the clerks have prepared, which sets out the background to the Justice (Northern Ireland) Bill. I welcome to the committee Hugh Henry, who is the Deputy Minister for Justice, and, from the Scottish Prison Service, Ruth Sutherland, who is the head of prisoner and operational administration, and Stephen Sadler, who is the head of legal policy. It is over to the minister for a brief statement.

The Deputy Minister for Justice (Hugh Henry): The Minister for Justice, Cathy Jamieson, wrote to the convener on 23 February to ask the committee to consider a Sewel memorandum on the transfer of prisoners. She set out the proposal's details and the safeguards that we have discussed with other United Kingdom jurisdictions. She made it clear that the Parliament would not consider a Sewel motion until after the committee had considered the memorandum.

Along with others in the UK, the Scottish Executive has been asked to play its part in providing the framework for our prison services to take a share of prisoners from Northern Ireland, to further the peace process. I stress that any such move would be taken only as a last resort. If the provision is used at all, it might involve at most a handful of individuals throughout the UK. The minister has said on the record that she believes that only one or two prisoners would be held in Scotland.

Scottish ministers have considered the matter carefully and concluded that the right thing to do is to offer our help if it is required alongside that of our partners in the UK Government. The Justice (Northern Ireland) Bill makes provision for the compulsory transfer of disruptive prisoners to safeguard the security and good order of prisoners in Northern Ireland. The Secretary of State for Northern Ireland has sought the agreement of Scottish ministers to extend the provision to Scotland.

The power would be reserved and it would be used only in exceptional circumstances when all other options open to the Northern Ireland Prison Service had been considered. If the power is ever used, it will result in only a very small number of prisoners being held in Scotland at any time.

No transfer could take place without the explicit consent of Scottish ministers. The Scottish Prison Service is confident that it will be able to manage such prisoners. It has also raised the matter with the trade unions, which have said that they are content with the safeguards in the memorandum of understanding, which we and they believe are sufficient to deal with any difficulties that might arise.

The minister's letter to the convener enclosed a copy of the memorandum of understanding between Northern Ireland, Scotland, England and Wales. It sets out the arrangements for any transfers and the safeguards that will be in place.

The stability of prisons in Scotland and the safety of those who live and work in them will be our key consideration. The need for individual transfers will be reviewed regularly and, as soon as it is no longer necessary, the prisoner will be returned to Northern Ireland. Scottish ministers will review the case of each transferred prisoner at least every three months. Scottish ministers will be able to ask for a prisoner to be returned to Northern Ireland at any time.

The Sewel procedure for the part of the Justice (Northern Ireland) Bill that will apply to Scotland is entirely appropriate. There is no immediate slot in our parliamentary timetable to introduce the power to transfer prisoners from Northern Ireland. The potential effectiveness of the new power will be reduced if prisoners can be transferred to England and Wales but not to Scotland. I hope that the committee will agree that Scotland should be prepared to play a part in the process and that by passing a Sewel motion we have the best way of ensuring that we are ready to help if required.

The Convener: Thank you very much.

Margaret Mitchell (Central Scotland) (Con): Minister, you said that the bill is being introduced to further the peace process in Northern Ireland and to deal with security issues for disruptive prisoners. Why is it necessary to use other jurisdictions to deal with those prisoners?

Hugh Henry: Those responsible in Northern Ireland want to prepare a contingency plan for the particular stresses and strains on the prisons in Northern Ireland. You will be aware that there are specific problems there to do with the segregation of prisoners. Even within the different traditions in Northern Ireland, there are differences of opinion between groups. All of that imposes particular problems and strains.

Also, the Northern Ireland Prison Service has to confront potential industrial action because of threats made to prison staff by paramilitary groups. That, too, is imposing strains on the service. In the difficult circumstances in which it operates, the service wanted to be able to make plans so that if one or two people required to be taken out of the prison system in order to make it more stable, that could be done smoothly. If it contributes to the peace process and helps with the effective management of difficult prisoners in Northern Ireland, we should be able to make that contribution. I would not want to minimise the difficulties of the situation in which the Northern Ireland Prison Service operates.

Margaret Mitchell: In short, are you saying that the Northern Ireland Prison Service could not disperse prisoners to other prisons? Is their removal to other jurisdictions the best and most effective approach?

Hugh Henry: The Northern Ireland Prison Service will take all possible steps to manage any difficulties and disperse prisoners within its own jurisdiction. The service would ask for prisoners to be moved to another jurisdiction only in exceptional circumstances, if it thought that that would take pressure off the system at a particular time. Its normal response would be to manage problems within its own jurisdiction.

Margaret Mitchell: That is helpful. Will you explain why the Scottish Executive has decided that a Sewel motion is the most appropriate route to take?

Hugh Henry: Legislation is required to allow this to happen and if we were to contribute to the process without using a Sewel motion, a full bill of the Scottish Parliament would be required. Given all the other pressures on the Scottish Parliament and given our heavy legislative work load, we believe that in order to be able to respond quickly, it is better to use the bill that is going through Westminster. That approach will enable us to avoid having to create a slot in our legislative timetable, which would cause problems, not just for the Executive but for the Parliament. The issue is relatively tight and could easily be dealt with as part of the UK bill. The main point to stress is that even if the Sewel mechanism is used, it will still be for Scottish ministers to decide whether a prisoner may be transferred to Scotland. Scottish ministers will retain the right to refuse to accept a prisoner.

I suppose that it would be competent for the Parliament to reject the Sewel motion, either because it does not want to contribute to the peace process, or because it does not want prisoners from Northern Ireland ever to come to Scotland for any reason. That would be a matter for the Parliament. I suppose that it would also be for the Parliament to decide that it does want to consider making such an offer to the Northern Ireland Prison Service, but only through a full bill of the Scottish Parliament. In that case, the Parliament would have to consider its timetable and the matters that would have to be rescheduled to accommodate such a bill. We think that the Sewel motion offers the speediest and most efficient approach to the matter.

Bill Butler (Glasgow Anniesland) (Lab): According to the Executive's memorandum on the bill, the Secretary of State for Northern Ireland has indicated that the ability to transfer prisoners to Scotland would be a reserve power that would be used sparingly, and you have said today that the power would be used "as a last resort". Will you outline the specific circumstances in which the power would be used?

Hugh Henry: It is difficult for me to answer that, because two matters would have to be considered. First, it would be for the Northern Ireland Prison Service to decide that it needed our help. Such a decision would be based on local circumstances and it would be idle of me to speculate on what might trigger a request for assistance. I would not want to sensationalise or exaggerate the situation. The indications that we have are that the Northern Ireland Prison Service will continue to manage any difficulties within its own jurisdiction, but at some point the service might think that it would be better to move someone out of Northern Ireland, for reasons of security, safety and stability. That decision would be for the Northern Ireland Prison Service.

Secondly, even if the Northern Ireland Prison Service thought that it would be appropriate to transfer a prisoner at a particular time, Scottish ministers would still have to decide whether to accept the individual. Issues such as whether we had the capacity, whether transferring the individual would cause difficulties for a particular establishment and other issues surrounding the individual would fall entirely within our legitimate area of consideration. In short, we would consider our circumstances at the time. We would take into account whether we could safely and securely accept the prisoner without prejudice to the overall stability of the Scottish prison system before we made such a decision.

I suppose that those two sets of issues would need to be considered. I have speculated on the second of those, but I hesitate to speculate on the first.

10:15

Bill Butler: You are unable to go into specific circumstances.

Hugh Henry: It would be wrong to speculate idly which specific incident might act as a trigger for the Northern Ireland Prison Service to make such a request. I am sure that all of us can think of circumstances in which that might happen, but I hesitate to start a line of debate that might take us into a range of what ifs about events in Northern Ireland. We sometimes have enough difficulties to cope with here without speculating what might be behind the thinking of the Northern Ireland Prison Service.

Marlyn Glen (North East Scotland) (Lab): Following up on Bill Butler's question on whether Scottish ministers' consent would be required for a prisoner's transfer, I want to ask what form the consultation with Scottish ministers might take in practice.

Hugh Henry: The Northern Ireland Prison Service would approach us with a request to transfer a prisoner. It would provide us with details of who the prisoner was and why it believed that the prisoner should be transferred. We would then reflect on our circumstances at that time. Thus, the formal approach would come to us from Northern Ireland, but the decision on whether it would be right to accept the request would rest with us.

Marlyn Glen: In what circumstances might Scottish ministers not consent to a transfer?

Hugh Henry: That is difficult for me to say without tying the hands of ministers at a future juncture. One can imagine a situation in which it was believed that the prisoner concerned might be overly disruptive in a particular prison because of other connections that the prisoner might have there. We would need to consider that. In addition, if there were problems in one of our prisons at a given moment, that would give us some pause for thought. We must also remember that, by and large, such transfers would be of high-security prisoners, who might well need to be kept in isolation. We would want to ensure that such prisoners could be held in those circumstances without disrupting the on-going work of the Scottish Prison Service.

We would consider the individual concerned and issues such as the safety and security of our staff and other prisoners and wider issues to do with the management of the prison system. We would need to consider a range of factors. Some of those might be obvious just now, but some might not be obvious until the request was made. However, I assure the committee that any request would be considered thoroughly and carefully. We would not make a quick or knee-jerk reaction but would provide a very considered judgment.

The Convener: Will you tell us about the timing of the bill? There have been on-going tensions in the region for some time. I wonder why it was decided in 2003 to allow prisoners to be transferred to the whole of the UK.

Hugh Henry: Some of that is beyond my competence or understanding. I think that I indicated some of the broader issues that were in play. In recent years, there have been certain tensions in the Northern Ireland Prison Service which, to some extent, have been exacerbated by threats and attacks on prison staff and their families. During the peace process, there has also been a review of security arrangements in Northern Ireland, to which I suspect that the bill is a response. The bill also forms part of the consideration of how best the peace process can be kept secure and stable.

