Local Government and Transport Committee

15th Report, 2006 (Session 2)

Stage 1 Report on the Transport and Works (Scotland) Bill

Volume 2: Evidence
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Local Government and Transport Committee

Remit and membership

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To consider and report on matters relating to local government (including local government finance), cities and community planning and such other matters (excluding finance other than local government finance) which fall within the responsibility of the Minister for Finance and Public Services; and matters relating to transport which fall within the responsibility of the Minister for Transport.

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David McLetchie
Mr Michael McMahon
Mike Rumbles
Tommy Sheridan
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Local Government and Transport Committee

15th Report, 2006 (Session 2)

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Transport and Works (Scotland) Bill: Stage 1

14:03

The Convener: Agenda item 2 is stage 1 consideration of the Transport and Works (Scotland) Bill. I welcome Tricia Marwick MSP and Jackie Baillie MSP, who both have recent experience of convening committees that dealt with major public transport infrastructure projects—such projects are part of the reason why the bill has been introduced. I look forward to their sharing their experiences as conveners of those committees and, I hope, informing our consideration of the bill. I hand over to them to make any introductory remarks.

Tricia Marwick (Mid Scotland and Fife) (SNP): I am happy just to answer any questions.

Jackie Baillie (Dumbarton) (Lab): Likewise, convener. It is a pleasure to be here. It will probably surprise none of the members that both Tricia Marwick and I are extremely keen on the bill that is before the committee, as we have had experience of the alternative.

David McLetchie (Edinburgh Pentlands) (Con): For the record, and for the purposes of compiling our report, will you say what amount of time was devoted to the respective bills that you dealt with at their various stages? Having regard to the analysis of the proposed new measures relative to the present procedures, what do you envisage will be the parliamentary time saving and the process time saving from the standpoint of the promoters of projects?

Tricia Marwick: The Waverley Railway (Scotland) Bill Committee met for almost three parliamentary years to consider the private bill, which made it one of the longest running private bill committees. There were problems with the private bill—not least with the rushed way in which the promoter introduced it. The bill was not ready to be in the Parliament. We also had problems with land referencing and objectors, which delayed the bill for a further six months. The task was extremely onerous. When we took evidence, we met most Mondays during the period. I am sorry, but I cannot say exactly how many committee meetings we had at the various stages—it was a bit of a blur at times. The evidence sessions were extremely hard and most of them lasted all day.

My biggest criticism of the present procedure is that it is extremely complicated. Not many members of the Scottish Parliament have the necessary technical expertise to deal with such matters. We were dependent a great deal on the advice of the clerks and the technical experts who
were brought in to advise us. The proposed new process will be a lot cleaner and will cut down MSPs’ involvement. If I can speak as the former Scottish National Party business manager, I know the difficulty that my party has had in proposing members for future private bill committees as a result of the experiences that some members had on previous private bill committees. It goes without saying that I am in favour of a streamlined system.

I must ask the question that I keep asking but which has never been answered: why is our method of dealing with rail projects different from the way in which we deal with road projects? If we dealt with rail projects in the same way as we dealt with road projects, would we need the Transport and Works (Scotland) Bill? That should be considered further. The processes that are laid down in the bill are a vast improvement on the current system, but I question slightly whether there will be sufficient parliamentary involvement. Perhaps we could explore further whether we need a system that is similar to the one that we have for building roads.

Jackie Baillie: The new bill is absolutely right in removing the biggest chunk of time, which is the consideration stage of the private bill process. The Edinburgh Tram (Line One) Bill Committee had about 150 objections from articulate individuals, all of which had to be considered, individually and collectively. Those 150 objections took in excess of 100 hours of parliamentary scrutiny.

Tricia Marwick touched on the issue of complexity. I now consider myself an expert on patronage, demand modelling, water-flow issues and the difference between $L_{\text{Amax}}$ and $L_{\text{Aeq}}$ in describing noise, but that is not the kind of knowledge that MSPs bring with them to the Parliament. A huge degree of complexity is involved in private bills and I am not convinced that MSPs are best placed to work their way through that. We rely on expert opinion, as do the objectors, but an enormous amount of time is still consumed in the process. Objectors must provide witness statements and rebuttals of other statements. The process consumes a huge volume of time, not just for the Parliament and parliamentarians, but for objectors. The bill offers a much more balanced and sensible approach to dealing with transport projects.

David McLetchie: You have mentioned the front end, or parliamentary scrutiny, and the back end, or parliamentary approval. The bill proposes that members will have to vote on an affirmative resolution on proposals that are of national significance. Is that proposition limited to transport projects promoted under the bill or is it a general proposition that will apply to all projects that are considered to be of national significance? Do you think that it should apply to nationally significant projects?

Tricia Marwick: I am not sure that I can answer your questions because I am not sure what the Executive’s thoughts are.

I have never yet had defined for me what “national significance” means. Are the Borders railway line, the Edinburgh tramlines or the proposed Bathgate to Airdrie line of national significance? I do not know. The term confuses me because, as I understand it, only transport projects that are of national significance will come back to the Parliament to be subject to the affirmative procedure.

David McLetchie: Should national significance be partly defined by the amount of public money that is committed to a project even though it might have only a localised benefit?

Tricia Marwick: That is one way of defining it, but we need a definition that we can all understand and sign up to. With respect, it is necessary that the committee manages to get Executive ministers to identify what the term means when they appear before you. We need to understand what national significance means before the bill is finally approved. MSPs need to know what we will be signing up to.

David McLetchie: Does Jackie Baillie think that her project—Edinburgh tramline 1—is of national significance?

Jackie Baillie: There is no yes-or-no answer to that. I agree with Tricia Marwick that absolutely clear criteria need to be spelled out, whether in Parliament or through the national planning framework. I understand that transport projects of national significance will need to be identified as part of the national planning framework. I would have thought that a reasonable way of measuring transport projects would not just be by their cost, but—more significant—their economic impact as part of the infrastructure not just of a city region, but of Scotland as a whole. I hope that there will be such criteria, but whether they are part of the bill or more properly part of the criteria for establishing what is in the national planning framework is something about which we want to ask ministers.

I am reasonably comfortable that Parliament’s time should not be spent on localised projects that will have an undoubted benefit in their local area but are not of great national significance and can be left at a local level.

Mike Rumbles (West Aberdeenshire and Kincardine) (LD): As a preface to my remarks, I note that the Scottish Parliament information centre briefing on the bill says on page 3 that if the scheme is of national significance it will be subject to parliamentary approval—that means projects identified in the national planning framework.
I share your view that the current system is unsustainable and that we cannot carry on with it because it is not right or practical. However, I get a little concerned about the amount of power that we give to the Scottish ministers. I feel that we give them too much power and that Parliament loses control, as it were. Now here we are thinking about moving the business of approving transport projects from parliamentary to ministerial control. Although we recognise that the current system is wrong and unsustainable, has the Scottish Executive proposed the most appropriate way forward?

14:15

Jackie Baillie: It has. It is not about who has the ultimate control—you should remember that, according to the parliamentary process, the Parliament will still be required to sign off projects at the beginning as we do currently when we are asked to approve the general principles of a bill. We ask ourselves whether we think that a project is right, given the bill that is before us. That aspect would not be removed from the Parliament.

At the moment, the Parliament has control over the middle part of the process, in that a committee of MSPs pores over the fine detail of competing claims and consults experts—there are experts on both sides, although they are predominantly on the promoter’s side. I believe that handing over that control to an independent reporter who is skilled at dealing with such matters would represent an appropriate loss of control for the Parliament and that it would be right to park responsibility for that part of the process with an independent reporter on behalf of the Executive.

It is appropriate for a national body such as the Parliament to have regard to projects of national significance and it is proper that such projects should come back to the Parliament for approval. Apart from projects that affected my constituency, in which case some regional consideration might be appropriate, I would not be interested in other transport projects being subject to parliamentary approval.

If we are honest, the Parliament’s ability to engage with highly technical subjects that have defied the comprehension of even the MSPs who have listened to hundreds of hours of evidence is limited, as I found out during the final stage debate on the Edinburgh Tram (Line One) Bill, when I attempted to lecture members on the merits of one noise policy over another. That was hard work. Members were trying to learn about the subject in the space of an afternoon and I saw their eyes glaze over. That is not a good way to proceed. The proposals in the Transport and Works (Scotland) Bill are proportionate and do not represent a loss of control.

Tricia Marwick: I have a slight concern that the proposals will move us too far in the opposite direction. It is important that there continues to be an element of parliamentary scrutiny, not for the sake of MSPs or so that the Parliament can show that it, and not the Executive, holds the power; such scrutiny is important for the objectors, whose lives will be affected by the decisions that are taken on private bills. It is the objectors whose houses will be purchased compulsorily and who will experience noise and other difficulties in their back yards.

In effect, the Executive has been the promoter of the private bills that have been considered so far, even though a body such as Scottish Borders Council might nominally be the promoter. If the Executive had not given a nod and a wink to Scottish Borders Council to indicate that money would be made available for the Borders rail link, I doubt that the Waverley Railway (Scotland) Bill would have been introduced. There has been a great deal of hypocrisy in the operation of the existing system.

If the Executive continues to be, in effect, the promoter of such bills and, in addition, is charged with scrutinising all the reports, people might feel that the system is unfair. Although the operation of the present system might not have pleased some of the objectors who did not get what they wanted, I do not think that anyone could have complained that they were not treated fairly. I believe that the promoters saw the Parliament as being independent from the Executive in the process. The private bill committees tried hard to ensure that the objectors got a fair crack of the whip. If all the decision making lies in the hands of the Executive, people may well feel that they cannot get a fair crack of the whip and that the outcome is predetermined because the Executive is also the promoter. I will be honest and admit that I do not know how we can get round that, but I am concerned that under the new proposals it seems that the Parliament will have no role, while the Executive will play a highly significant role. I worry about the effect of that on people who have legitimate concerns.

The Convener: A question springs to mind on the back of what you have just said. You are right to say that the Executive has expressed support for many private bill projects in advance and has indicated that it would make money available to develop them. However, several of the political parties that were represented on the Waverley Railway (Scotland) Bill had previously expressed support for the Borders railway project, even if the individual members who were nominated to serve on the committee did not have a particularly close connection with it. Surely it could be said that that arrangement meant that it was predetermined that
the bill would be approved and that only the detail could be amended?

**Tricia Marwick:** I have some sympathy with that argument, but although people may have thought that to begin with, the members of the committee served on it faithfully and listened to all the evidence. We treated the objectors with respect and courtesy. The reports were genuine reports. As members well know, the committee system that we have in the Scottish Parliament means that, although parties have signed up in different ways on issues, we work together. The members of my committee—and those on Jackie Baillie’s committee—worked collectively to ensure that the right decisions were reached.

**Tommy Sheridan (Glasgow) (Sol):** I have a couple of questions for either Tricia Marwick or Jackie Baillie. All of us are agreed that we want to streamline procedures. If something needs done, it needs done, and we should try to get it done. There is good will towards the Transport and Works (Scotland) Bill, but I am worried about how communities will make their objections. We need to ensure that their views are thoroughly taken on board.

I turn to the issue of Scottish ministers deciding to appoint an independent reporter and triggering a public inquiry. Under the proposals, Scottish ministers will then decide whether to accept, modify or reject completely the report of the independent reporter. Is that not a wee bit like having a predetermined view? In other words, if the Executive supports a proposal and the independent reporter’s recommendation goes against the proposal, will the Executive ever decide to back down? I have a follow-up question, but my first question is whether the process is robust enough, particularly in taking on board people’s objections.