The bill should be viewed in the broader context of attempts to retain some of the recent stability in Northern Ireland. I am not saying that the problems have disappeared. We are all aware of some of the recent reports that paramilitaries are still carrying out punishment beatings. However, in comparison with some of the worst excesses in past years, there has been a period of relative stability in Northern Ireland.

As well as being part of that review process, the bill is a response to some of the problems that have become obvious in the Northern Ireland Prison Service in the past year or two, which have put considerable strain on prison staff. The service has been trying to cope not just with difficult prisoners but with difficult prisoners who have a view on how they should be incarcerated and with whom they should have to associate. That whole swirl of issues has led to a re-examination of how security and prisons are operating.

The Convener: I want to clarify a couple of technical matters about the process. Is it correct to say that a Northern Ireland minister would make a direct approach to a Scottish minister?

Hugh Henry: I believe so.

The Convener: Why would a Northern Ireland minister approach Scotland rather than England or Wales in any given circumstances? Would that be done out of a geographical consideration or would Scotland simply be a further option?

Hugh Henry: Scotland would just be a further option. We must keep stressing that we do not know whether any such requests would be made.

We are talking about a contingency plan; we do not know whether anyone would need to be moved. We would expect that the majority of any such requests would be handled by the prison system in England and Wales. We would be making a small contribution to that.

The Convener: Would the Executive decide which prison any prisoner would go to? How would that be decided?

Hugh Henry: The Minister for Justice would make a decision about whether a prisoner would transfer. It is clear that she would have to consult the Scottish Prison Service about which establishments might be appropriate. Before any decision to accept a prisoner was made, a discussion would take place with the SPS to identify first whether the capacity to accept someone existed and, secondly, whether there was a suitable location for that person. If, at any juncture, the SPS gave advice that that person could not be accommodated, the minister would not give her agreement.

Mr Stewart Maxwell (West of Scotland) (SNP): I take you back to the answer that you gave about the Sewel motion route. One of the reasons that you provided for the use of a Sewel motion was that you wanted the bill to be enacted speedily. I take it from that that the legislation came upon us unexpectedly and very quickly. When was the Justice (Northern Ireland) Bill introduced at Westminster?

Hugh Henry: My understanding is that that happened just before Christmas; I do not have specific dates, but I could obtain that information for the committee. It was introduced at the end of last year.

Mr Maxwell: So, there was no indication, prior to December 2003, that such a bill was likely to be introduced.

Hugh Henry: I am not sure what discussions took place about the difficulties that Northern Ireland was facing and how the Government was seeking to resolve them. I understand that the legislation was introduced in Westminster late last year.

Mr Maxwell: Okay. Let us move on to the issue that you have mentioned several times this morning—the right of a Scottish minister to refuse consent if the Secretary of State for Northern Ireland applied for a transfer. Where in the bill is it stated that a Scottish minister could refuse permission for a transfer?

Hugh Henry: We have made it very clear in the memorandum of understanding that that is exactly how the bill would operate.

Mr Maxwell: Yes, but where in the bill is it stated that you have the right to refuse permission for a transfer?

Hugh Henry: Because we are responsible for our prison system, the bill would not give anyone from any jurisdiction permission to transfer prisoners to Scotland without Scottish ministers' consent. The bill cannot be read in isolation from the memorandum of understanding. The bill creates the mechanism for making the decision; the memorandum of understanding sets out the conditions in which decisions will be made.

Mr Maxwell: Let me clarify the point. Does that mean that if the Secretary of State for Northern Ireland wanted to transfer a prisoner, you would have an absolute right of veto?

Hugh Henry: Yes.

Mr Maxwell: And there are no circumstances in which the Secretary of State for Northern Ireland could override that decision.

Hugh Henry: No.

Nicola Sturgeon (Glasgow) (SNP): When it was originally introduced at Westminster, the bill did not refer to Scotland at all. What factors led to that changing? Why was it later considered appropriate for the bill to refer to Scotland? When a request is made of Scottish ministers, will there be any role in that process for Parliament? Will ministers either consult Parliament prior to making a decision or report to Parliament after decisions are made?

Hugh Henry: I would expect that the minister would keep Parliament informed. However, it would be difficult to suggest that there should always be prior parliamentary approval in sensitive operational matters such as this, in which the minister is required to make a decision. Ministers are required to exercise a number of things in the course of their duties for which they do not have to have prior parliamentary approval. It would be difficult if we were to operate a system whereby ministers came back to Parliament on a daily basis for approval of decisions that they had to make. Nevertheless, for many reasons, it would be essential for the minister to keep Parliament informed about the decisions that she was making.

Scotland was included in the bill simply because the UK bill would otherwise have referred only to the jurisdiction of England and Wales. It was felt that if England and Wales were making a contribution to the peace process in Northern Ireland, it would be appropriate for all parts of the United Kingdom to consider what assistance should be given. We felt that Scotland should also be considered as the bill was being amended. The only alternative for us would have been to introduce a bill in the Scottish Parliament which,

considering the constraints that we faced, would have been difficult. It would still be a matter for Parliament to decide if it did not want to contribute to assisting in the process. However, the view of ministers and the Scottish Executive was that, when it was being considered by other parts of the United Kingdom, it was right for us to offer to take any potential pressures off the Northern Ireland Prison Service if that had to be done.

10:30

Nicola Sturgeon: You have said—and the memorandum of understanding makes it quite clear—that transfers would be a measure of last resort and that transfer requests will be made only if all other options have failed. That suggests that such requests will probably be made only for prisoners who cannot be controlled in any other way; that is, prisoners who are at the most disruptive end of the scale of disruption. Given the fact that transfer is likely to be regarded as a form of punishment, we can assume that prisoners will not be happy about being transferred. All that might add up to the assumption that they would present a security risk or a risk to order in Scottish prisons. Once the decision has been made to accept a transfer, what steps will be taken by the Scottish Prison Service to ensure that order in our prisons is not compromised as a result of having one or more prisoners of that nature?

Hugh Henry: I return to a point that I made earlier. Before any decision was made by a Scottish minister, discussions would take place with the Scottish Prison Service to determine whether it felt confident that the transfer could be managed in an orderly way. The Scottish Prison Service tells us that it can cope with transfers; however, any specific request would require such a discussion to take place and such an assessment to be made before the minister could decide.

It is possible that transfers could involve people like those whom Nicola Sturgeon described; however, it is also possible that, if there was a problem in the Northern Ireland Prison Service, a person might be moved out of it for their own safety. That person might be in danger from the sort of people whom Nicola Sturgeon described. It would not necessarily be the case that transfer would happen in the very worst conditions, which Nicola Sturgeon has described; there could be a range of situations in which it will be necessary to move a prisoner.

It would be idle for me to try to speculate on every set of circumstances that might require transfer; however, I assure Nicola Sturgeon that we will take very seriously stability, security and safety in our prisons and only if we can be assured that those will not be prejudiced will we decide to accept a transfer. It will not be a question simply of trying to get someone who is causing problems out of Northern Ireland and then taking a suck-it-and-see approach when they come here: a full, competent and thorough assessment will be undertaken before a decision is made.

Mike Pringle (Edinburgh South) (LD): When a prisoner arrives in Scotland, his or her case will have to be reviewed every three months. What factors will be taken into consideration during that review? Under what circumstances, resulting from that review, might the prisoner be returned to Northern Ireland?

Hugh Henry: A range of matters will be considered. We will examine how secure that person has been in our prisons and whether that has caused any unanticipated problems. If we believe that the person's presence is causing disproportionate disruption that gives us cause for concern, we could decide that we no longer want that person in Scotland. At the end of three months and having reviewed the situation, we might decide, on the basis of information about the situation in Northern Ireland, that the concerns that required that person to be transferred no longer exist. In such circumstances, it would be appropriate for a person to be returned.

Other factors could mean that the decision to release an individual would be for the Northern Ireland Prison Service to make. A person would have to be returned to Northern Ireland to be considered for release by the Northern Ireland Prison Service, thereby justifying their return at the end of three months. I suppose that things could happen in our jails that would lead us to consider moving a person back to Northern Ireland, or things might be happening in the Northern Ireland prisons that might justify the person's being moved back there.

Mike Pringle: To follow on from that, is there a possibility that a prisoner might be transferred temporarily to Scotland at the request of the Northern Ireland Prison Service, but only on the basis that they would be in Scotland for a specified period before being returned to Northern Ireland?

Hugh Henry: That is the way in which we anticipate the procedure will work. We are not thinking about long-term situations—we are talking about something that will happen over a fairly restricted period of time and which will allow a problem in Northern Ireland to be resolved. This is not about taking out of a prison in Northern Ireland someone who thinks that they might quite like to be in prison in Scotland for whatever reason for the next 10, 15 or 20 years; it is about the Northern Ireland Prison Service continuing to carry out its functions and discharge its duties, but with our help in taking strain off its system temporarily and at times.

Bill Butler: It has been suggested that the number of such prisoners who would be held in Scotland at any time would be very small. Earlier, the minister said that we are talking about a

"handful of individuals across the UK".

What estimates have been made of the number of prisoners who might be transferred to Scotland and on what basis were they calculated?

Hugh Henry: As I said in my opening remarks, Cathy Jamieson, the Minister for Justice, is on record as saying that she would be willing to consider only one or two prisoners at any particular juncture. Her overriding concern is the safety and stability of the Scottish Prison Service. At the very most, those are the numbers that we would be willing to consider.

Bill Butler: So, would it be a maximum of two prisoners?

Hugh Henry: "One or two" is how the minister described it.

Bill Butler: I accept that safety and stability are paramount, but is there a more scientific basis for the estimate? That figure seems to be a wee bit impressionistic.

Hugh Henry: I suppose that to some extent the figure is impressionistic, but it is an impression that ministers have got to make in response to particular requests that have come before us. Having spoken to the Scottish Prison Service, we believe that we could reasonably cope with numbers of that order, but we believe that anything beyond that small number would start to create pressures that could be disruptive to the Scottish Prison Service.

The minister has made a judgment on the basis of the discussions that she has had with the Scottish Prison Service—she believes that it is the right judgment. We believe that it is right to constrain the numbers in the way that we have indicated.

Bill Butler: Has the Northern Ireland Prison Service made any estimate of what you have called the

"handful of individuals across the UK"

that might need to be transferred to other jurisdictions?

Hugh Henry: The Secretary of State for Northern Ireland indicated to colleagues throughout the United Kingdom that he believes that a very small number will be involved. As I explained earlier, this is a contingency plan that has been put in place because of some of the difficulties that the Northern Ireland Prison Service faces. I do not think that it has calculated exactly how many prisoners will be involved. Irrespective of what the Secretary of State for Northern Ireland might like to do, he would be constrained first by the willingness of colleagues in England and Wales to take numbers and secondly by our willingness to do so. We have set out clearly what our acceptable parameters would be.

Mr Maxwell: I will follow up Mike Pringle's questions about situations that could arise in which a prisoner is returned to Northern Ireland. You mentioned in your answer to Mike Pringle that there might be unforeseen circumstances in which a prisoner might be more disruptive than we had imagined, or caused problems that were not envisaged, and we might wish to return them. In such circumstances, will Scottish ministers have an automatic power to transfer a prisoner back to Northern Ireland? In other words, can the minister invoke the original refusal at that point, or would it be the case that an application to return the prisoner could be made, but which the Secretary of State for Northern Ireland could refuse?

Hugh Henry: No. We would have the right to transfer a prisoner back. If we decided that the prisoner should not remain in Scotland, we would ask that they be returned and they would be returned.

Mr Maxwell: That clears that up.

As regards the financial implications of the bill, the numbers that are being discussed are small and you say that there will be no financial effect as a result of the transfer of prisoners. Will you explain why you believe that to be the case? Surely, even if only one or two prisoners are involved, there will be an automatic cost to the Scottish Prison Service. The service might be able to contain that in its budget, but there is an obvious cost in having additional prisoners, whether there be one, two or more of them.

Hugh Henry: The Scottish Prison Service has advised us that it could cope with the numbers of additional prisoners that we suggest within its existing budget. On the basis of the advice from professional staff and officials, we believe that there will be no significant financial implications.

Mr Maxwell: Do you accept that there are automatic costs associated with holding prisoners and that if we got an extra two prisoners from Northern Ireland those costs would be met by the Scottish Prison Service budget and not by the Northern Ireland Prison Service budget?

Hugh Henry: Many of those costs would be met anyway. Our prisons are staffed to certain levels and we hold numbers of prisoners to certain levels. We do not believe that some of the costs that you suggest could be incurred would be in addition to those that the prison service already has.

Mr Maxwell: Although I accept what you say about buildings and staffing, there must be additional costs—of clothing, feeding and so on—for additional prisoners. Therefore, would not it be reasonable for the Northern Ireland Prison Service to contribute to those costs?

Hugh Henry: The variable costs that you try to identify would be so small that the time and the cost of our staff calculating how much we had spent on food and how much electricity had been consumed, preparing and issuing an invoice and arranging collection through our accounting systems would probably be disproportionate to the amount of money that we would recover. All the legal aid costs that might be associated with such a transfer would be met by the Northern Ireland Legal Services Commission. We are advised by our prison officials that the cost to us of managing the prisoners in any establishment would be minimal and would be contained in the existing budget.

Mr Maxwell: Is it likely that there would be any costs associated with visiting rights? What would happen if a family member wished to visit a prisoner? If the prisoner were in a local prison in Northern Ireland, those minimal costs would be met by the visitor. If the prisoner were transferred to a Scottish prison, the costs would be extortionate in relation to family members' right to visit their relative.

Hugh Henry: Those costs would be met by the Northern Ireland Prison Service.

The Convener: You will probably not be able to answer this question, but I will throw it in for good measure. The question of the European convention on human rights would not arise in relation to the responsibility of Scottish ministers to prisoners who were transferred; I guess that that would be the responsibility of the Northern Ireland ministers. Some prisoners might potentially be transferred a long way—they could go to the north or the south of Scotland, depending on where you decide to put them. Has there been any appraisal of ECHR issues in relation to taking prisoners so far from home?

Hugh Henry: We certainly do not believe that there are ECHR implications for the Scottish Executive, for the Scottish Prison Service or for the Scottish Parliament. I suppose that, if there were any ECHR challenges, they would go to Northern Ireland. We do not believe that what is being proposed for the transfer of prisoners within the jurisdiction of the United Kingdom would cause a problem with the ECHR, but I suppose that there is always someone who might want to think about that.

10:45

The Convener: We have had a fair round of questions on that. I thank the minister, Ruth Sutherland and Stephen Sadler for coming before us this morning.

It is for the committee to decide whether it wishes to report to Parliament, so I will do the usual and advise members that a debate is planned for 18 March. Members will begin to see the timetable emerging. If the committee decides to put together a report, it would have to be circulated this Friday so that members could have their say on its contents and so that we could publish it on Wednesday 17 March. I want to make everyone aware of the timescale.

Do members wish to put together a report and, if so, are there any points that they wish to emphasise in it?

Mr Maxwell: It would be helpful to Parliament if a report on the bill were produced—the bill has attracted some attention. As you said, there will be a debate. There were a number of matters on which we questioned the minister today that were clarified, particularly in relation to the absolute right of veto. The minister was clear that Scottish ministers would have the absolute right of veto. It is not clear from some of the paperwork that that is the case, but Hugh Henry has made that clear today. Matters such as that should be included in the report so that other members of the Parliament are aware of the Executive's position on the matter.

Margaret Mitchell: I agree that a report would be useful. It would help members when the debate comes to Parliament. Because a Sewel motion is recommended, it is appropriate that we set out why—if we are in favour of such a motion—we think that such a motion is an appropriate way to handle the bill, and that we set out the minister's comments on why he thinks it is the best legislative process. For those reasons, it would be worth compiling a report.

Bill Butler: I agree with Stewart Maxwell and Margaret Mitchell. Parliament needs a report of our interrogation of the minister, which has brought out the salient facts that we have been able to elicit from him. It is necessary that we compile such a report and I agree that we should follow that course of action.

The Convener: I think that we all agree that there should be a report. I suggest that we use our lines of questioning and the answers as the content of the report and I presume that members will want to emphasise that what we have heard this morning is what we would expect to hear in relation to the right of Scottish ministers to consent, the right to veto and the right to transfer a prisoner back. We have also heard that the

numbers involved would be about one or two prisoners. I think that the clerks probably have enough to put a report together.

Mr Maxwell: Could we also include the comments about financing the proposal, particularly in relation to travel for visiting family members? We should clarify that the costs would not be borne by the Scottish Prison Service.

Margaret Mitchell has said that she feels that a Sewel motion is appropriate in this case. I would like to register the fact that I do not feel that it is appropriate that a Sewel motion be used. There has been lots of time to timetable a Scottish bill to deal with the issue, so I would not support a report that said that we supported the Sewel motion.

Bill Butler: Can we do what is becoming the norm and say that opinion was divided on that matter? I think that a Sewel motion is appropriate, but there is obviously division in the committee and our report should reflect that.

The Convener: On costs, we heard this morning that the Scottish Prison Service has said that it can deal with the matter in its budget, but that does not mean that the measure will be cost neutral. The report needs to make that clear, because transferring a prisoner from Northern Ireland to Shotts, for example, will incur a cost. I presume that there will be some security costs attached to that. Costs are also associated with housing such prisoners. We will need to emphasise that.

I ask members to look out for the report in their e-mails on Friday and to check that they are happy with it. If they are, we will sign it off and publish it. We are likely to debate the Sewel motion on 18 March.

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

10:50

The Convener: While we wait for the Deputy Minister for Justice to join us for item 2, I am afraid that I have to make a rather long-winded announcement. Trust me—this is the shortened version. As this is the first day of stage 2, I will make as clear as possible the roles that we will play in the process. As convener, I will ensure that everyone speaks at the right time, so members should not worry too much.

Amendments have been grouped to facilitate debate, but the order in which they are moved is dictated by the marshalled list. Members will need to refer to the groupings and the marshalled list and should note that we cannot deviate from the order on the marshalled list—once we have moved on, we cannot go back.

Sometimes, because of the way in which they are constructed, it is difficult to group amendments in the way that we would want to debate them. I intend to ensure that we debate both aspects of the complex amendments in the second group. I wanted to split some of the groupings more, but matters are complicated when we vote on amendments, so I agreed to the groupings that are before members. Notwithstanding what I said, there will be one debate on each group of amendments. Members may speak to their amendments if they are in the group, but there will be only one debate on each group.

I will call the lodger of the first amendment in the group, who should speak to and move the amendment. If that member does not want to move the amendment, he or she should simply say, "Not moved". If the amendment is moved, I will call other speakers, including those who have lodged all the other amendments in the group. Please note that members should not move other amendments in a group at that stage; I will call members to move amendments at the appropriate time. Other members should indicate their wish to speak in the usual way. The Deputy Minister for Justice will be called to speak on each group.

Following debate, I will clarify whether the member who moved the first amendment in the group wishes to press it to a decision. If not, that member may seek the committee's agreement to withdraw the amendment. If it is not withdrawn, I will put the question on it. If any member disagrees, we will proceed to a division by a show of hands. I will ask members to ensure that their hands are in the air, as we must count and record the votes, which takes a few seconds.

After the committee has debated amendments, it must decide whether to agree to each section of or schedule to the bill to ensure that we have covered every aspect. If members want to vote against a section, they must lodge an amendment to delete that section. Strange as it may seem, that is the parliamentary procedure.

If there is disagreement on any question, we will go straight to a vote. Please note that any members who choose to leave proceedings for whatever reason do so on the understanding that proceedings will continue in their absence and that divisions will not be held back for their return.

Monday's business bulletin said that the committee would not go beyond the end of section 11 today. I do not intend to go beyond section 10, but members will see from the groupings that we might not get that far anyway. I propose that we continue until about 12:15, as we have other business.