**Jackie Baillie:** The process under the bill is more robust than the current system, under which objectors who have made individual objections are channelled into groups of objectors. Each group has to appoint a spokesperson, yet, in some cases, group members have not met one another. In addition to preparing its original witness statements, each group also has to prepare rebuttal statements. On the objector side, that whole process can be virgin territory, whereas, on the promoter’s side, a battalion of lawyers and experts, noise consultants and so on do the work. It is a bit like David and Goliath. I do not mean to be patronising in any way, but—certainly on the committee on which I served—the objectors were superb. They marshalled their arguments and cut through some of the technical nonsense to get to the things that really mattered to them.

My criticism of the current situation is its inflexibility. I refer to the length of time that objectors and witnesses are given to present highly complex issues to members. They have 10 minutes to speak—that is it. They have to make their case quickly and clearly. They can answer the committee’s questions and rebut arguments from the other side, but the process is very channelling in nature. It does not allow them any flexibility in the time available for putting their case, but a process involving an independent reporter could allow that. Some of the submissions that the Local Government and Transport Committee has received from objectors suggest that, in order to rebalance their role in the process, they would like to be staffed with experts. That proposal may be worthy of your consideration.

I turn to the ability of Executive ministers to accept or modify proposals from the reporter. There is an exact parallel with what private bill committees do. Currently, members of a private bill committee move amendments: they are the only people who can do that. In some instances—it did not happen in my case, but it is relevant to Tricia Marwick’s experience—a committee can agree to an additional provision, such as a train station, that did not form part of the original proposal that the Executive approved. Certainly, such a provision would not be what the money was set out for, but that is the end result. That is a clear indication of the way in which the process could operate under either system.

I am also clear that issues arise, for example, patronage and demand modelling evolve over time. The first bite at the cherry is not necessarily the end result as the figures become more precise over the process and people become more aware of what needs to be done to customise a system or rolling stock, which can make a difference to the time taken to get around a given piece of track. Such technical issues can change people’s minds. In the present system, that change results from committee debate, but an independent reporter could also find a need and demand for another train halt, for example.

**Tricia Marwick:** I share some of Tommy Sheridan’s concern about the Scottish ministers being able not only to accept, but to modify or reject the reporter’s recommendations and, if appropriate, to make a final order that will be subject to parliamentary approval if a scheme is of national significance.

I return to the question of what is of national significance and what is of local significance. In effect, ministers will be able to do what they want regardless of what a reporter says. If a development is not of national significance, Parliament will have no role and a local order will be made. If a development is of national significance, Parliament will be reduced to saying yes or no to whatever the Executive proposes. I am genuinely concerned about that.
Some debate is needed near the end of the process that does not necessarily result in a yes-or-no answer. When ministers receive the report from the independent reporter, I would like a parliamentary committee to receive it too, so that it has the opportunity to consider the report before an order comes before Parliament and to question ministers on decisions and on why they want to modify recommendations or reject advice. A role needs to be developed for the Parliament and its committee system, although it should certainly not be the role that we have under the current system.

Tommy Sheridan: I asked Jackie Baillie and Tricia Marwick about the issue because there is no question but that the current system needs to be changed—nobody would argue that we should stick with what we have. The current system is too laborious and it allows nothing like the required importance to be attached to some projects and to delivering them on time. However, if we are to replace that system, we should replace it with something that is better.

I am worried because of the comparison with major road projects. The M74 extension was very contentious in Glasgow, so an independent reporter held a public inquiry, which resulted in that independent reporter’s recommendation against the extension. That recommendation was ignored and the extension is to proceed.

Are we talking about simply replicating that system, which leaves a sour taste in the mouth of members of the public who have spent an awful lot of time and energy on giving input to public inquiries only to see, as someone said earlier, an outcome predetermined from the beginning? The feeling in Glasgow was that the outcome on the M74 extension was predetermined from the beginning. The independent reporter rejected the arguments in favour of that project, but that view was ignored. Will we simply replicate that system? Is there no way for the bill to attach more status to independent reports?

Jackie Baillie: I do not think that what you describe will be the consequence of the bill or has been our experience in Parliament. Any project with which the Executive decides to proceed has a budget heading, never mind the fact that it belongs to a subject committee. Our current system enables us to scrutinise proposals twice—once at the subject committee for which they are a relevant policy issue and once through the annual budget exercise, which enables the Parliament to question priorities and in which big or small transport projects are likely to feature as separate budget lines.

We cannot and should not ignore the fact that we already have a parliamentary scrutiny system that works and which lends itself to the bill. The aim is not to remove Parliament’s scrutiny but to proceed proportionately and to use Parliament as it should be used.

Tommy Sheridan: I am not sure whether that was the point that I made. My question is whether the new system will allow more weight to be attached to the result of public inquiries. You talk about a process that will allow the Scottish ministers to appoint an independent reporter if objections are made, yet ministers will have the power to ignore the reporter completely. Is that fair?

14:30

Jackie Baillie: The bill makes it clear that a proposal can be accepted, modified or rejected—all three options are open to ministers and to the Parliament. Therefore, if a minister lays an order that seeks to change a project in a way that does not reflect the independent reporter’s recommendations, it is for the Parliament to scrutinise the order, just as we currently scrutinise ministerial orders.

Tricia Marwick: I disagree slightly with Jackie Baillie. As I understand it, such an order would be subject to the affirmative procedure and the Parliament would not be allowed to amend it. There would be no question of amending the order to ensure that the approach reflected the independent reporter’s suggestions. That is a problem. There should be scrutiny of the decision-making process when ministers want to modify or reject a reporter’s recommendations. A committee of the Parliament should question the minister about the decision before the order is laid.

Tommy Sheridan: You are a co-promoter of the bill. Do we have an opportunity to flag up an intention to build in such checks and balances? I understand that if a project is regarded as being of national significance, the Scottish Executive can decide to reject the reporter’s report entirely and proceed without further legislative scrutiny—I hope that I am not misrepresenting the situation. Such an approach might add to the public perception that we have all encountered, which leads people to say, “Och, once they’ve made up their minds they just dae it anyway.” People think that consultations take place on matters that have already been decided.

A procedure that allowed the Scottish Executive to slap a “national significance” tag on a project and reject the recommendations of a public, independent report that the proposal be rejected or modified would not sufficiently involve the public or take cognisance of such independent reports. Is there room for giving extra weight to a public report in such circumstances, by ensuring that there is a channel for further scrutiny?

Tricia Marwick: As I said, we need a procedure near the end of the process whereby a committee
engages with the minister on the Executive's attitude to the independent inquiry reporter's report, regardless of whether the recommendations are to be rejected or modified. Such a procedure would do the Parliament a service, in that we would not be faced with a laid order that we could only accept or reject. Such a procedure would give weight to the Parliament's views and confidence to objectors that they were being dealt with fairly.

In all planning matters and in the processes that we undertook in relation to the proposals for the Borders railway and the Edinburgh tramlines, culture is the issue. Do people believe that their voices will be heard and that they can make a difference? In the planning system in general, as well as in the bill that we are considering today, there are huge challenges for the Executive and the Parliament to ensure that people are confident that their views will be taken into account. Despite the failures of the current system, it has allowed people's voices to be heard. Objectors have not criticised the system on the ground that they did not get the hearing that they hoped for.

Jackie Baillie: That is a fair comment up to a point. However, in written evidence to the Local Government and Transport Committee, objectors questioned whether partnership members could stand apart from the process—apart from Mike Rumbles, who makes a habit of doing that. [Laughter.] We should not believe that a committee of MSPs is in any way given more credibility than is an independent reporter.

Tommy Sheridan's point is about what happens after a report has been produced. Two things will fix the problem: First, a report that is a matter of public record will of itself create an expectation about what will happen next—such as the publication of recommendations, for example.

Secondly, a subject committee that has before it an affirmative order laid by ministers may decide to undertake a degree of scrutiny. Policy committees do that in any case. I would expect the Local Government and Transport Committee to take an active interest in any orders that ministers laid.

Tommy Sheridan: I am sorry for taking so long, convener. Jackie Baillie seemed to be hinting that she would support public reports being open to the public. At the moment, however, that is not the case. Reporters submit their reports with recommendations to Scottish ministers. As a promoter of the bill, are you saying—

The Convener: Jackie Baillie and Tricia Marwick are not promoters of the bill. They are here only as witnesses. This is an Executive bill.

Tommy Sheridan: I am sorry. I thought that they were promoters of the bill. As witnesses who have a great deal of credibility, because of their experience and deep knowledge of the issue, would they support reports being made public?

Tricia Marwick: Yes. It is important that they should be made public when Scottish ministers receive them.

Ms Maureen Watt (North East Scotland) (SNP): I understand the need for change to the present system, for the self-preservation of MSPs. I am also aware that railways are treated anomalously as compared with other major projects. The bill's drafters looked to England and the Transport and Works Act 1992. For that reason, it has been described as TWA-plus—in other words, the TWA with knobs and bells on. The bill gives ministers much more control than is necessary—including, I understand, the ability to amend legislation retrospectively. How do you feel about the fact that, under the bill, the Waverley Railway (Scotland) Act 2006, the Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006 could be revoked, because of the strength of the powers that it gives to the Executive?

Jackie Baillie: I have no problem with borrowing from the Westminster Government and improving on what it has done. If the bill is the TWA-plus, the "plus" will be of benefit.

Ms Watt: When I referred to the bill as the TWA-plus, I meant that it gives more powers to the Executive.

Jackie Baillie: I am not convinced that that is the case. The Executive and the Parliament are not far apart on major road transport projects. The Parliament passed the Edinburgh Tram (Line One) Bill, with the support of the Executive. [Interruption.]

Shall I continue over the fire alert, convener?

Tommy Sheridan: That is what the announcement just said.

Jackie Baillie: You are not the convener, Tommy.

Tricia Marwick: Neither is the disembodied voice that accompanied the fire alert.

The Convener: The clerks have informed me that I must suspend the meeting until the alert is over. We do not need to leave the building, because the announcement does not require us to do so.

14:38

Meeting suspended.
The Convener: I have been advised that it is now imminent safe for us to proceed and that there is no imminent threat to our safety, so we can recommence the meeting. I think that we were in the midst of the witnesses responding to a question from Maureen Watt, but I ask her to refresh our memory of her question. We will not criticise her if she gets any of the words slightly out of place.

Ms Watt: Jackie Baillie more or less answered the question in that she said that it was okay to have the TWA-plus, which gives the Scottish ministers more power. I was waiting for Tricia Marwick to say whether she agreed.

Tricia Marwick: The important thing is that we get a process that suits the Scottish Parliament. If we can borrow from elsewhere and enhance what we have, that is no bad thing. We have not got the process right up to now and we need to get it right in the bill because we cannot keep chopping and changing the process for public transport and other huge projects. If that means taking processes from elsewhere, that is fine. I have already expressed my concern that the bill gives the Executive just a touch too much power, but I welcome the general thrust of the bill.

Jackie Baillie: Earlier on, I may have commented that, under the bill, the Parliament would have a role at a preliminary stage in agreeing to the general principles of a project. I wish to make it abundantly clear that that is not the case.

Ms Watt: Tricia Marwick has been involved in the Planning etc (Scotland) Bill. Does she perceive any overlap between it and the Transport and Works (Scotland) Bill that might cause conflict, or are the two complementary?