Before section 1

The Convener: Amendment 80 is grouped with amendments 80A, 80B, 80C and 106.

Mr Maxwell: I hope that amendment 80 is not contentious. I expect it not to be, on the ground that its purpose is to bring into the debate the recommendations that the committee took during discussions for the stage 1 report, paragraph 40 of which states:

"The Committee believes that the managed meeting is an integral part of the process and that it should be mandatory."

As laid out by the Executive, the bill will not make the managed meeting mandatory. The committee made that recommendation in order to ensure that the managed meeting was part of the bill. The evidence that we took from individuals associated with the High Court and various professional groups indicated the importance of, and the emphasis that was placed on, managed meetings' being carried out to an appropriate standard and covering several issues.

We also discovered from evidence that if managed meetings are carried out properly, and the evidence that is taken and the ideas that are discussed at them are recorded properly, that will lead to a smoother passage for the preliminary hearing and the rest of the process. Easing the process for witnesses and victims is central to the bill, so it is important that managed meetings are not seen as an adjunct or side issue and put aside while we hope for the best.

I hope that the committee agrees with my interpretation of the evidence that we took. I also hope that it will support the recommendations in the stage 1 report, agree that the managed meeting is central to the success of the various measures that follow on from it—particularly the preliminary hearing—and that members will support amendment 80.

Amendment 106 is a consequential amendment. If amendment 80 is passed, amendment 106 will also have to be passed to include managed meetings in the long title.

I have no problem with amendment 80A.

Amendment 80B seeks to change my amendment 80—which suggests "3 days" as an amendment to the original bill, which said "2 days"—and to increase the number of days to five. I have no great concern about that. I was seeking to change it from two days to three to give time for the managed meeting to occur and for the written note to be compiled before the two-day deadline. If members think that five days would be more appropriate, I do not mind.

That is all that I need to say on amendment 80. I hope that the committee supports it. We took evidence on managed meetings, which will be crucial to the success of the bill and its component parts.

I move amendment 80.

Margaret Mitchell: On amendment 80A, if we are considering the principle and culture of early disclosure, rather than working to deadlines, the idea is to hold meetings as soon as possible, but only when people are prepared, which is the reason for my amendment to Stewart Maxwell's amendment 80. I agree with amendment 80 because everything in it is vital to the success of the bill. The managed meeting should not be an adjunct; it should be an integral part of the bill.

Amendment 80B follows on from that. Having five days before the preliminary hearing would give all parties the opportunity to address any outstanding issues at the managed meeting. That is a reasonable timescale and I am pleased that Stewart Maxwell is happy to support that amendment.

I move amendment 80A.

11:00

The Convener: I will speak to amendment 80C and the other amendments in the group. It can be a bit awkward when the person who convenes the meeting also speaks to amendments, but I will not ask Stewart Maxwell to take the chair because he has many other amendments that he wants to speak to. It is best that I just continue as convener and speak to my amendments briefly.

Perhaps I made a bit of a mess of amendment 80C and it is not really what I intended. Stewart Maxwell was right to point out that the committee

was keen that there should be a reference in the bill to the managed meeting. Our stage 1 report suggested that information such as who took part in the managed meeting and the date and time at which it took place should be recorded. Therefore, I fully support subsection (3) of proposed new section 71A that amendment 80 would introduce in the Criminal Procedure (Scotland) Act 1995. Subsection (3) states:

"A written note shall be kept of the managed meeting".

That is in line with our stage 1 report. My intention in amendment 80C was to ensure that the written record would include a reference to the managed meeting, including the information that is specified in subsection (3).

However, although I want the bill to require the recording of some information about the managed meeting, my difficulty with the first two subsections of Stewart Maxwell's amendment, and with the position that Margaret Mitchell has taken, is that I think that the bill should not be so prescriptive as to specify the number of days within which the managed meeting must take place. I am quite happy with about three quarters of amendment 80, but I feel that some of it is too prescriptive.

Bill Butler: I echo the convener's support for part of amendment 80. However, specifying details in the bill such as the number of days within which the meeting should take place is far too inflexible and prescriptive. Therefore, amendment 80 is a bit like the curate's egg. I would have been much happier if we had had an amendment that merely required that the note of the managed meeting should state who was party to the meeting and the date and time of the meeting. Such an amendment could have been accommodated, but that is not what we have before us. On that basis, I am afraid that, unfortunately, amendment 80 is not the most appropriate in the circumstances.

Hugh Henry: I understand fully the points that members have made. The bill's underlying policy intention is to encourage better and earlier communication between practitioners, but we recognise that there will be occasions when face-to-face meetings between the parties might not be possible. The important thing is that the parties discuss the issues in the case; they should agree any evidence that is capable of being agreed, decide which witnesses they would require if it is necessary to proceed to a trial, and agree on any plea of guilt that might be tendered. Much of that can be done by telephone, fax or e-mail, without the parties necessarily having to meet face to face. We do not think that a formal requirement for a face-to-face meeting in every case, as amendment 80 and the amendments to it would provide, is necessary.

The time limit for lodging the written record, which is two days before the preliminary hearing, will afford the parties involved the maximum time to prepare and discuss the case. We do not think that it is necessary to impose any further time limits. We think that the matters to be reported on in the written record, and the form and content of that record, are better decided by the court and by those who practise in the courts. That is why the bill provides that the requirements in relation to what has to be reported or what has to be in the written record are to be contained in an act of adjournal; they may then be amended quickly and in the light of experience.

We share the aspirations that have been expressed and believe that many of the amendments in the group have been driven by the best of intentions, but we worry that they could create inflexibility and unintended difficulties. We subscribe fully to the notions of forcing those concerned to co-operate and effecting justice more speedily and more efficiently. We believe that the use of an act of adjournal, which provides the potential to hold discussions with the relevant parties, will enable changes to be effected more quickly if that is required. We believe that the suggestion of including the requirement in the bill, which would need subsequent primary legislation to amend it, would not act in the direction in which we all want to move.

We support the intentions behind the amendments in the group, but believe that the best way to achieve those intentions is through an act of adjournal. We worry that agreeing to the amendments in the group would create a rigidity or inflexibility that could give rise to adverse effects.

The Convener: You understand where the committee is coming from, in particular the mover of the lead amendment, Stewart Maxwell, who is trying to reflect the committee's position. Concern was expressed about how it would be possible to ensure that the managed meeting actually took place, if there was nothing to that effect in the bill.

Hugh Henry: We believe that the proposals involving the act of adjournal would ensure that the meeting happened. After stage 2, I will be happy to communicate with the committee to set out more specifically how the arrangements will work.

We would need a written record, to which reference has been made in the bill. That aspect, therefore, is already covered. If further clarification is needed, I will set it out in a letter to the convener, explaining exactly how we think things should operate. Some of our worries have been articulated by committee members, but we have other worries that, if we were to agree to the amendments in the group, we would not achieve the desired effect.

The Convener: Does that mean that the Executive would not consider putting anything along those lines in the bill?

Hugh Henry: Anything that goes in the bill must be sufficiently vague as to avoid arguments about prescription. Things might need to be discussed around the act of adjournal and how it might operate, but the attractions of using an act of adjournal are the speed in which changes can be made, the flexibility and the potential for engaging all the relevant parties in making changes. The worry about including something too prescriptive in the bill is that it would take time and would be dependent on finding suitable legislative slots if changes needed to be made subsequently.

The Convener: For clarification, the issue is the managed meeting.

Hugh Henry: Are you not talking about the act of adjournal?

The Convener: The act of adjournal in relation to the written record.

Hugh Henry: Yes.

The Convener: I am asking whether you would consider putting anything in the bill that relates to the managed meeting. We do not have any information about what the written record will include. We do not know whether the written record will include a reference to the managed meeting. The problem is that, on the basis of the evidence that we have heard, we do not think that the written record will include any reference to the managed meeting. There is nothing about that in the bill. How can we ensure that the parties will have that meeting?

Hugh Henry: I presume that the written record will force the parties to have a meeting. The written record will record what is said at the meeting. The requirement for a joint record presupposes discussion. I am struggling to think what we could put in the bill that would clarify matters. I am quite happy to write to you, after stage 2, explaining how we envisage the system operating. However, leaving aside some of the broader issues, the amendments would cause more problems than might be anticipated.

Bill Butler: I hear what you are saying, and I note your promise to write to the convener, but I wonder whether you could reflect on what members have said. We wish the Executive to consider putting something in the bill that would be sufficiently vague, to use your word—although I would prefer the word "flexible", or even "robust"—and which would not fall into the trap of being over-prescriptive. I agree that amendment 80 is too prescriptive and inflexible. I am not asking you to come up with something right away; however, could we have an assurance that you will reflect on what the committee has asked of the Executive and reconsider the issue?

Hugh Henry: I am more than happy to reflect on the comments that have been made and on the aspirations that the convener, Stewart Maxwell and Margaret Mitchell have outlined in their amendments. If we think that something can be added to the bill that would help to clarify the matter, strengthen the bill and achieve what is intended, we will do that. We will also reflect on how we think that those aspirations can best be met and we will return to the committee with some suggestions well ahead of stage 3, to allow the committee to draw its own conclusions. However, at the moment, we are not persuaded that what has been suggested would be the best way of achieving what is intended. We believe that what is set out in the bill and what I have described is a better way. Nevertheless, I am quite happy to give Bill Butler the assurance that he seeks.

Margaret Mitchell: I thank the minister for his comments. The evidence that we have received shows clearly that people often work to deadlines, although we are trying hard to change that culture and to have early disclosure. Including the managed meeting in the bill would flag up the fact that the meeting must take place to achieve that culture of early disclosure. For that reason, it is imperative that the provision is included in the bill and I hope that the minister will reconsider doing so.

The minister said that he thought that amendment 80 was prescriptive but, in many ways, that might be a good thing. Its purpose is to ensure that as soon as the indictment is served, all parties focus firmly on the managed meeting, get their thoughts together and sort out unresolved matters. They will then have a reasonable timescale in which to ready themselves for the preliminary hearing. I hope that, with such an approach, the hearing itself will not continue a culture of adjournment but will find people in the best possible state of preparedness, ticking things off and resolving matters.