Tricia Marwick: There will obviously be some sort of overlap between the two bills in regard to developments of national significance and the national planning framework, but we need to develop the proposals that best suit the Parliament. The proposals on developments of national significance should mean that the national Parliament will have some say in such developments.

Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP): I will raise two points, one of which relates to the M74. I will put a general proposition to find out whether the witnesses, with their experience of private bill committees, agree. The Scottish Executive’s policy was that there should be an M74 extension and it was voted in on that policy. Would it not be rather perverse if any system that the Government set up had the result of stymieing its own policy at one planner’s behest? What mandate would one planner have to go against the mandate of an Executive that, whether we like it or not, has been voted in by the people?

Jackie Baillie: I could not have put it better myself. Any political party is elected on a manifesto and its job in government is to implement that manifesto, occasionally in coalition. One would think that the coalition parties would have a majority in the Parliament, so it is a question not only of the Executive pursuing something irrespective of an independent report but of the Parliament agreeing with that position by majority.

Tricia Marwick: Governments have the right to get their programmes through. It is up to the Opposition to oppose and change legislation where necessary, but Governments set out matters such as transport infrastructure projects in the manifestos and receive support on that basis. I agree with Fergus Ewing that it would be perverse to introduce a system that might affect those commitments.

However, the reporter has a wider role than simply saying whether a scheme should go ahead. Election or party manifestos say only that, for example, there will be an M74 extension; they do not specify its route. The reporter—and, indeed, the committee in question—has to consider many issues such as whether a proposed route is the best one and whether it will affect people, who would then be entitled to compensation. In principle, I agree that such projects should go ahead, but people’s opinions can change when they examine the fine detail and find that the proposed routes are not what they had hoped for.

Fergus Ewing: If an SNP Government were to pledge to dual the A9, any reporter who rejected such a project would get fairly short shrift from me.

Tricia Marwick has anticipated my second question, which is not so much about the general process of considering objections as about specific objections that set out what amount to alternative proposals. After being contacted by people who had proposed alternatives to major projects that committees were about to consider, I was not entirely satisfied that they had been given a fair hearing. For example, Mr Simon Wallwork proposed a light rail and park-and-ride scheme as an alternative to the Glasgow airport rail link. Although he was not an engineer, he had at least worked up a proposal. I know that Jackie Baillie’s committee considered his evidence very closely, but I wonder whether we could find a means for independently appraising realistic alternatives. The flaw in the current system, in which the promoter can be asked to say what he or she thinks about the alternative, is that it will always say that its
scheme is better than any alternative—of course, that is human nature. I do not want to protract the process of introducing national transport and works projects but, given the two witnesses’ experience of the current system, I wonder whether they have any thoughts about an ideal method of giving realistic alternatives to such projects—no matter whether they be motorway routes or airport rail links—a full, thorough and sufficient appraisal.

Jackie Baillie: First, I should point out that I was convener of the Edinburgh Tram (Line One) Bill Committee, so if Mr Wallwork had presented his proposal to us, he would have been giving evidence to entirely the wrong committee. I have to confess that I have not examined his scheme for Glasgow airport.

That said, at the moment, these committees can consider alternative routes, but only when they are at what might be called an initial stage. In saying that, I do not want to give the impression that they take only a superficial look at them. For example, the Edinburgh Tram (Line One) Bill Committee examined alternative routes to service the Western general hospital and was able to dismiss them quite quickly because, if I remember correctly, none of them was able to operate at a particular gradient. The process allowed us to determine whether the closer examination of alternative routes, beyond an initial sift, would have any benefit and we felt that doing so would have meant lodging an amendment to the bill. That would have meant reopening our consideration of the bill, which would have been quite difficult to do and would have taken us back almost to the start of the process. In that respect, the current system tends to drive people away from considering alternative routes.

I think that having a reporter will provide more flexibility because, after carrying out the initial sift, he or she might decide that there is merit in looking more closely at alternatives. I do not get the sense that the reporter is fettered in any way; I certainly cannot see from the papers in front of the committee any attempt to fetter the reporter in that regard. I would have thought that the committee could seek some assurance from the process that is proposed rather than the existing process, which would be counterintuitive to what you are suggesting.

Michael McMahon (Hamilton North and Bellshill) (Lab): My question has been touched on, but I seek clarification. You felt that your bill committees could get bogged down with the technicalities. Where MSPs do not have the expertise and it is of no benefit to them to get into the detail of the technicalities, it is right to cut through it, but is there a danger of throwing the baby out with the bath water? Genuine objections on social grounds or regarding non-technical issues would not be able to come through in the normal consultation that we are all aware takes place on other bills. Can a balance be struck that would satisfy your concerns that the technicalities should be left to those with expertise while allowing objectors the right to put forward their ideas and suggestions? Could that fit within the structures that would be allowed under the new bill?

Jackie Baillie: I would expect anybody promoting a bill to contact their local MSPs. It is called for in the bill that the promoter of a development should notify everybody, including local MSPs, who are one channel between the electorate and the Parliament for communicating messages, whether they are complex and technical or to do with social policy. I would have thought that that could be done with the existing complement of MSPs, but the reporter will be able to reflect issues beyond just the technical. There is no doubt about the complexity of the private bills process and I would not want to subject the committee to the pain that we went through; suffice it to say that I do not think that you will be throwing the baby out with the bath water. The technical issues will be handled competently but, in addition, some of the genuine views of objectors will emerge, if not through that process, certainly through MSPs doing their job.

Tricia Marwick: The process was extremely difficult and, as we have both alluded to, extremely technical, but there was the opportunity to listen to the social case. Indeed, the Waverley Railway (Scotland) Bill Committee made it clear that it approved the Borders railway precisely on the social case. Moreover, there was a social case for a station at Stow. Can a reporter do that equally well? I see no reason why not. There are opportunities throughout the public consultation for people to put forward their views. Like Jackie Baillie, I do not think that the reporter will deal only with technical issues; I think that he will look at the issues in the round. There will be ample opportunity for individuals and community groups to put their point of view. If there are objectors to the scheme, it is more than likely that there will be public hearings at which people can put their views. There is an opportunity for the community to be involved in that way. I do not think that we are throwing the baby out with the bath water; the new system will be just as good as the one that we have at the moment. My concern is not with whether people will be able to engage with the process—that will be dealt with effectively under the new system—but with the final wee bit of the process.

Michael McMahon: That comes back to the point that Tricia Marwick made earlier about the manner in which statutory instruments are
under the modified private bill process, which involves an assessor. I am perfectly happy to answer questions on that.

Tricia Marwick: That is part of my concern. At the stage at which the reporter introduces his report, which is either accepted by the Executive or modified or changed, there is no way that MSPs can put their point of view forward. That is why at the final stage, before the final order is introduced to the Parliament, there needs to be some element of scrutiny by MSPs. I am not saying that there should be three or four weeks of scrutiny, or three or four meetings, or that we should rerun what has already been done, but we need to be able to question ministers and perhaps even the reporter.

15:15

Jackie Baillie: I disagree with Tricia Marwick in that I think that such a process already exists. No policy committee of the Parliament that is worth its salt would not, if there was any dispute about an order that was being dealt with under the affirmative procedure, call the minister before it to question them and undertake a degree of scrutiny. Therefore, there is a safety net. MSPs can get round an order, if they choose to do so.

The Convener: That brings us to the end of our questions. I thank Jackie Baillie and Tricia Marwick for their evidence.

I now welcome John Halliday, who is the acting assistant chief executive for transport and strategy at the successor organisation to Strathclyde Passenger Transport—SPT—which I see is cleverly called Strathclyde Partnership for Transport, or SPT for short.

John Halliday (Strathclyde Partnership for Transport): Just a minor correction, convener. I am no longer acting assistant chief executive, I am the actual assistant chief executive.

The Convener: Excellent—congratulations. I point out to any members of the public who have just come in that the reason why we are running a little behind schedule is that we had a fire alert earlier.

I invite John Halliday to make any introductory remarks and to give us SPT’s perspective on how it would deal with future major public transport projects.

John Halliday: I am here to represent SPT, but I have the advantage of having been a member of the Strathclyde Passenger Transport Executive, so I bring a bit of experience of what went before. We are in the process of promoting the Glasgow Airport Rail Link Bill, which is being dealt with under the modified private bill process, which involves an assessor. I am perfectly happy to answer questions on that.

I have a host of points that might be worth bringing out in due course but, rather than make a lengthy speech now, I will leave it to the committee to ask questions on points of interest. SPT welcomes the idea that the development of major projects should have an appropriate pace. Our general feeling is that the present process is lengthy, involved, expensive and ultimately extremely exhausting for all parties. That is the view not only of promoters of projects but of communities. On that basis, we welcome the proposals.

I will comment on some specific issues that have been mentioned. In thinking about the inquirer process, the committee should consider that, in transport matters, a recognised process already exists called the Scottish transport appraisal guidance process, which is a key element for any promoter. The promoter is charged with developing policy objectives that are pertinent to the project and the STAG process provides a full test of the promoter’s policy objectives. I imagine that, under the proposed process, the inquirer would scrutinise the STAG process closely, as happens in the present private bill process. Therefore, the structure already exists. There are some other aspects of the process that we are interested in. For example, the length of time that it takes needs to be appropriate, by which I mean that it should be neither too short nor too long. In our experience, that is an important consideration.

We have been extremely interested in some of the financial consequences that are identified in the literature. The front loading of the process is noteworthy. It has been assessed that that will cost promoters an additional £1 million. In the round, that is probably not a bad thing, in that it will mean that more work will be put in at the start of a project. One would expect that by the time an order is applied for, a lot of the work will have been done. That presents a danger for promoters. If an application for an order ultimately fails, there is a higher risk of the relevant public authority having to bear that cost. Risk is a consideration, but the new system will certainly provide a good incentive to get things right.

The Convener: I invite questions from committee members.

Paul Martin (Glasgow Springburn) (Lab): One of the points that you have made is that the bill will result in less bureaucracy. We know that the current system allows for a great deal of bureaucracy. We have had experience of being advised that passing a bill would result in less bureaucracy. Can you be specific about how the bill will result in less bureaucracy?

John Halliday: Our view is that the involvement of an expert inquirer will make the process much more dynamic in the sense that there will not be a
need to go through as much of a paper trail as we need to go through at the moment. I do not think that that diminishes the validity of the argument. I have had experience of building up a case in the private bill process and can assure you that that generates an enormous amount of paperwork. A staggering amount of evidence is fed in. The end product is what is seen, but an enormous amount of paperwork leads up to its development.

Paul Martin: Why is it the case that there will be less bureaucracy? In the past, we have been assured that passing legislation would result in less bureaucracy, but organisations have subsequently told us that the new process still involved bureaucracy. Will there not always be bureaucracy, regardless of how we proceed? Most of the projects in question involve significant sums of public money, so there will always be a requirement for a paper trail. Why do you think that the appointment of a reporter will mean that there will be less of a paper trail? I do not know many reporters who have not had to deal with a significant amount of bureaucracy. What will happen to the paper trail?

John Halliday: I share your view. In the round, there will probably be as much paperwork as there was before. Let us face it—there will be a burden of proof on the promoter of an order, who will have to show that the project stands up. The Scottish transport appraisal guidance requires that it be demonstrated unequivocally that a proposal meets all the necessary objectives, which include the five Government objectives that are before us. The inquirer would expect to be provided with an appropriate level of paperwork.

I am not sure about how much bureaucracy it is being suggested would be saved. I agree that regardless of which way one proceeds, there will always be a burden of proof on promoters, which they will have to satisfy one way or another.

Paul Martin: The bill will mean less time for parliamentarians to scrutinise proposals. Previous witnesses have told us that the private bill process involves a significant input from parliamentarians. That will be put aside, so the only advantage of the bill is that an independent reporter will spend time considering all the technical details that are provided. Is that the bill’s only advantage?

John Halliday: I see the benefit of such an approach, but it is for members of the committee to consider the benefits of removing MSPs from the scrutiny process and leaving that role to a reporter.

The current process is slightly different from the experience that the previous witnesses described—it is almost halfway between that experience and the approach that is proposed in the bill. During the preliminary stage of the Glasgow Airport Rail Link Bill, the proposal was considered by the Glasgow Airport Rail Link Bill Committee, but at consideration stage an assessor has been appointed to scrutinise the proposal. We are providing the assessor with evidence to support the development of the project. The approach saves parliamentarians from what is—believe you me—an onerous task. However, the scrutiny must take place.

The committee needs to give careful consideration to the pace of scrutiny. The scrutiny process deals with all the issues, but it places a heavy burden on the promoter—that is why I look tired at the moment. People might say, “So what? You’ve got the resources,” which is fair enough, but the process also places a burden on the objectors, who must prepare the evidence and put it to the assessor in a particular timescale. I suspect that there is a need to consider whether to time-limit the process, to force an appropriate pace and an assured outcome.

The Deputy Convener (Fergus Ewing): The convener is temporarily absent, so I will take the chair. Members should let me know if they want to ask questions.

I asked the previous witnesses how, in the current system, alternative proposals are considered by bodies such as SPT. Is there currently no method by which an alternative proposal for a project can be appraised independently of the promoter? Given that the promoter has already considered how best to deliver the scheme, we would expect the promoter to be reluctant to conclude that their preferred method is inferior to an alternative.

Perhaps in response to my question you can draw on your experience of the Glasgow airport rail link proposal. I am sure that you remember Mr Wallwork’s proposal. Although his scheme seemed to be worth considering, there appeared to be no mechanism for working up the proposal on the basis of the necessary financial and engineering expertise, to enable us to make a judgment. If, as we presume, the bill is passed, how will the new planning process enable us to deal effectively with such matters, without denying people the opportunity to put forward alternatives? My impression is that such opportunities are currently pretty minimal and that alternative proposals are not subject to thorough, robust and independent analysis.

John Halliday: I note your observation. It is important that I be careful about what I say about the Glasgow airport rail link project, which is currently being scrutinised. I will therefore talk about things in general. Please excuse me for not dealing with Mr Wallwork’s proposal.
Fergus Ewing: You are right not to do so, and I would not criticise you for that. I appreciate the point that you have made.

John Halliday: Thank you. However, I think that the issues will emerge in what I say.

The proposal to appoint an expert to inquire into the process is a step forward. A real test has existed in the Scottish transport appraisal guidance, to which I have alluded, for recent projects that have been promoted. The fundamental basis of that guidance is that people should start from a problem and work up the alternative options. It is up to the promoter of a project to demonstrate that the preferred option is, in order to meet the policy objectives that have been set, the superior option and that, by implication, the alternatives have dropped away. It seems to me that in locking the expert-inquirer process into the procedure, the inquirer would and should have the absolute right to scrutinise and establish whether the process is robust and whether an appropriate span of alternatives has been considered.

I was interested in what the previous witnesses said and would like to tell members about some of my experience. It is important that the process is public. It might be recalled that Strathclyde Passenger Transport promoted Strathclyde tram proposals some years ago. The proposed legislation, which was scrutinised by the House of Lords, fell at Westminster, but we do not to this day know why it did so and we could not learn from what happened. There was and remains a distinct taste of unhappiness about the process. We believed that we had done the best job we could, but people who objected to the proposed legislation—as well as the promoter—did not know why it failed. The committee might want to consider the openness that an inquirer could bring to the process. In that context, having the STAG process open to inquiry and scrutiny and the outcome of the process being reported by the inquirer would result in the satisfaction that the process is a step forward. A real test has been carried out near the beginning of the process.

John Halliday: It is perhaps not a flaw but, given the span of this sort of legislation, it would be expected that consultation be undertaken in which the promoter will be informed of the points that need to be considered.

The question is a valid one, but I will put the answer another way. It is very difficult for projects to meet everyone’s expectations; invariably, a balance needs to be struck. For one reason or another, someone somewhere will not like a project. They may be involved in a business, have a vested interest in an alternative proposal or be one of the individuals who would be impacted directly. A test needs to be applied to ensure that the promoter promotes the project. If the process were to be otherwise, an awfully long timescale would need to be levered in, which may not get us anywhere. There is also the imperative to deliver projects. I guess that the member was thinking about the pace of delivery.

Fergus Ewing: I fully accept that argument. Logically, any consideration of the alternatives has to be carried out near the beginning of the process.

John Halliday: Absolutely.
**Fergus Ewing:** It cannot be introduced—Holyrood style—halfway through. That would not work at all.

**John Halliday:** No.

**Fergus Ewing:** I do not want to propose anything that would further protract an already extremely protracted process. I am grateful for your evidence. Thank you.

**John Halliday:** On that point, I suggest that the objective of the bill is to produce certainty about outcomes—the process of promoting the order would otherwise be wasted. The issues should be bottomed out early in the process and everyone should be on firm ground by the time the order is promoted.

**The Convener:** I have one question before I bring in other members. The bill proposal is that only projects that are defined as being of national significance will require parliamentary approval; projects that are of local or regional significance will not. Is that the right balance? Which of the projects that are currently under consideration are of national significance and which are of regional or local significance?

**John Halliday:** As the convener might expect, I gave some thought to that issue in advance of the meeting—the question is a difficult one. National significance will be defined in the national planning framework, which is in a sense a snapshot in time. I will give one example to illustrate why the proposal may lead to problems.

SPT is currently working up the proposals for the Glasgow crossrail project, which has been under consideration for some time. The project has been debated in the Scottish Parliament—indeed, it was the subject of an order under the previous system at Westminster. Crossrail is not in the national planning framework or—as yet—in the developing rail strategy. However, the west of Scotland contains 42 per cent of Scotland's population and people there, who are familiar with the project, almost unanimously regard it as being of national significance, although it might appear to be a local project. The committee might want to consider the factors that determine whether a project is regarded as nationally significant. Will only projects in a certain box be regarded as nationally significant? It should be possible to lever in other projects.

We must consider the dynamics of development. We are living in a world in which things are evolving faster than ever. Developments are being proposed that would not have been considered 20 years ago, such as the Clyde gateway waterfront regeneration project, which is hugely significant. In such a context, the committee must consider how projects are designated as being of national significance.

**The Convener:** I do not know whether you heard Jackie Baillie suggest that the threshold at which a project is regarded as nationally, rather than just locally, significant should have something to do with the project's economic impact. Would such a criterion be worth while?

**John Halliday:** I would be cautious about making economic impact the only criterion. My experience in public transport is that it is almost always difficult to find public transport projects that have huge cost benefit ratios and net present values. That is not to say that the projects are not worth delivering; it is simply a feature of the science of economic evaluation, which cannot capture all the benefits of a project.

In Scotland, the STAG approach represents a great leap forward. Colleagues in England look north and are envious of our approach, because although the kernel of the appraisal is the economic case for a project—its financial efficiency—other elements that will make a scheme worthwhile are considered. Those elements are weighted up, so that a judgment can be made about whether a project should go ahead. In a public transport context, the elements that cannot be quantified are often more significant than the quantifiable factors.

The economic case for significant public transport projects is usually marginal. The Department for Transport tends to think that projects that have a benefit cost ratio of more than 2—that means that the economic benefit will be twice the costs—should be taken forward. However, many public transport projects struggle to reach a BCR of 2. I therefore urge that a cautious approach be taken in consideration of what projects should be given the go-ahead, so that the broader scope of the appraisal guidance is taken into account.

15:45

**David McLetchie:** I have a couple of points. I notice from the financial memorandum accompanying the bill that the cost to promoters of the new system is estimated to be higher than the cost of the present parliamentary system. Do you accept that the new system for approval is likely to be more expensive? Is that a reasonable proposition?

**John Halliday:** I touched on that earlier, but I have a couple of other observations. The financial memorandum suggests that there will be approximately £1 million in additional costs. My observation is that the bill would shift the cost of development of the project from later to earlier. That is just my gut feeling, as we have not done a huge amount of analysis on it. Although front loading the project with work that needs to be
done at the front end would make it more expensive at the start, it would probably be worth while in respect of making the project more efficient later on as it moves into the formal order process.

David McLetchie: That was going to be my next question. If the process costs the promoter more because of the front-loading element, will that additional cost be reflected in the efficiency of the process? Do you expect the timescale of the process of evaluation and approval to speed up in comparison with the current system? For example, if a current project was under the new procedure, would it complete the approval process faster?

John Halliday: It is difficult to say yea or nay to that. From my reading of the Transport and Works Act 1992 and my understanding of the English system under it, I suggest that there is probably some efficiency to be gained and the formal stage of the order process should be quicker. That said, to be frank, if the scope of the work was not sufficient, that would suggest inefficiency on the part of the promoter and the cost of the middle part of the process could be just as high. In a sense, that is possibly the right way round, because the promoter carries the burden to develop the project.

There is another element: it is a little theoretical, but one needs to think about what happens to promoters of projects for which the orders fail. Let us consider the process as it happens today. At the preliminary stage, the promoter is basically given a green light, which tells it that it can start gearing up to its project’s development. There is still a mass of detail to be gone through, but at least the promoter is assured that the project’s principles have been approved.

One consideration of having the money at the front with no approval is the question of what happens when orders fail. The promoter would lose a considerable amount of finance from that. However, members may reflect on the fact that that is a strong incentive to get things right. There is, as ever, a balance to strike.

David McLetchie: Are not the promoters of national projects that get the green light largely funded by the Scottish Executive for the costs of promotion and parliamentary process? That is certainly the case with the Edinburgh tram link project, with which I am most familiar. I am not entirely sure about the economics of GARL, but I suspect that the costs of the process are underwritten by the Executive.

John Halliday: I think that your premise is largely correct. We are talking about very large projects that, under the current system, tend not to be within the financial capability of local authorities. However, authorities often band together, as with the Stirling-Alloa-Kincardine railway. In my neck of the woods, SPT’s regional capability allows us to finance elements of works, although we cannot fund large projects fully.

Nonetheless, in developing a project from the start, a fair degree of the money at the front end is often provided by the promoter of a project. That may be a good thing, because at least it stops frivolous projects being generated, although those tend to be weeded out in any case, because the promoter must make its case to the Scottish Executive for funding. Local authorities or promoters tend to pump in their money at the front end. The potential is that, if the project fails, the promoter will lose the money. I guess that a balanced judgment must be made on that.

Ms Watt: You have talked throughout about the heavy workload of promoting a bill and the long, drawn-out process that is involved. Should scheme promoters be required to provide information to objectors? What impact might that have? Might it speed up the process?

John Halliday: I was probably referring to the mass of technical detail. In my experience of the management of the GARL project, we have endeavoured to provide and make public the technical information along the way. That has frustrated several objectors, because despite providing that information, we cannot provide a host of information that is unfinished and is part of on-going development work. For example, that work may involve examining alternatives that fail and so do not see the light of day, perhaps because there has been a wrong premise that we have discovered through scrutiny. That is the nature of development work—it has to be done.