I cannot emphasise Stewart Maxwell's comments enough. This issue is crucial to the success of reforming the situation with delays in the High Court.

11:15

The Convener: The question is, that amendment 80A be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

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

AGAINST

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

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

Amendment 80A disagreed to.

Amendment 80B moved—[Margaret Mitchell].

The Convener: The question is, that amendment 80B be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

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

AGAINST

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

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

Amendment 80B disagreed to.

Amendment 80C not moved.

Mr Maxwell: Members have raised a number of points about amendment 80. I am sure that they understand that the amendment seeks to bring to being the committee's wishes as expressed in the stage 1 report and in our discussions about the evidence that we received. I am glad that members have no problem in accepting the latter half of the amendment, and I will not discuss it any further.

As for the first half of amendment 80, the minister said that a managed meeting would have to take place. The committee's stage 1 report recommended that there should be a presumption that face-to-face meetings will take place wherever possible. Subsection (2) of proposed new section 71A of the Criminal Procedure (Scotland) Act 1995 says:

"The prosecutor and the accused's legal representative shall normally attend the managed meeting in person."

Although the wording attempts to make explicit the presumption that face-to-face meetings will take place, it does not make such a presumption prescriptive or inflexible. Instead, it allows meetings that are not face to face to take place. I believe that such an approach matches the committee's intention in this regard.

It is a matter of opinion whether the amendment's terms are inflexible. However, I point out that many of the bill's provisions are inflexible. In fact, the bill forces people to do lots of things. For example, in section 2, subsection (2) of proposed new section 72E of the 1995 act says:

"The prosecutor and the accused's legal representative shall, not less than two days before the preliminary hearing, jointly lodge with the Clerk of Justiciary a written record".

That provision fixes a two-day period in the bill. Given that the written record has to be submitted two days before the preliminary hearing, it seems entirely reasonable—and eminently sensible—to establish a deadline by which the managed meeting must take place to allow time for the written record to be composed and submitted to the court. I neither understand nor accept why it is seen as entirely reasonable to fix a period for certain measures, but not reasonable to allow an amendment that seeks to fix a period to fit in with the bill's existing provisions. I think that that is an entirely reasonable step.

The minister said that, as we will not be able to amend the bill's provisions without primary legislation, it would be more appropriate to use an act of adjournal. I said at the very start that I feel that this issue is so important that it should be included in the bill. Section 21 contains the option to amend sections of an act through statutory instruments that might be laid under the affirmative procedure. Such an approach seems entirely reasonable and appropriately speedy and it would preserve the parliamentary scrutiny of any changes to such an important measure.

The option to use statutory instruments to amend the provisions gives flexibility and allows parliamentary scrutiny. There is already inflexibility in the bill in that it has fixed deadlines and dates for the number of days in which things must be done. Therefore, it is appropriate that amendment 80 should also seek to do that. Amendment 80 seeks a presumption in favour of a face-to-face managed meeting. I believe that the amendment's wording expresses that intent clearly. Amendment 80 does not say that there must be a face-to-face meeting; it attempts to make that the presumption. The desire for that to be the presumption was clear in the evidence that we received. Therefore, I hope that committee members accept what I have said, look back at the stage 1 report and its recommendations, think about the evidence that we received from a range of professionals and support amendment 80.

The Convener: The question is, that amendment 80 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

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

AGAINST

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

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

Amendment 80 disagreed to.

Section 1—Preliminary hearings

The Convener: Amendment 81, in the name of Margaret Mitchell, is grouped with amendments 82 to 88 and 93 to 105. Before we go any further, I point out to members that a number of pre-emptions are involved in this group of amendments: amendment 93 pre-empts amendment 94; amendment 95 pre-empts amendments 96, 97 and 98; amendment 96 pre-empts amendment 97; amendment 99 pre-empts amendment 100; and amendment 103 pre-empts amendments 104 and 105. Pre-emption means that if the first amendment is agreed to, the other amendment or amendments cannot be called. That is all clear.

Margaret Mitchell: The basis of amendment 81 is the retention of the 110-day rule. Amendment 81 would provide for preliminary hearings in custody cases to be held 15 days after indictment. I believe that that is of fundamental importance. The Scottish legal system has an initial presumption of innocence, so I believe that it is unacceptable for anyone to be held in custody for longer than is necessary. For centuries, the 110-day rule has ensured that that did not happen. Amendment 81 seeks to hold the preliminary hearing within 15 days, which would allow for that rule to remain in place.

I believe that what amendment 81 proposes would aid the culture for early disclosure that we are desperately trying to encourage. Rather than people working to last-minute deadlines, we want matters to be dealt with as soon as possible. We want the focus to be on what can be resolved as soon as possible and we want meetings to be held as early as possible to dispose of such matters.

Basically, I lodged amendment 81 as a result of our evidence taking. I have not been persuaded that there is a need to change the 110-day rule. If the culture of early disclosure is embraced by all of the parties concerned, I believe that it will still be possible to fit comfortably within the timetable. It will be possible to have the preliminary hearing within 15 days and still have sufficient time to set a fixed trial date within 110 days. The other amendments in my name in the group are consequential to amendment 81.

I move amendment 81.

The Convener: The amendments that I have lodged in this group, which are amendments 93, 96, 98 and 99, were lodged for the purposes of clarity in respect of the new provision under which an accused is

"entitled to be admitted to bail".

Committee members know from experience that the bill is complex and hard to understand. I want to ensure that, for the purposes of the parliamentary debate, we understand the changes in respect of a breach of the time limits. As we said in our committee report, the bill will make a dramatic difference to the rights of the accused when a breach of time limits takes place.

Section 9(5) amends section 65(4) of the 1995 act by substituting the words "liberated forthwith" with the words

"entitled to be admitted to bail".

On first look at section 9(5), the substitution appears to give an automatic right to bail. The policy memorandum to the bill says

> "The Bill provides for an accused to be entitled to bail if the 80, 110 or 140 day limits are breached but the Crown will still be entitled to prosecute providing the trial starts within 12 months of the first appearance on petition before the sheriff."

That gave the committee the impression that breach of the time limits automatically entitled the accused to bail.

The explanatory notes to the bill say that section 9(5) amends section 65(4) of the 1995 act so as to

"provide that an accused may not be detained by virtue of the warrant committing him or her for trial for a period of more than 80 days without an indictment having been served and that where it is not served he or she shall be entitled to be admitted to bail."

The notes go on to state:

> "The present time limit is that a trial must commence within the 110 day period. In addition, the subsection amends the present provision by giving the accused an entitlement to bail if these time limits are not complied with."

In our report, we said:

> "The Committee understands that this does not mean that the accused will necessarily be released"

if a breach of the time limit has occurred. If the court does not extend the time limits, it must

"release the accused on bail. However, the Crown will still be entitled to have its say on any conditions that may be attached to bail."

I am trying to establish whether the new provisions give an automatic right to bail if the time

limits are breached. I also want to get on record what the process is if the Crown either fails to apply for an extension to the time limits or is refused an extension to the time limits.

My understanding, which could be wrong, is that the accused will be brought before court, although I am not sure whether there will be a hearing. I want to be clear about whether the Crown can oppose bail or whether, at that stage, the Crown simply argues for conditions to be applied. I should point out that, as the sole ground for an extension to time limits is cause shown, which considerably slackens the process, it appears that the Crown will be much more likely to have time limits extended. I want to be clear about what the rights of the accused are when such time limits are breached.

All the amendments in my name in this group mean the same thing in effect. They are essentially probing amendments so as to get some clarity in the debate.

11:30

Michael Matheson (Central Scotland) (SNP): I wish to comment on the amendments in the name of Margaret Mitchell, which would retain the 110-day rule, as opposed to the 140-day rule. I sympathise with the concerns that she has expressed. When I first considered the bill, I was opposed to the change to the time limits. However, it is important that the bill is considered as part of a package of measures, and I do not think that it is possible for the 110-day rule to fit in with the package of measures in the bill, which include the preliminary hearing. Therefore, I do not think that it would serve the High Court system well for us to retain the 110-day rule. It is because of the benefits that will be gained from the overall package of measures that the 110-day rule should, I believe, be changed to a 140-day limit.

However, I think that it is important to have a culture whereby prosecutors view the 140-day limit as the outer limit. They should be working to achieve trials within that period, rather than working to the 140-day limit. I would hope that as many cases as possible can be brought before the courts well within the 140-day limit. It is important that ministers ensure that the Crown Office is provided with the necessary resources for that. There needs to be a culture change that will ensure that trials are brought before court as early as possible.

Margaret Mitchell: I will address the matter of the effect of breaching the time limits. The purpose of my amendments is for there to be a further 30 days in which the accused may apply for bail, should the 110-day limit be breached. If bail had not been granted by the 140th day, the accused would automatically be liberated, although they could still be brought to trial within 12 months. If the retention of the 110-day limit, which I propose, is not accepted, then amendment 81 would be to the effect that, if the 140-day limit is breached, the accused should be liberated, although they could come to trial within 12 months. I hope that that clarifies the intention behind my amendments.

My amendments are based on the assertion that an accused person should not be held in custody any longer than absolutely necessary, on the presumption of innocence. The 30-day period in which they are entitled to apply for bail, but when they may still be kept in custody, is in line with what many members have already accepted in extending the 110-day rule. I hope that my proposal would be acceptable in that regard. I believe that it is not acceptable to go beyond 140 days, so automatic release should kick in at that point, with it still being possible to bring the trial within 12 months.

The advantage of that approach is that there will be a clear record of the stage that the accused has reached and of the stage at which the process has either worked or fallen down. Accountability is therefore strengthened by my proposal.