It is important that people who are at the rough end of projects see appropriate information about the stages of development. My experience is that, through providing that information, we gain at least some acceptance, because people can see in a transparent way that the project is being developed professionally. People challenge projects. Most of them are lay people in technical terms but, my goodness, they are certainly up for scrutiny.

The Convener: That brings us to the end of our questions. I thank John Halliday for his evidence.

I welcome our third panel, which will give us the local authority perspective. I welcome James Fowlie, who is a team leader in environment and regeneration with the Convention of Scottish Local Authorities; Ewan MacLeod, who is a partner with Shepherd and Wedderburn and who is appearing on behalf of Shetland Islands Council; and Councillor Chris Thompson, who is a member of South Lanarkshire Council. I ask James Fowlie to make introductory remarks on the bill.
James Fowlie (Convention of Scottish Local Authorities): Perhaps unusually, COSLA does not have particularly strong views on the bill. We broadly support it and would certainly welcome the speeded-up process that it proposes. The bill’s proposals are consistent with what we have long been arguing for in planning legislation.

Because we have heard few representations on the bill, we have little to say today. Instead, we are keen that the member councils that have raised concerns be given the opportunity to express them. We therefore invited South Lanarkshire Council and Shetland Islands Council to provide the committee with their views. I understand that other councils will be heard at a future meeting. If specific issues are raised, we will deal with them in the course of the questioning.

Councillor Chris Thompson (South Lanarkshire Council): My council welcomes the Transport and Works (Scotland) Bill. I am sure that we would all welcome anything that would speed up legislation for delivering transport projects. However, a few issues around the bill are worth considering. Having said that, I ask members to remember that I am a co-councillor and a lay person, and not an engineer or even a lawyer.

It appears from the figures—I heard a committee member discussing this earlier with the previous witness—that the application costs for large schemes could be high. Application costs could be anything from £10 million down to about £1 million for smaller-scale schemes. As we heard, in order to deliver a project such costs would be required up front. Even given what John Halliday had to say, we should consider whether that would discourage promoters from taking on specific projects. We believe that in order to ensure that more projects are brought forward, consideration should be given to identifying a funding stream that would enable the promotion of projects. Perhaps it could be similar to the previous public transport fund preparation pool. That could be a way of tipping the balance, in some cases.

On the primary function of local authorities, the explanatory notes refer to there being no “significant financial impact” because of the expected limited frequency of applications through the proposed process. Although South Lanarkshire Council and, I am sure, other councils would acknowledge that the main reason for the bill’s introduction is to make the process more efficient and simple—compared with that for private bills—there could be significant additional funding requirements for local authorities to provide the necessary transport and planning resources. We all in local authorities know how difficult that would be at the present time. I am sure that members realise that planners are few and far between, and that civil engineers are even rarer.

We also want the committee to consider the issue of “paralysis by analysis”, if I may quote someone. The increasing need for a Scottish transport appraisal guidance analysis and a strategic environmental assessment in transport projects increases costs and can add to delay. The question is whether those types of assessment can be simplified and kept to a minimum so that funding is not sucked up into assessment instead of being used on the project itself. At the end of the day, we will end up with the studies and assessments—and those who do them—taking up all the money rather than it going into the project.

My final point is on deadlines, which are hugely important to all of us. Speaking for myself, I know that I work far better to deadlines; I am sure that other people would agree. People all the way up to the minister should have deadlines throughout the transport project process. It is only fair that deadlines regarding dates and how long things should take be applied to everyone in the process. By doing that we would get far more efficiency and timescales would be met, which would make the process better.

That is all I have to say, but I am of course happy to take any questions—if I can answer them.

16:00

Ewan MacLeod (Shepherd and Wedderburn): My remit this afternoon, on behalf of Shetland Islands Council, is relatively narrow. The council supports the principles behind the Transport and Works (Scotland) Bill; in particular, it supports the principles behind one of the proposed changes to the Roads (Scotland) Act 1984. From the submission that I have made on behalf of Shetland Islands Council, it will be apparent that the council finds itself in a peculiar situation. Because of a particular objector to a particular council project, the project is subject not to the normal inquiry process but to a special parliamentary procedure.

The difficulty for the council is about not openness and transparency, but paralysis. In this case, it is not paralysis by analysis but simply paralysis of process. As other submissions on the bill show, the special parliamentary procedure has been used very rarely—only twice in the past 60 years at Westminster, I think. It has never been used in the Scottish Parliament, and that brings difficulty because officials in the Executive and the Parliament are wary of what is novel or what has not been done before.

Shetland Islands Council wishes to be able to take projects to a determination stage—which would allow the openness and transparency that we all want in the decision-making process—and to put its case to an independent third party.
The Convener: I open up the meeting to questions.

Michael McMahon: I want to come directly to Chris Thompson. You seem to have hit on a major plank in the proposals in the bill.

John Halliday regarded application costs as a good thing, because they would prevent the proposal of frivolous projects. Your argument is that an application cost of between £1 million and £10 million could prevent good projects from coming forward.

Over a long period, the committee has heard from local authorities that are concerned about overbureaucratic requirements. They have put together projects but have then found that, having put in all the time and money, the funding stream was not available. Is there not a danger that, if a transport fund pool were put together, we would be returning to those days? If that happened, a local authority might not achieve its ends after presenting a project. That possibility—although I take Jim Cannon’s paper seriously—will be a major consideration that might put people off presenting a project in the first place.

Councillor Thompson: That is a very important issue, but a balance has to be struck. We all want good transport projects to come forward. We are crying out for them in many parts of Scotland, and it would be a great pity if projects were held back only because of the up-front requirements for finance.

I am not suggesting by any means that a pool should fund projects entirely. John Halliday’s point was well made. There has to be some pain for the promoters of schemes, and the pain will be that they have to put in money and time. However, the schemes have to be the right ones. They have to be schemes that can be argued for, and hearts and minds have to be won over.

My council and I have found ourselves on the point of taking forward very good schemes that have then slipped because other schemes were regarded as more important at the time. That sort of thing will happen, but the difference would be that the people making the decisions would have a choice of very good schemes in front of them. There would be options on how to spend the money. We need options and we need more of them, and I think that some funding would help with that.

Michael McMahon: Have you calculated how big that pool would be? How much would the Scottish Executive have to make available to COSLA? It might be fairer to put the question to COSLA rather than to South Lanarkshire Council, but what type of fund are we talking about?

Councillor Thompson: Unfortunately, I do not have a feel for that. I suppose that the criticism is always that local authorities come looking for money but can never tell you how much; up to a point, I would bow to that criticism. We had such a fund before, and I think that we should consider setting up a similar fund and let people try to take money out of that to put together those projects. John Halliday hinted at how difficult it is to get such initiatives together.

I have served on the SPT and am now on the regional transport partnership. My concern is about the amount of time that it takes us in this country to get major projects together and about the fact that costs run away with themselves. The M74 extension is a good example of a project that has taken many years before we were able to take that work forward. We need more projects and we need good projects. Let us not lose that for the sake of a small amount of money.

Michael McMahon: My next question might be better directed at James Fowlie. I do not want to dwell on a constituency interest, but I would like to give an example from my constituency. Chris Thompson alluded to the M74 extension, which is an important project, but its knock-on consequence is that it will put pressure on the Raith interchange; as a result, we must consider how much money would be available to make the necessary changes at Raith to take account of the M74 extension project. Can some sort of analysis be done on that? Has COSLA done that analysis, and could some paperwork be produced to give the committee an idea of the type of funding streams that we would be talking about?

James Fowlie: The simple answer is no: we have not done that analysis. I will consider with my finance colleagues whether we can do such analysis and we can come back to the committee with some information. I take your point, but what we are really looking for is a level playing field, and there are a number of projects in which the Executive is at an advantage because it holds the purse strings, while some equally good local and regional projects might not go ahead if money is not made available.

Fergus Ewing: I am sympathetic to the points that Councillor Thompson has made about paralysis by analysis and about the cost and the time burden of environmental impact assessments and the like. I share those criticisms of the whole process, and they concern me a great deal.

The Executive has now created the RTPs; Councillor Thompson mentioned that he is now a member of an RTP. The legislation did not determine what powers the RTPs would have, but it is clear that each has to produce a broad strategy in its first year or 18 months. I argued—unsuccessfully, as it happened—at stage 3 of the Transport (Scotland) Bill that it would make sense for an RTP to draw up a list of the top 10 projects
in its area, so that there is a distinction between what is essential and what might be merely desirable and therefore not in the top 10. That could be done for Glasgow, Edinburgh, the north and the south; I know that Shetland is doing its own thing.

Somebody has to set priorities. Do you feel that the RTPs should make top 10 recommendations to the Executive? Should we be getting on with that so that we can have a preparation pool of such projects and so that there are always a few schemes that can be brought forward in case of unexpected delays to major schemes such as the M74? I know that, if the Dalkeith bypass had not been ready, there would have been nothing for the heavy engineering sector in Scotland to do. Fortunately it was ready, because this committee had urged the Executive to introduce a preparation pool 18 months before, and on that occasion the Executive seemed to listen to us. Do you agree that there should be prioritisation and that the RTPs should perhaps play the primary role, in consultation with COSLA, with the councils and with others, to allow us to achieve a quicker process and to have more candidate projects than there have been in the past?

Councillor Thompson: I certainly agree with the premise that the setting up of the RTPs is a huge step forward. My personal view is that the RTPs must now prove their worth by coming up with the type of projects and transport strategy that will take us forward. In the west of Scotland, we were fortunate in having two previous organisations that we could put together. We have a good staff base and, up to a point, we are off to a flying start.

At the moment, that transport strategy is being put together. It has to identify where we believe that the regional transport partnership needs to go. We need to be able to say that to you and to others, and the constituent authorities and others need to argue out what the priorities are and where they lie. You can imagine that that will not be a particularly easy thing to do. However, at the end of the day, we cannot hold you to account for not doing those jobs if we are not willing to say what we want. I take on board exactly what Fergus Ewing has said. We should be saying what we believe the main projects should be and where we think the money should be spent, and that we have a prepared list of projects that can be proceeded with if there should be any slippage. I admit, however, that I always like a bit of slippage as it can be a useful way of levering in a bit more money.

The John Hallidays of this world have a lot of experience and knowledge and that pool has to be used. The RTPs have to earn their keep by painting a vision that this Parliament will buy into and by putting together and delivering the projects. That is the way forward and I hope that we in the west of Scotland can do that. We have made a good start and we want to keep going with it.

Mike Rumbles: My question is directed to Ewan MacLeod. I am a relatively new member of the committee, so I hope that I am not speaking out of turn. However, this is the first time in my seven years in Parliament that a lobbying company has given evidence to a committee on behalf of somebody else. Am I right in thinking that that is what Shepherd and Wedderburn is?

Ewan MacLeod: Absolutely not. Shepherd and Wedderburn is one of the top legal firms in Scotland. I am a partner in the planning and environment group of Shepherd and Wedderburn.

Mike Rumbles: So you give legal advice to the council?

Ewan MacLeod: Yes.

Mike Rumbles: I am interested in the issue of democratic accountability. You are concerned about the bridge from Bressay to the mainland in Shetland, to which Lerwick Port Authority has registered an objection.

According to the Transport and Works (Scotland) Bill, the council would put forward a proposal to the minister, who would appoint an independent reporter to consider the issue and report to the minister. The scheme in question is not national or of national significance, so it would be up to the minister to decide whether he approved the scheme. Do you think that that is a good example of the democratic process?

Ewan MacLeod: Yes. I want to draw one point to your attention. The scheme that Shetland Islands Council is interested in is a bridge that is being promoted under the Roads (Scotland) Act 1984. All that the Transport and Works (Scotland) Bill will do, if it is passed, is remove the need for a special parliamentary procedure. At the moment, there are orders that are sitting with the Scottish Executive for allocation to a reporter for an inquiry to take place into a number of orders that the council requires, including an order under the Coast Protection Act 1949 and a compulsory purchase order to acquire certain pieces of land that do not currently belong to the council. If it is passed, the Transport and Works (Scotland) Bill will simply put the roads scheme on the same footing as other orders that the council requires for the same project.

To address your question directly, I would say that the Minister for Transport—like all of you—is an elected MSP. He is bound to follow the legislation that has been set out by the Scottish Parliament or Westminster. Both the minister and the independent reporter, who has been appointed
by him to consider the issue of impact on navigation, which is the crux of the matter, will have to apply the various tests that are set out in the legislation. The environmental impact of the bridge and its social and economic impact will also have to be considered. All those matters will have to be brought together in one comprehensive report, which will make a recommendation to the minister on whether the proposals should go ahead. The minister will have the opportunity to consider the report. If either the reporter or the minister goes wrong in the analysis that they have undertaken, there is obviously recourse to the courts.

If the nub of your question is whether the process is likely to be any less open, transparent and democratic, my answer is no—I do not believe that it would be.

16:15

Mike Rumbles: Surely a parliamentary system in which a parliamentary committee goes through a process of taking evidence in public and producing its report is an entirely different kettle of fish from what is proposed in the bill. The minister would receive the report, which is not published, from the independent reporter. As we have seen with the M74, the minister can decide to reject the report’s recommendations.

I am puzzled by your response, because I feel that the process would not be as democratic or as open as it is at present. However, we must balance that with the advantages of the bill because we would get rid of the bureaucracy and everything else. When we pass a bill such as this—if we pass it—which is all about generalities, evidence such as yours is interesting because it gives us a specific example that is pertinent to the decision makers. I want to ensure that we do not pass a law that sounds fine in principle but which turns out in practice to be very much less than open and transparent.

Ewan MacLeod: Your question raises a couple of issues. As far as openness is concerned, when a reporter is appointed there will be a public inquiry at which anyone with anything relevant to say will be entitled to appear or to be represented. The reporter will have to take into account any relevant representations. I accept what you say about the report of the inquiry not being published until after the minister has made his decision, but the report and the minister’s decision will ultimately become public.

As I said, if something has been missed, if there is a feeling that the minister has taken into account irrelevant considerations, or if the procedure has not been followed properly, there is the opportunity for recourse to the courts. You used the example of the M74, which is perhaps not one that I would have chosen, but it is an example of how things can go if it is felt that the process has gone awry.

In Scotland, we currently operate a system whereby significant development projects that go through the planning regime or the process of consent under the Electricity Act 1989, such as power station inquiries, wind farm inquiries and major regeneration projects, some of which have budgets of hundreds of millions of pounds, are subject to the sort of process that I am advocating. In that process, an independent reporter with specialist expert knowledge in his or her field—or perhaps more than one—hears evidence and makes recommendations to the relevant minister. As far as I am concerned that process works very well in practice. I do not see why a distinction should be drawn between major development projects of that nature and this proposal, which—ultimately and in the general scheme of things—is on a relatively small scale.

Fergus Ewing: I am unsure about a couple of issues, but perhaps Mr MacLeod can help me out. Your written submission confirms that "A bridge to Bressay has been an aspiration of Shetland Islands Council since the mid 1970’s" and states that "corridors are safeguarded in the current Shetland Local Plan. The project is also specifically listed in the Council’s Corporate Plan and the Local Transport Strategy.”

That has been the case for four decades now. Why has not the council submitted a proposal to Parliament to deliver that project?

Ewan MacLeod: If you are talking specifically about the current project, the answer is that, when the initial orders were promoted—the roads order in particular, which is the one that triggers the private legislation aspect that I am here to discuss—an objection was received from the Lerwick Port Authority. The council, as a responsible local authority, undertook significant consultation and discussion with the port authority, and has embarked on a process of facilitation in an effort to remove the port authority’s concerns and ultimately to remove its objection to the proposals. Sadly, that has not been possible, and we are only now at the final stage where it has become apparent that the council has no option but to pursue the private legislation route. I hope that that answers your question.

Fergus Ewing: It does not really, because you stated in your earlier evidence—unless I misunderstood or misheard it—that applications had been with the Executive in 2004. What puzzles me is why the applications had to be submitted to the Executive—a local authority can be a promoter and local authorities have been and are promoters, so why bother with the Executive?
Could not Shetland Islands Council simply have come to Parliament, as other councils have done, to be the promoter of its project?

**Ewan MacLeod:** There is probably a significant issue of the legislative competence of any such act. The only reason that an act of Parliament—a Bressay bridge bill, if you like—would be competent at this stage is because of the provisions of the Roads (Scotland) Act 1984, which invoke special parliamentary procedure. Without an objection from the Lerwick Port Authority, because of the bridge’s impact on navigation, the council can competently promote a roads scheme under the current roads legislation, can competently promote an order seeking to interfere with navigation under the Coast Protection Act 1949, and can competently promote the relevant orders under compulsory purchase legislation. That being the case, it is my understanding that the Parliament would most likely say that there was no need for a private bill because the council had sufficient powers under other pieces of legislation. The distinction that I would draw between that and the likes of the Edinburgh tram bills, for example, is that, in the case of the tram bills, the City of Edinburgh Council did not have all the powers that it required to construct and operate the tram. That is why a private bill was sought in that case.

**Fergus Ewing:** I am still pretty puzzled, because your written submission states that “section 76 of the 1984 Act requires the consideration of the Road Scheme to be subject to special parliamentary procedure.”

That seems absolutely clear and I was trying to understand your paper on the basis that Shetland Islands Council’s view of the law—presumably informed by Shepherd and Wedderburn—is that you need to have the parliamentary procedure. However, you have gone on to say that you suspect that the Parliament would take the view, for other reasons, that the procedure would not be appropriate. Is not that more of a legal dispute than a policy issue? Am I wrong in understanding that the failure seems to be on the part of the council, for not coming forward with its proposal in the way that other local authorities have done?

**Ewan MacLeod:** If the council had promoted an order under the roads legislation and there had been no objection from the port authority, there would have been no requirement for private legislation and the special parliamentary procedure would not have kicked in. If the council had promoted an order under the roads legislation and the port authority had objected, but if, through the negotiation and facilitation process, it had been possible to remove the port authority’s objection, the special parliamentary procedure would not have kicked in either. The special parliamentary procedure would have applied only if the port authority had objected to, and had maintained its objection to, the proposal under the roads legislation. It is as a result of—I do not want to use the word “failure”—the fact that the facilitation process has not been able to resolve the issues that we are now at a stage where a private bill is required.

**Fergus Ewing:** I understand that the parliamentary procedure is required because there is an unresolved objection. However, almost every proposal that has come before the Parliament has attracted a substantial number of objections—there were major objections to the Edinburgh Airport Rail Link Bill—but that has not stopped local authorities or conglomerates of local authorities employing an agent and bringing forward proposals. For how long has the objection been extant and for how long has it been clear that the objection has not been capable of being resolved? If that situation arose in 2004, should not the council have sought parliamentary time for the Bressay bridge proposals in 2004?

**Ewan MacLeod:** Part of the difficulty with seeking parliamentary time at that stage is that an informal policy operates within the Parliament that does not allow for more than three private bills to be before the Parliament at any one time. I understand that that is because of the imposition on parliamentarians’ time. I believe that since the introduction of the private bill procedure, which currently still applies, there have always been three private bills before the Parliament, so there simply would not have been space for the proposal in the parliamentary timetable. The discussions have been going on for some time and the Scottish Executive has encouraged them to continue, probably in an effort to avoid the situation in which we find ourselves.

**Fergus Ewing:** No doubt the Minister for Transport will enlighten us when he comes before us next month.

**The Convener:** That brings us to the end of questions for the panel. I thank Ewan MacLeod, James Fowlie and Councillor Chris Thompson for their time.
SUBMISSION FROM SHEPHERD AND WEDDERBURN ON BEHALF OF SHETLAND ISLANDS COUNCIL

Shepherd and Wedderburn has been appointed by Shetland Islands Council to represent their interests in connection with the promotion of various orders under the Roads (Scotland) Act 1984 and other legislation to facilitate the construction of a bridge between the Shetland mainland at Lerwick and the Island of Bressay. One of the objectors to the Orders is the Lerwick Port Authority which has concerns about the impact which the bridge would have on the navigable channel of the Bressay sound. As a result of their role and function as Navigation Authority for the stretch of water in question, section 76 of the 1984 Act requires the consideration of the Road Scheme to be subject to special parliamentary procedure.

A bridge to Bressay has been an aspiration of Shetland Islands Council since the mid 1970's and corridors are safeguarded in the current Shetland Local Plan. The project is also specifically listed in the Council's Corporate Plan and the Local Transport Strategy.

We note the comments by the Minister for Transport and Telecommunications in the Forward of the Consultation Paper on the proposals for a new approach to delivering public transport infrastructure developments. The Minister notes that "currently… major rail infrastructure projects are subject to a distinctive parliamentary procedure. This has proved to be unduly burdensome, technical and complex. The private bill process can also be intimidating for promoters and objectors to development proposals."

The Minister goes on "we are… keen that any new process should be simpler for promoters and objectors than the existing private bills process while retaining the core principles of fairness, transparency and technical scrutiny".

On behalf of our clients we support and endorse the Minister's statements and suggest that they apply equally if not more so to the situation in which Shetland Islands Council finds itself. The difficulty which the Council has faced for some time now is that because of the relatively unique circumstances of this project, the complexity of the procedure and the limited resources available to the Parliament it has not been possible to obtain an airing of the issues before any independent third party who can determine one way or another whether the impact of the bridge proposed by the Council is acceptable or not in the context of not just the navigational requirements of the Port Authority but also the environmental impact on the wider surroundings and other affected parties. The inability of the Council to date to take matters forward through the process through no fault of its own has significant implications for what is a relatively small community. Uncertainty is created for landowners who may be affected by the proposed bridge. Uncertainty is created for the Council in terms of capital funding expenditure and the availability of grants to assist with the construction of the bridge. Uncertainty is created for the Lerwick Port Authority by virtue of the fact that it does not know at this stage whether a third party will ultimately rule in favour of the bridge going ahead or against it. That uncertainty may in itself prevent investment decisions being taken on the future development of the port.