Hugh Henry: As Michael Matheson has said, the proposal that is set out in amendment 81 is to some extent unworkable. Indeed, it strikes at the heart of the bill itself. The proposed changes in the bill are fundamental and, if amendment 81 were agreed to, it would effectively remove everything that is critical to its success.

The bill contains a package of measures proposed by Lord Bonomy that would be workable with regard to defence preparation and trial planning. Before I go into any more detail on that point, I should address Michael Matheson's other comment about the way in which prosecutors might perceive the time limits and the need to encourage people to move before those limits are reached. The changes to and huge additional investment in the Crown Office and Procurator Fiscal Service reflect our commitment to that very principle. There have been changes in culture and methods of working, more staff have been employed and other structural changes have been introduced. All that is part of a process to ensure that the judicial system works more efficiently and effectively. As a result, I give Michael Matheson the commitment that we will work with the Crown Office to ensure that some of the changes in culture and attitude that he seeks are delivered. However, I must in all fairness put on record the fact that many of those changes are already taking place and that, overall, there has been a significant change in the service.

Although Margaret Mitchell's amendments in this group represent an attempt to retain the

preliminary hearing as proposed by Lord Bonomy, they seek to have the trial within 110 days instead of following his proposal to have a preliminary hearing within that time and a trial within 140 days. The purpose of a preliminary hearing is to allow parties to indicate to the court their state of preparedness. They require to have discussions and to lodge a written record of those discussions. For the preliminary hearing to be meaningful, the defence must have adequate time to prepare and the current timescale is inadequate in that respect. That is why the present period of 29 days was applied to the preliminary hearing and we would argue that a timescale of 15 days, as proposed in amendment 81, is unrealistic if people are to comply with the bill's provisions.

One of the bill's key objectives is to ensure that parties are fully prepared for trial and that trials proceed on the date that the court sets. That will create greater certainty for victims and witnesses, reduce the unacceptable level of adjournments and provide victims and witnesses with the comfort that a fixed date has been set for a trial. The retention of the 110-day time limit as proposed in the amendments would jeopardise that package of measures. The proposals in the bill retain an accused's right to have a hearing within that timescale while allowing adequate time for preparation and therefore greater certainty that trials are ready to proceed on the date that has been fixed.

The bill amends the 1995 act's provisions on the breach of custody time limits. Under the current law, when the 80-day limit is breached, the accused must be liberated but can still be prosecuted. However, if the 110-day limit is breached, the accused is liberated and cannot be prosecuted. The consequences of such a provision are perverse as far as victims, witnesses and the public interest are concerned. Liberation means just what it says—the accused is unconditionally free for ever. The bill seeks to address that by providing that if the limits are breached, the accused will be entitled to be admitted to bail. That firmly places the onus on the Crown to bring the accused before the court to rectify the situation by seeking an extension of the time limits. Only where the time limits are not extended will the accused be entitled to be admitted to bail.

Perhaps I should expand on that point. I am quite prepared to come back and give further clarification and assurances to the committee, because the concerns that you raise, convener, are real.

Amendment 93 would require the accused to apply for bail. Our policy is that no requirement should be placed on an accused to apply for bail in the situation where the time limits cannot be met. The policy intention is that he is brought to court to have his entitlement to bail determined. That would ensure a degree of judicial management over the detention of the accused awaiting trial. In addition, it would give the court the opportunity to inquire of the parties the reasons for the delay and to inquire of their state of preparedness. Our proposals are an attempt to make the parties more proactive at the margins of the time limits, which I argue is to be preferred.

I hope that we can see the bill's provisions on time limits as part of a structured package that is aimed at delivering greater certainty to proceedings, while striking a fair balance between the interests of the accused and the public interest in prosecuting the most serious criminal offences. That is why we think that there should be a judicial decision on whether to release the accused on bail, rather than an automatic right.

Margaret Mitchell seeks to ensure that the accused should automatically be granted bail at 140 days. It is expected that a time limit of 140 days will be sufficient to allow all trials to commence within it. However, in his review, Lord Bonomy recognised that there will inevitably be occasions when it is not possible to allocate a trial within 140 days, because of the need for further investigation or because further work needs to be done, and that an extension to the 140-day period may be appropriate. That would happen with the most complex and serious cases and therefore there should be no bar to granting extensions where a judge of the High Court, after hearing the parties, considers it appropriate.

Amendments 81 to 88, 94, 95, 97, and 100 to 103, in the name of Margaret Mitchell, would undermine the objectives of the bill and disturb the balance. I hope that she will agree to withdraw amendment 81 and not to move the others, because if they were successful, they would strike at the heart of the bill.

I am happy to come back with further clarification if that is required.

The Convener: I will ask a few questions for clarity. In the event that the Crown does not apply for an extension to the time limit, or an extension is refused, would the accused then have an automatic right to bail, or could the Crown still oppose bail?

Hugh Henry: I do not follow you, convener. Are you saying that if the Crown does not oppose bail it could be—

The Convener: Proposed subsection (8C) of section 65 of the 1995 act states that where the case has gone beyond 110 days, and the Crown has not applied for an extension or an extension has been refused, the accused is entitled to be

admitted to bail. Does that mean there is an automatic right to bail?

Hugh Henry: The issue then would be the conditions, rather than the—

The Convener: So there is an automatic right to bail.

Hugh Henry: Yes, but the court would then consider what conditions should be applied.

The Convener: So the Crown cannot oppose bail. All it can do is argue for conditions to be attached.

Hugh Henry: That is in the circumstance where the Crown has not opposed bail. If the Crown has not opposed bail, the court can still consider the conditions that would be imposed as part of any bail.

The Convener: So it is an automatic right to bail, albeit with conditions.

Hugh Henry: It would be for the court to determine what conditions would be applied if the Crown did not oppose bail.

The Convener: That is what I am trying to establish: can the Crown oppose bail? I think that you are saying that the Crown cannot oppose bail, because it has had its chance to extend the time limits, so bail is automatic, albeit that the court will attach conditions.

Hugh Henry: The first thing that needs to be tackled is the extension. In effect, by seeking an extension, the Crown would be opposing bail.

The Convener: I understand that bit, but say we have gone beyond that. I am talking about the point when the Crown has not applied for an extension to the 110 days or the 140 days, or it has applied but the court has said, "No, you are not getting an extension."

Hugh Henry: The entitlement to bail is accepted.

The Convener: The accused has an automatic right to bail and all that the court can determine is the conditions that are attached to bail. Is that right?

Hugh Henry: Yes.

The Convener: In other words, the Crown cannot oppose bail at that point.

Hugh Henry: Yes. If the Crown does not oppose bail—

The Convener: That means that the court cannot refuse bail.

Hugh Henry: It is worth pointing out that if the accused did not accept the conditions that the court imposed, he would be returned to custody.

The Convener: That is helpful.

11:45

Margaret Mitchell: The minister referred to the proposals in the bill as a package of measures, but the Scottish Executive has already altered some of the proposals in the package that was proposed by Bonomy, so the original proposals are not sacrosanct. The Executive has deviated from them and so have I, because I think that the 110-day rule is still achievable.

I accept the argument that the minister and Michael Matheson made that we are dealing with a culture of early disclosure, but in that culture we hope to move towards not always having set timescales, but dealing with matters as early as possible. For example, the indictment does not necessarily have to be served on the 80th day. The accused appears on petition or is charged after appearing in the sheriff court after seven days, and a full 73 days are available to serve the indictment, so there is no reason for going to the 80th day.

If we start whacking that culture, I firmly believe that the proposals in the amendments will be achievable. They have the advantage of retaining the 110-day rule, which is a landmark in Scottish criminal law. That is a huge prize to gain. After centuries of working well, the rule should not be discarded without at least trying to find out whether the measures in the bill, which all relate to the culture of early disclosure and dealing with matters as soon as possible, have had a chance to work. Not to do that is to throw in the towel.

The presumption of innocence underlies my amendments on bail. No one should be held in custody any longer than necessary.

For those reasons, I will press amendment 81, which is on the 110-day rule.

The Convener: The question is, that amendment 81 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Mitchell, Margaret (Central Scotland) (Con)

AGAINST

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

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

Amendment 81 disagreed to.

The Convener: Amendment 4, in the name of the minister, is grouped with amendments 6, 7, 9, 45, 46 and 50.

Hugh Henry: The preliminary hearing is designed to enable the court to dispose of all preliminary matters so that the trial can proceed without disruption. Parties are required to give notice before that hearing of any preliminary issues, including objections to the admissibility of any evidence. However, after the period of notice expires, other matters that relate to the admissibility of evidence may arise. Amendment 4 recognises that the court should be able to consider whether to deal with those matters at the preliminary hearing. Amendment 50 gives the sheriff at the first diet the same powers to deal with objections to admissibility for which the appropriate period of notice was not adhered to.

The amendments also address concerns that were raised at stage 1 that some issues of admissibility cause serious disruption to trials by creating trials within trials. Amendment 50 introduces new section 79A into the 1995 act. The proposed new section will provide certain safeguards before leave may be granted for an objection to be raised after the preliminary hearing or first diet. The new section will also enable the court to appoint a further diet to deal with the objection and to allow the matter to be dealt with without the need for witnesses and jurors to wait around for the trial to start. We recognise that it will not always be possible to prevent trials within trials, but amendment 50 seeks to prevent them by ensuring, as far as possible, that issues in relation to admissibility of evidence are dealt with prior to the trial diet.

I move amendment 4.

Amendment 4 agreed to.

The Convener: Amendment 5, in the name of the minister, is grouped with amendments 15, 52 and 53.

Hugh Henry: The bill seeks to improve procedures for victims and witnesses in the High Court. Amendments 5, 15, 52 and 53 seek to ensure, as far as possible, that only those witnesses who are identified by the parties as essential need to attend court. The provisions on preliminary hearings seek to ensure that trial preparation by the parties is focused and meaningful. In addition, parties have a duty under the 1995 act to agree evidence.