The Orders under the 1984 Act that the Council requires to construct the bridge were promoted by the Council and submitted to the Scottish Executive in June 2004. Had it not been for the peculiarities of the special parliamentary procedure arising by virtue of Section 76 we think it likely that a public inquiry into the Orders would have taken place by autumn 2005 at the very latest. Whilst it is always difficult to anticipate reporting and decision making timescales following a public inquiry we think it is reasonable to presume that a decision on the Orders would have been made public by now. Unfortunately because of section 76 the Council and other interested parties are not yet even at a stage where they can estimate when a Parliamentary Inquiry into the bridge proposals could take place. We submit that at a time when environmental justice and speed of decision making are being placed at the top of the agenda by Ministers in the context of the Planning regime it cannot make sense for the Scottish Parliament to allow delays of this kind to continue.
Against that background it is our submission on behalf of our clients that the removal of special parliamentary procedure from the 1984 Act is an entirely appropriate course of action. We would emphasise that the removal of SPP will not in any way diminish the level of information to be provided in support of the bridge orders or indeed the scrutiny which is required of that evidence and the justification for the order. We refer in particular to section 76 of the 1984 Act which requires Scottish Ministers before making or confirming any order for a bridge or tunnel to "take into consideration the reasonable requirements of navigation in the waters affected by the order or scheme". Section 76(2) contains a list of documents to be provided in support of such a bridge including "such plans and specifications as may be necessary to indicate the position, clearances for the passage of vessels and dimensions of the proposed bridge". These matters are additional to the detailed requirements of the Environmental Impact Assessment Regulations 1999 which require the promoter of any relevant transport project such as the Bressay Bridge to provide a significant amount of information to the Scottish Ministers, to the various consultation authorities referred to in the Regulations and to the public at large.

Returning to the matter of determination it is our understanding that the proposals contained in Schedule 3 to Transport & Works (Scotland) Bill would simply remove any reference to special parliamentary procedure on the 1984 Act. That being the case the issue of navigational impact arising from the bridge and the relevant road orders would be considered by an independent reporter appointed by the Scottish Ministers to make recommendations to them on whether or not to approve the orders in question. The reporter will undoubtedly be an official of the Scottish Executive Inquiry Reporters Unit. He or she will most likely conduct any inquiry under the terms of The Compulsory Purchase by Public Authorities (Inquiries Procedure) (Scotland) Rules 1998 and Scottish Ministers do of course have the power to appoint an additional assessor to give specialist advice on the evidence which is to be heard at the Inquiry. There should be no reason that the consideration of any proposal such as the bridge to which we refer in such a manner should be any less open or transparent than the process which currently applies in terms of the appointment by a parliamentary bill committee of an independent assessor.

In all the circumstances on behalf of our clients we submit that there can be no reason for retention of Special Parliamentary Procedure under the Roads (Scotland) Act 1984. The recognition by the Transport Minister in relation to motorway and significant rail projects that the private bill procedure is unduly burdensome, technical and complex applies equally and indeed more so in relation to a project of the nature that the Council is involved in. We therefore submit on behalf of our clients that the relevant provisions of the Transport and Works (Scotland) Bill removing the reference to special parliamentary procedure from the 1984 Act should remain in place unaltered.

SUBMISSION FROM SOUTH LANARKSHIRE COUNCIL

Question 1 (Paragraph 4.9, page 7):- Are there any other transport works beyond rail, guided busways and inland waterway developments that should be within the scope and if so why?
The only other transport works that could be considered would be the development of major trunk road schemes. As discussed in paragraph 4.8, we would agree that the existing procedures may be sufficient. However, should this new procedure be adopted and be seen to have expedited the delivery of major transport projects, then there should be an opportunity for expanding the scope in the future to include the development of major roads projects.

Question 2 (Paragraph 4.16, page 8):- What reasons exist for lengthening or indeed shortening the 6 month minimum designated statutory pre-application period between the promoter publicising the initial proposals and presenting an application for an Order to the Scottish Ministers?
The 6 month period would seem reasonable for informing those affected if the promoter is also allowed to try to resolve objections during this period.

Question 3 (Paragraph 4.19, page 8):- What process should apply to enable a promoter, without a statutory right, to enter land to conduct preliminary investigations?
If the promoter cannot voluntarily agree access arrangements with the landowner then there should be a process whereby they can apply for permission to access the land. The Scottish Executive would have to consider if they or a local authority would be responsible for granting such
permission, setting conditions and ensuring compliance with access conditions. If this duty is placed on local planning authorities then they must be given the appropriate resources and powers.

The promoter would have to liaise with each landowner and give adequate notification of when they are allowed access, what activities are proposed and how long they will take. The promoter would have to include notification of the appropriate contacts at their own organisation and the organisation responsible for access permission in case there is a dispute during these preliminary investigations. Resources would be required for monitoring these investigations and powers would be necessary to take appropriate action against any promoter who exceeds their entitlement or causes excessive damage. Further powers may also be needed to ensure landowners do not prevent or hinder access.

The promoter should be responsible for recording conditions prior to commencement, during and after completing work so that any requests for compensation can be dealt with. However, the promoter should advise the landowner that they should also record conditions before, during and after works in case there are disputes about damage and disturbance. A process for dealing with compensation claims would have to be developed.

**Question 4 (Paragraph 4.22, page 9):** What documentation should be supplied by the promoter in support of the application? Is there sufficient information contained within the proposals?

Depending upon the nature of the project and its overall impact, the project should be assessed in line with the Scottish Transport Appraisal Guidance (STAG) and if necessary subjected to any necessary Environmental assessments. It is suggested that a STAG Part 1 is all that would be required at this stage.

The promoter’s application should also identify how the proposal impacts on the National Transport Strategy, Regional Transport Strategy, Local Transport Strategy, and relevant Structure Plan and Local Plan policies. The application should also be supported by appropriate environmental assessments (e.g. EIA and SEA).

If available, the promoter should provide letters of support in principle from appropriate organisations (e.g. Network Rail, local authorities etc.).

**Question 5 (Paragraph 4.25, page 9):** What are the implications of reducing the time period for objections from 60 to 42 days?

A reduction from 60 to 42 days would seem appropriate and likely to expedite progress of projects. While it is acknowledged that it may be difficult for some individuals or organisations to prepare objections, if they have been part of the 6 month consultation period then they would have had sufficient time to prepare objections. Care would have to be taken to ensure that everyone informed of the project during the initial 6 month period is made aware of the formal objection period.

**Question 6 (Paragraph 4.40, page 12):** Are there any reasons why, once the Scottish Ministers have determined that the application meets the procedural conditions and the specified criteria conditions, that the application should be considered by the Scottish Parliament prior to public examination of the objections?

We do not see any reason for the application to be considered by the Scottish Parliament at this stage as, given the considerable workload already placed upon the Parliament, seeking their views could lead to substantial delays. In any case, under the process being proposed, the Scottish Parliament still has an opportunity to make a decision on the application once all the objections and evidence has been fully investigated.

It would seem appropriate for Scottish Ministers to approve an unopposed application at this stage. However, it would seem inappropriate for them to reject such an application without giving the promoter an opportunity to present the proposal through the detailed consideration stage. Clarification on the procedures to deal with unopposed applications should be provided.
The Scottish Ministers may wish to determine an application for a proposal which is clearly unacceptable, so as to avoid objectors and the promoter unnecessarily going through the detailed consideration stage.

**Question 7 (Paragraph 19, page 6):** Are there any reasons for extending Parliamentary consideration and approval of projects beyond those contained within the NPF? Do you agree that it should be possible for the Scottish Ministers to designate other transport related projects not in the NPF for Parliamentary consideration should they see fit?

We would agree that if other national transport related projects are developed, which are not contained within the NPF, then Scottish Ministers should have an opportunity to designate them for Parliamentary consideration if necessary.

**Further Comments**

Whilst we appreciate the principle of what is being proposed, there is some concern over the possibility of certain aspects of a proposal not being fully considered due to them being dealt with at the same time as part of the overall project (e.g. TRO’s being considered at the same time as Environmental issues).

In relation to the requirement for the promotion of Road Orders (e.g. CPO’s, Line Orders and Stopping Up Orders), it is not clear as to what procedure would be followed. At present only Government bodies, or those representing those bodies, can promote such Orders. Would there be a need to change the appropriate legislation and at what stage would these Orders be promoted?

**Comments relating to Paragraph 4.5 page 3**
Criteria will have to be developed for identifying affected persons who will need to be notified of proposals. Where will details of proposals be displayed for public consideration? Will it be at the Scottish Executive, local authority offices, public buildings etc?

**Comments relating to Paragraph 4.11 page 7**
The Promoter should consult and take on board comments from the planning authority and other statutory and non-statutory bodies etc.

As discussed earlier, the promoter’s application should identify how the proposal impacts on the National Transport Strategy, Regional Transport Strategy, Local Transport Strategy, and relevant Structure Plan and Local Plan policies. The application should also be supported by appropriate environmental assessments (e.g. EIA and SEA).

**Comments relating to Paragraph 4.14 page 7**
The Promoter should include Transport Scotland in pre-application consultations.

**Comments relating to Paragraph 4.15 page 8**
The Promoter should also consult Community Councils.

**Comments relating to Paragraph 4.35 page 11**
It seems unreasonable that once an application has been rejected, due to a breach of procedure or fails to meet one or more of the statutory criteria, it cannot be re-presented without substantial revision. Is there any scope for proposals to be accepted, subject to conditions that ensure the necessary criteria are met?
Scottish Parliament
Local Government and Transport Committee
Tuesday 12 September 2006

[THE CONVENER opened the meeting at 14:01]

Transport and Works (Scotland) Bill: Stage 1

The Convener (Bristow Muldoon): I call today’s meeting of the Local Government and Transport Committee to order. We have received apologies from Tommy Sheridan, David McLetchie and Sylvia Jackson, and Maureen Watt has informed us that she will be late because she has been delayed on her journey to Edinburgh.

The only item on the agenda is further consideration of the Transport and Works (Scotland) Bill at stage 1. I welcome to the meeting Bruce Rutherford, who is the Waverley railway project director and who works for Scottish Borders Council, and Douglas Muir, who is the transportation policy manager for Midlothian Council. I invite you to make introductory remarks.

I expect that you will want to tell us about your experience of progressing the Waverley Railway (Scotland) Bill. As well as that, perhaps you could comment on how you think the Transport and Works (Scotland) Bill will affect how such projects are advanced in the future.

Bruce Rutherford (Scottish Borders Council): We have no prepared notes—we bring just our experience to the table. I invite members to ask questions and I look forward to a lively debate. We are survivors of the private bills process and we have the scars to prove it. Our experience should be beneficial to people who follow us.

The fact that Douglas Muir and I have been involved in the Waverley project since the early 1990s reflects how long major projects sometimes take to come through the various stages, beginning with the structure plan and the local plan. Our work has included participation in feasibility studies, early consultation and the option appraisal process, in which Scottish transport appraisal guidance criteria are used to decide which route and which mode of transport would be best. We have been involved in the preparation of environmental statements and an appropriate assessment on the length of the route that runs through a special area of conservation.

As well as giving evidence at the consideration stage and attending the parliamentary debates, so we have some knowledge of the proceedings that take place in public. We are more than prepared to take questions on the range of activities in which we have been involved.

The Convener: Thank you for those remarks.

What advantages do you envisage the Transport and Works (Scotland) Bill will bring? If you had been able to operate under the new regime rather than under the private bills system, how much improvement in the delivery time would there have been?

Bruce Rutherford: Both of us will have comments to make, so we will just jump in. If you would like us to expand on anything, we would be more than happy to do so.

The private bills system proved to be successful for us, but we found it tortuous. One member mentioned in the final stage debate that the process took two and a half years, so any system that would cut the length of the process would be beneficial. The fact that the new approach—which involves people sitting round a table with a reporter—is similar to the one that is adopted in planning inquiries will be an advantage. It will certainly mean that people are more focused, we hope over shorter timeframes.

As well as giving evidence to the committee, I am involved in a local plan inquiry back in the Borders, which is concentrated into three months. If we can use the proposed legislation to shorten the period for consideration of projects, so that everyone is at the table at the same time to discuss it, that will be very effective.