Amendments 5 and 52 provide that, at the preliminary hearing in the High Court or at the first diet in sheriff court solemn proceedings, the court must ascertain from the prosecutor as well as from the accused which witnesses are required to attend the trial. Amendment 15 provides that, if the preliminary hearing is dispensed with on the joint application of the parties, the application must identify which witnesses will be required by the prosecutor as well as by the accused to attend the trial. Amendment 53 provides that the prosecutor has a duty to cite only those witnesses who are identified as necessary by the prosecutor or the accused at the preliminary hearing or the first diet in the sheriff court.

The amendments will ensure that the question of which witnesses are likely to be required to attend court is clarified, both for the court and for the parties. That will assist with the organisation of witnesses for trials and prevent many witnesses who are not considered essential from having to attend trials.

I move amendment 5.

Amendment 5 agreed to.

Amendments 6 and 7 moved—[Hugh Henry]—and agreed to.

The Convener: Amendment 8, in the name of the minister, is grouped with amendments 10, 47, 48 and 49.

Hugh Henry: The emphasis in new section 72 of the 1995 act, which is introduced by section 1 of the bill, is that preliminary matters should be dealt with at the preliminary hearing or a further diet that takes place before the trial diet. Amendments 8, 10, 47, 48 and 49 were lodged in the recognition that that might not always be possible and that some issues of admissibility are best dealt with by the trial judge. The amendments therefore give the court the option of allowing preliminary matters to be dealt with at the trial diet.

Amendments 47 and 48 amend new section 79(4) to provide that, in cases in which a court, at a preliminary hearing or first diet, has allowed a party to raise a preliminary matter without giving the requisite notice under the 1995 act, the court may appoint that matter to be dealt with at the trial diet.

Amendment 49 introduces to the 1995 act new section 87A, which makes provision about how matters that are held over until the trial diet should be disposed of. In general, such matters will be disposed of before the jury is sworn, to avoid disruption to the trial. In particular, the effect of the provision will be to avoid the disruption that is caused when objections about the admissibility of evidence are dealt with by a trial within a trial.

At present, the unpredictable nature of trials within trials causes disruption to trial planning and programming and inconvenience to witnesses and jurors who cannot be present in the courtroom when the issue is being dealt with. The judiciary and legal profession were supportive of measures that would help to avoid trials within trials, but the profession was also concerned that we should

recognise that there might be circumstances in which trials within trials were necessary. We hope that the amendments address those concerns.

I move amendment 8.

The Convener: On your last point, I take it that the amendments are designed to prevent trials within trials but will not constitute a bar to them.

Hugh Henry: No. We recognise that there could be circumstances in which an issue needed to be debated.

Amendment 8 agreed to.

Amendments 9 and 10 moved—[Hugh Henry]—and agreed to.

Amendment 82 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 82 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Mitchell, Margaret (Central Scotland) (Con)

AGAINST

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

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

Amendment 82 disagreed to.

The Convener: Amendment 11, in the name of the minister, is grouped with amendments 19 and 20.

Hugh Henry: Under the current law, the indictment can be deserted either simpliciter or pro loco et tempore. If the indictment is deserted simpliciter, the 1995 act states that the prosecutor cannot raise a fresh indictment unless that decision is reversed on appeal.

Amendment 19 clarifies that, where the court has deserted the preliminary hearing simpliciter, that has a similar effect and proceedings are at an end, unless the decision is reversed on appeal. Amendment 20 is for clarification of the application of the custody time limits that are applicable where a case that was previously indicted to the High Court is re-indicted in the sheriff court. It provides that, in that situation, the sheriff court time limits apply. Amendment 11 clarifies that the reference in section 72A(3)(b)(i) to the court deserting the diet is a reference to the preliminary hearing.

I move amendment 11.

Amendment 11 agreed to.

Amendments 83 to 88 not moved.

The Convener: Amendment 12, in the name of the minister, is grouped with amendments 18, 35, 37, 51, 55, 58 and 61. I point out to members that amendment 35, if agreed to, would pre-empt amendment 69.

Hugh Henry: The purpose of the amendments is to restructure the provisions in the 1995 act relating to the alteration, adjournment and postponement of diets. Amendment 51 inserts in the 1995 act new section 75A, which applies to both the High Court and sheriff and jury courts and makes provision in relation to all diets. The other amendments are consequential.

I move amendment 12.

Amendment 12 agreed to.

The Convener: Amendment 13, in the name of the minister, is grouped with amendments 14, 16 and 17.

12:00

Hugh Henry: The amendments remove the references to the "Clerk of Justiciary" appointing a trial diet where the court has granted an application under new section 72B to dispense with a preliminary hearing. In its evidence to the committee, the Faculty of Advocates was uncomfortable with the references, believing that only the court should have the power to appoint the trial diet. We have taken that on board and the amendments address those concerns.

Amendment 17 simply clarifies that the power of the court to dispense with the preliminary hearing has no effect on the calculation of any time limits or notice periods that, in the 1995 act, are fixed with reference to the date of the preliminary hearing. The date originally fixed for a hearing that is subsequently dispensed with will continue to be the date for the purposes of such time limits or notice periods.

I move amendment 13.

Amendment 13 agreed to.

Amendments 14 to 20 moved—[Hugh Henry]—and agreed to.

The Convener: Amendment 21, in the name of the minister, is in a group on its own.

Hugh Henry: Amendment 21 clarifies the intention in relation to provisions introduced by the bill, which, on the one hand, require the accused to state at the preliminary hearing how he pleads to the indictment and, on the other, allow preliminary hearings to take place in the absence of the accused. The amendment inserts provisions in new section 72D to clarify that, ordinarily, accused persons should be present at a

preliminary hearing. However, it is recognised that there may be good reasons why an accused need not or cannot attend. The provisions therefore give the court the power to allow the hearing to proceed when it considers that cause has been shown for the accused's absence. When it does so, the accused is treated for the purposes of proceedings at the hearing as having pled not guilty.

I move amendment 21.

Amendment 21 agreed to.

Section 1, as amended, agreed to.

Section 2—Written record of state of preparation in certain cases

The Convener: Amendment 22, in the name of the minister, is grouped with amendments 25 to 30.

Hugh Henry: New section 72F, which is inserted in the 1995 act by section 5 of the bill, imposes a duty on solicitors acting for accused persons who are indicted into the High Court to notify the court and the Crown that they are acting. It also imposes a duty to inform them when the solicitor is dismissed or withdraws from acting.

The amendments are related to amendments 24, 31, 32, 33, 36, 54, 57 and 60, which extend the provisions of new section 72F to cases indicted into the sheriff court. The amendments are concerned with the consequential adjustment of the provisions for notification and intimation in so far as they relate to the Crown.

Subsection (1) of new section 72F provides that notification is to be given to the court and the Crown Agent. For cases that are indicted into the sheriff court, the intention is that notification should be given to the court and the procurator fiscal for the district in which the case is to be tried. Amendment 25 therefore substitutes for the reference to the "Crown Agent" in new section 72F(1) a reference to the "prosecutor". Amendment 29 inserts a new subsection that defines "prosecutor"—for the purposes of the duties to notify and to inform notification—as the Crown Agent for High Court cases and as the procurator fiscal for solemn proceedings in the sheriff court.

Amendment 26 makes further provision in relation to the situation where intimation is given by a solicitor prior to an indictment being served that he is acting for an accused in relation to a charge that is under investigation. In practice, such intimation is often given following appearance by the accused on petition. Amendment 26 therefore introduces provision that, where such intimation has been given to the procurator fiscal for the district in which the charge is being investigated, that will be taken to be notification to the prosecutor for the purposes of new section 72F(1). Accordingly, where such intimation has been given, no further notification is required, whether the case is subsequently indicted in the High Court or in the sheriff court. If the solicitor subsequently withdraws or is dismissed, he is still required in High Court cases to inform the Crown Agent of that. In relation to solemn proceedings in the sheriff court, the duty is to inform the procurator fiscal.

Amendments 27 and 28 make consequential amendments to subsection (2) of new section 72F. Amendment 22 makes a consequential amendment to the provisions of new section 72E of the 1995 act, which is introduced by section 2 of the bill and provides for a written record of the state of preparation in certain cases. Subsection (1) of the new section currently provides that the section applies where a solicitor has notified the Crown Agent under section 72F(1). As explained, it might be that, under section 72F as proposed to be amended, the solicitor will not have notified the Crown Agent but will have intimated to the procurator fiscal prior to the indictment being served. It is therefore more appropriate that the reference in new section 72E should be to notification to the court under section 72F(1), which must occur in every case where a solicitor is acting. Amendment 22 therefore substitutes for the present reference to the "Crown Agent" in section 72F(1) a reference to the "Court" instead.

I move amendment 22.

Margaret Mitchell: I seek clarification from the minister. When you use the term "solicitor", do you mean "legal representative"? Would that term cover a solicitor advocate or counsel, for example?

Hugh Henry: A solicitor advocate is by definition a solicitor.

Margaret Mitchell: Would it cover counsel?

Hugh Henry: No.

Margaret Mitchell: So the term "solicitor", rather than "legal representative", is correct.

Amendment 22 agreed to.

The Convener: Amendment 89, in the name of Stewart Maxwell, is grouped with amendment 91.

Mr Maxwell: The Justice 1 Committee stage 1 report states in paragraph 45:

> "The Committee is content that the format of the written record should be determined by an Act of Adjournal provided that the Committee is supplied with more detail on what should be contained within the written record in advance of Stage 2."

As far as I am aware, we received no further information on what would be contained in the act

of adjournal in advance of stage 2, which commenced today, and that is why I lodged amendments 89 and 91.

It seems reasonable that some detail should be provided so that people are aware of the effect that that part of the bill would create. I lodged the amendments on the basis that, since we have not received that information, some detail should be provided. Amendments 89 and 91 are probing amendments and I hope that the minister will be able to address some of the concerns that have been expressed to us by legal professionals. I am concerned that we have had no information to clarify the position. We hoped to have the information by this stage so that we could accept that the act of adjournal was the correct method for dealing with the matter. If the minister can give us that detail, I would be happy to accept that.

I move amendment 89.

The Convener: I support Stewart Maxwell's point. Having signed up to the general principles of the bill, the committee should be able to ascertain the likelihood of achieving a reduction in any delay. However, as we said in our report, we remain concerned that much of the information will not be presented to the Parliament and although it is good that the written record is covered by the bill, there is no detail about what the record will contain. It would be helpful if the minister could indicate whether we are likely to see some detail before stage 3. The committee is pushing the issue to ensure that the maximum amount of information will be available to the Parliament. At the stage 3 debate, when members catch up with what has been happening in this committee, they will ask, "If the bill purports to be able to reduce delay in the High Court, what mechanisms will achieve that?"

Bill Butler: I echo what has been said. The committee requires a degree of comfort with regard to the detail that the written record will contain. It is important to have that specific assurance, and I hope that the minister can give us the comfort that we all seek. I will be interested, as I am sure other members will be, to hear what the minister says in response.

Mike Pringle: On behalf of Margaret Smith, I echo those comments and endorse what Bill Butler said. I know that that is exactly how Margaret feels.

The Convener: Thank you. That is helpful.

Hugh Henry: The amendments in this group are to the provisions of proposed new section 72E of the Criminal Procedure (Scotland) Act 1995, which is inserted by section 2. The proposed new section provides that, in proceedings in the High Court, parties are to lodge jointly a written record of the state of preparation of their cases prior to the preliminary hearing.

Subsection (4) of proposed new section 72E provides that the form and the content of the written record will be prescribed by an act of adjournal. Amendments 89 and 91 seek to remove the power to prescribe the content of the written record by the act of adjournal and to set out detailed requirements on that content in a new subsection of the 1995 act. Our argument, which is similar to the discussion that we had earlier, is that we do not believe that it is necessary or desirable to prescribe the detailed content of the written record in primary legislation, as the amendments seek to do.

We think that the content of what should be included in the written record is better suited to an act of adjournal. We believe that it is desirable that there should be the opportunity for discussion with the judiciary, the Faculty of Advocates and the Law Society of Scotland on the detail of the information that is to be contained in the written record. Providing for that detail to be set out in an act of adjournal would allow that opportunity.

One of the things that we intended to do was to consult the Faculty of Advocates, the Law Society of Scotland and others, not about the specific act of adjournal but about some of the content issues. It is a bit difficult to consult ahead of certain decisions being made, but if it is possible, we could consult the Crown Office, the Law Society of Scotland and the Faculty of Advocates ahead of stage 3, and we could give the committee a draft outline of what comes from those consultations.

Stewart Maxwell asked a specific question about the detail of the act of adjournal. We were unable to prepare an act of adjournal for a bill that has not been passed, because one would flow from the other. I hope that, if our consultation goes into some of the details of what should be included, we can come back to the committee ahead of stage 3.

Views on the information that it is considered desirable to include in the written record may develop with experience of the new procedures. Again, that brings us back to our argument about the use of an act of adjournal rather than putting detailed provisions in the bill. As I said in our previous discussions, we think that using an act of adjournal will give us the opportunity to respond more readily and more appropriately when that needs to happen.

I am happy to assure Stewart Maxwell, Bill Butler and the convener that we will reflect on any comments that are made. We are not persuaded that putting specific provisions in the bill is necessarily the best way to progress, but we shall see what we can come back to the committee with ahead of stage 3, with regard to consultation.

The Convener: The bill says:

"as may be prescribed by Act of Adjournal."

That is a matter for the Scottish courts. You said that you might be able to furnish the committee with information before stage 3—

Hugh Henry: On the consultation. We do not intend to consult on the specific act of adjournal. You are right that that would be for the court—

The Convener: Would it be possible for the committee to get an idea about what information might be in the act of adjournal? Presumably there is a draft somewhere.

12:15

Hugh Henry: We can certainly ask the Lord Justice General whether he might be prepared to give an outline of what an act of adjournal might include.

Mr Maxwell: I am sure that the minister understands the committee's concern that, as it stands, the matter is effectively left wide open. We have no idea exactly what would be contained in the act of adjournal, or what would be likely to be contained in an act of adjournal. However, the minister says that he will attempt to provide more detailed information and that he will provide some feedback from consultation, so I will not press the amendment.

Amendment 89, by agreement, withdrawn.

The Convener: Amendment 90, which is in my name, is in a group on its own. The amendment would remove the words

"may be prescribed by Act of Adjournal"

and insert words to the effect that the written record would be prescribed by Scottish ministers.

On balance, I agree with the Executive that the content of the written record is probably best decided by the court and not by Scottish ministers. I lodged the amendment, however, because I feel that we are at odds with the Executive on getting assurance for the Parliament that there are provisions in the bill to force the parties to be prepared for the preliminary hearing. One way of achieving that would be by making the content of the written record a matter for Scottish ministers. That would mean that the Parliament would have before it a note of what will be contained in the written record. The Parliament could say whether it considers that the written record will achieve what it sets out to achieve, which is to ensure that the parties are prepared prior to the preliminary hearing.

There is a bit of déjà-vu here—we discussed the same issue earlier. The committee wants to get the message across to the Executive that it feels strongly that the Parliament ought to be able to feel that there is a commitment in the bill to ensuring that people are forced to consider what they should be doing before the preliminary hearing. Without any such reference, we will simply be saying that we will rely on good faith. The purpose of the bill is to reduce delay and to introduce a new hearing, yet we would just be letting everyone get on with the matter, without any parliamentary scrutiny. Amendment 90 is a probing amendment, but we wanted to impress upon the Executive the importance of that principle.

I move amendment 90.

Bill Butler: I echo what the convener said. Will the minister reflect upon the concerns that were expressed by the convener and see what can be done to address them? I seek a degree of comfort from the minister.

Hugh Henry: I am certainly prepared to see whether we can address those concerns. However, we share the convener's hesitancy about amendment 90. We know the principles of what you are trying to achieve, but we are not entirely persuaded that the amendment is the best way of doing that. It might be rather strange if supplementary rules for procedures that are introduced by the bill were made by ministers, by means of a statutory instrument, when such rules in relation to other parts of criminal procedure are provided by an act of adjournal.

We note the concerns that have been expressed and give a commitment to greater consultation. We will try to report back to the committee on the results of that consultation and to provide members with more information ahead of stage 3. However, unless we see something striking to the contrary, it is still our view that the best way of proceeding is through an act of adjournal. We will take away the committee's concerns and reflect on them.

The Convener: Based on what the minister has said—and reserving my right to return to the issue at stage 3—I will not press the amendment.

Amendment 90, by agreement, withdrawn.

Amendment 91 not moved.

Section 2, as amended, agreed to.

The Convener: I propose to stop there, as it is 20 past 12 and we have made reasonable progress. I thank the minister and his team for their attendance. We will see them again next week.

Rehabilitation Programmes in Prisons

12:22

The Convener: Item 3 on our agenda concerns the inquiry into the effectiveness of rehabilitation programmes in Scottish prisons. I refer members to the paper prepared by the clerk, which sets out a proposed approach to fact-finding visits in respect of the inquiry. I seek members' views on whether they wish to visit the prisons that are suggested in the paper. At Her Majesty's Prison Cornton Vale, we would examine rehabilitation opportunities for women prisoners. At HMP Barlinnie, we would examine rehabilitation opportunities in a prison that is overcrowded—members will recall that one of the criteria that we set for ourselves was to examine rehabilitation in that context. At HMP Glenochil, we would examine rehabilitation opportunities in a prison with a wide range of categories of prisoners.

Members will be aware that the Executive has launched a consultation on reducing offending. Before we debate the clerk's paper, I draw to members' attention the fact that there may be some overlap between what the Executive intends to do and the results of our inquiry. I have written to the Minister for Justice seeking an assurance that the committee's conclusions will be taken into account in the development of Executive policy in this area and that the Executive will take no policy decisions before it sees the outcome of our inquiry. There may be no overlap between the inquiry and the Executive's consultation, but the people from whom we wish to seek evidence may be the same people whom the Executive wishes to question. That could be a problem, as they might suffer from witness fatigue. I have taken the liberty of expressing some concerns and suggesting that the Executive should perhaps have considered what committees were doing and have incorporated that work into its consultation. We will receive a response from the Executive that clarifies exactly its thinking on this matter.

I invite members to discuss the paper or any other matter that relates to the inquiry.

Michael Matheson: I welcome the suggested visits to the three prisons. The only thing that is missing from the paper is anything about the rehabilitation of sex offenders. We have one prison that specialises in dealing with sex offenders. Should we include that category of offenders in our considerations?

The Convener: Do any members object to that suggestion? When we drew up the paper, we considered members' commitments and how many days they would be available over the year. However, Michael Matheson makes a fair point. If we are to be comprehensive, we will have to consider the STOP 2000 programme.

Michael Matheson: Peterhead prison has built an international reputation for its rehabilitation programme. If we are to get an overall picture, we should go to what would appear to be one of the jewels in the crown of the SPS's rehabilitation programmes, to see how it works and how effective it is.

Bill Butler: That is a very fair point. If it can be accommodated in our schedule, we should attempt a visit.

The Convener: I am interested in whom we are trying to rehabilitate. As other inquiries demonstrate, if you do not have a willing person, you can have all the rehabilitation programmes in the world but they will be of no use. At some point, we will have to get down to the nitty-gritty of the range of offenders and how they might respond to the range of programmes that is available. As we usually do, we will consult members about the timing of our visits.

I remind members that our next meeting will be a joint meeting with the Justice 2 Committee on Tuesday 16 March. The committees will consider witnesses for the budget process. Thereafter, the next meeting of the Justice 1 Committee will take place on Wednesday 17 March, for further stage 2 consideration of the Criminal Procedure (Amendment) (Scotland) Bill. I advise members that amendments for stage 2 should be lodged as early as possible—to help the clerks—and no later than 2 pm on Monday 15 March.

I thank Chris Gane for his attendance, and apologise for not doing so earlier.

Meeting closed at 12:27.

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