Douglas Muir (Midlothian Council): I echo Bruce Rutherford’s sentiments. This is not a criticism of the parliamentary process, but our approach was dictated by parliamentary timescales, which include summer recesses and so on. That made it difficult for the promoter to plan its workload and to keep moving forward, and it made things difficult for the objectors. We spent a considerable amount of time bringing MSPs up to speed on technical issues that a technical person might have been able to deal with more quickly. That is no criticism of MSPs—I would be in the same position if something that I did not know or understand were thrown at me. Much time was spent on covering background; I hope that the proposed new process will speed that up.

We dealt both with objectors and supporters of the Waverley project, quite a few of whom were put off by the formal parliamentary process. A more relaxed environment involving a reporter might suit such people a bit better. They might open up more, which would produce a better debate. We also had a problem in that we did not
have the opportunity to cross-examine objectors when they said something that was obviously wrong. In a reporter's inquiry, we can tease out exactly what objectors mean or question the line that they have taken. We were able to do that only in written evidence that was submitted to Parliament after the event, which made it difficult to follow a line of conversation.

Bruce Rutherford: We quickly discovered a problem that we christened "people pain". People really suffered because of the time it took to get through the process. Some people had lived with the project for two or three years before we came on the scene to try to deliver it through Parliament. People would ask simple questions, such as whether they should paint their outside windows, because there would have been no point in their doing that if their house was to be bought. However, we could not provide them with certainty about when the project would be delivered and whether it would be a reality within two or three years.

There is another issue that affects discussions with the general public. When taking forward a private bill, one has only so much detail on the design of the project, because promoters will not commit to spending £2 million or £3 million to work up full detailed designs unless they know that the project will go ahead. I do not know whether the situation will be different under the proposed legislation. People expect us to give them answers in minute detail; they may want to know whether a fence will be put at the bottom of their garden. We have to try to manage such questions. In the planning process, people are aware that we do not always have such details, so adoption of that model may help us to manage expectations. It will not cut out all the pain that people experience, and they will continue to have issues hanging over their heads, but they will understand what point has been reached in the life of the project.

Another issue—which we still face—is access to land. Under the private bill process, we have no powers of land entry at an early stage in a project, so we are delighted that such powers will be included in the new order-making system. It is important to ensure that promoters have statutory powers of early land entry. When they are working up the details of proposals, they may want to speak to landowners about ownership, to carry out topographical surveys or to do preliminary geotechnical work: they need the power of entry to do that. At the moment, we have to buy our way in. We have to negotiate on every occasion with every landowner. Over the length of the Waverley route, 465 landowners are directly in the path of the railway. Some are more helpful and considerate than others, but if people oppose the scheme, it can be difficult—if not impossible—to negotiate with them to get detail.

Land Aspects Limited carried out the land referencing for us. We came across one or two real difficulties. One of the first was that there is no obligation on landowners, tenants, property owners or agents working on behalf of landowners to fill in the forms in an honest fashion. That is not to say that they did not do so, but we know that one or two of the returns that we got were vague to say the least, and downright unhelpful in some instances. We have to establish ownership of the land at an early stage.

The Convener: Thank you. That was a comprehensive reply.

Paul Martin (Glasgow Springburn) (Lab): Douglas Muir referred to the committee's ability to tease out information, given some of the specialities that are involved. How would a reporter do that differently? What information could a reporter extract that a group of MSPs could not?

Douglas Muir: I do not think that there was a problem with teasing out information; the committee did a very good job of teasing out information from us, but we spent quite a lot of time explaining some of the technical issues. That is natural, because we were talking about technical aspects of railway design and operation, which are difficult for a lay person to grasp. The committee was good at drawing out information from us; it obviously had advisers in the background who helped with that. The issue was more the time that was spent explaining things. If the reporter was a technical person, such as an engineer or railway person, we would not spend much time discussing how signalling systems work, for example. The new process might save time in that regard.

Paul Martin: You are expecting a specialist for each inquiry. For a roads project, you would want the reporter to be a roads engineer, but there will be aspects of technical information on which a reporter will not necessarily be an expert.

Douglas Muir: That is correct—I would not expect a reporter to be an expert on everything, but I would anticipate their being a specialist in at least the major part of the project. Although we promoted a railway scheme, we have had to divert roads and provide car parks, so we have had to deal with roads issues as well as rail issues. However, the rail issues were predominant. A road scheme might involve crossing a railway, so there would be an interface with rail, but I would expect the reporter on such a scheme to be a specialist in the road aspects.

Paul Martin: You referred to the procedures that were involved and to parliamentary recesses. I do not know of any planning inquiries that have been over in two weeks; they tend to last a considerable
time. Most inquiries that I have been aware of have been extensive; they have not been rushed through, but have involved detailed examination. What timescale would you attach to the new process? Would it save six weeks or a year, for example?

Douglas Muir: I do not know whether a huge amount of time would be saved in the process. If the reporter is doing his job properly he will be taking evidence from all parties and weighing it up. The difficulty that we had with the parliamentary process is that we were working to parliamentary years. As we approached a recess, the work was heaped on the promoter to get finished by a certain time. If there is a strict deadline, the quality of work might not be the best, because people must work late into the night to produce it. There would be slightly more flexibility with the reporter process. Although one would not let the process stretch on for ever and a day, that would not be too important. When Parliament closed, we had to stop for two weeks, then start again when it resumed. It was difficult for the promoter to organise its workload in that regard.

Paul Martin: Would you prefer that the process was open ended instead of there being a target that was tied to the parliamentary timetable?

Douglas Muir: Yes—but that process would be open ended only to a degree. We could go on debating something for ever and a day and never really reach a conclusion, so reporters must be able to say that they have taken enough evidence and so will not continue. With the Waverley Railway (Scotland) Bill, some objectors would have repeated their objections endlessly, so the process got quite difficult. It is useful to have an end date, but perhaps not quite so rigid a date as is set by parliamentary years.

Paul Martin: Much of the bill is intended to deal with stresses on the promoter such as you mentioned. Do you accept that there is sometimes an issue with a promoter's capacity to progress a private bill? It has been mentioned that the promoter will not always be able to deal with the demand at the start of the process for information that will be needed throughout the process. Will not that be the same even if a reporter is involved?

Bruce Rutherford: Douglas Muir has touched on the fact that it took us two and a half years to get the Waverley Railway (Scotland) Bill through Parliament. There were at least two summer recesses in that period. Although we were working in the background, we never felt that the business was making progress towards approval.

In the local plan inquiry that we are currently going through in the Borders, two reporters are collecting evidence in a three-month block. We are going all out to deliver the evidence and to react to questions within those three months. After Christmas, there will be another two months for summation. The process does not really stop; we work five days a week at the table with the reporters.

In contrast, for the Waverley Railway (Scotland) Bill we were in Parliament every Monday, then we had week to put together answers for questions that we could not answer on that Monday and were back in Parliament for the next Monday. The cycles were weekly, but we were only at Parliament on a Monday. Not all the team was tied up in replying to the questions—much of our other business carried on regardless. The promoter's teams always have scope to deliver day after day if they have to. They would just concentrate on satisfying the demands that were in front of them if they were working five days a week on that.

Douglas Muir: I have not had a chance to read through the proposals in the bill in detail, but it appears that the bulk of the work that the promoter has to do will be done in advance of an order's being made, whereas we submitted certain things at different stages as we went through the private bill process. A promoter will not save much time at the beginning of the process, because it will probably have more work to do before the process starts, but I am hopeful that once the process starts the promoter will get through it more quickly because it would not be continually bringing in fresh evidence or documentation. The promoter might be asked for some explanatory documentation to back up what it has submitted, but the bulk of the information should already be lodged with the reporter.

Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP): I will go back to a couple of the points that Bruce Rutherford made on the problems that he encountered in going through the private bill process without statutory powers—in particular, without powers of access to land. I think he said that that had led to difficulties on one or two occasions. Will you illustrate, without mentioning particular owners—unless you feel that there is no problem in doing so—the practical problems and why access to people's land was needed in each case?

Bruce Rutherford: We needed access to land to carry out environmental surveys. We had to find out what species of flora and fauna were in a given area to ensure that none of the engineering features that we were introducing would damage the environment. That was done through appropriate assessment under the European directive on the conservation of natural habitats
and of wild fauna and flora, but we need to access
the land to find out what is there before we can
take due cognisance of how to treat it and try to
mitigate against any effects that would produce a
negative result.

One landowner owned about a mile and a half of
the river. Because the route of the railway line
almost follows the river's course and crosses the
river on dozens of occasions, we had to get
access to that land, but he simply would not allow
us to get in there. We could not get access to such
a high proportion of the length of the river that we
had real difficulties—we had to tell Parliament that
we had done the appropriate assessment, but that
we had not had access to that section. It was only
through the intervention of local councillors,
including the leader of the council, that we
managed to convince the person that we should
have access to the land. He eventually came
round to the idea—I think his wife convinced him
that he should give us access—so we were
relieved about that. A similar situation arose with
two or three landowners, but that one landowner
owned an appreciable length of the river.

We still have difficulty getting access to land. As
we are working in a railway corridor, we work
within limits. All our early work was to define the
limits. We then went to Parliament and said that
those were the limits within which we wanted to
work. We got the powers to do that, but now, as
we go back to do more environmental work,
problems arise. We have found kingfishers that fly
a kilometre in either direction of the land over
which we have powers, so we have to go outwith
those limits to determine whether the scheme will
have any detrimental effect on their habitat.
Although we now have powers under statute, we
have still to negotiate with landowners.

I do not know how such issues could be
captured at the beginning of the process. In the
Borders, we would end up going over the hill and
far away, because we work in whole valleys.

Fergus Ewing: You did not mention the identity
of the landowner, but I imagine that it would not be
too difficult to find that out from the information
that you gave. Section 18, which is on access to
land, will give wide powers; indeed, non-
compliance with section 18 or wilful obstruction of
the exercise of those powers will perhaps be an
offence. That is to be welcomed.

I have a question for both witnesses on timing.
Such projects are complex and take excessive
time. We need to consult and generally take
people with us but, nonetheless, 10 or 12 years is
too long. To be frank, the public do not have clue
about the length of time that is involved. That is
my perspective, but you have hands-on
involvement in a project. How might the overall
process for considering such projects be
shortened? If the bill goes through, one beneficial
effect will be that you will not have to deal with
MSPs, although that is always a pleasure, and you
will not have long waits while we have long
holidays, which will be good. I presume that the
independent reporter will work continuously until
the job is done and will deal with the work in a
much more compact fashion. Do you have any
ideas about how we can speed up the process in
other respects? I am sure that people would wish
us to do so if at all possible for major national
projects that are of strategic importance, most of
which receive support from throughout the parties.

Douglas Muir: The whole process is an issue. I
will concentrate on rail projects, because we have
just completed the parliamentary process for a rail
project. Way back in the early 1990s, various
studies were carried out to determine what would
help to regenerate the Borders—the rail line
emerged as the thing to do. From that point, we
had to get funding to put the bill through
Parliament, which at that time meant a bid to what
was called the public transport fund. We carried
out a feasibility study, which showed that the
project would work, and we then had to convert
that feasibility study into a bid for funding to take
the bill through Parliament. Once we were
awarded the money, we started on the bill
process, which in itself took about five or six years
before we even started the parliamentary part.

Anything that could speed up the process would
be helpful. We do not have the public transport
fund now, but Transport Scotland has been set up,
so there may be mechanisms to get funding
agreed much more quickly, especially with fairly
large schemes, which Transport Scotland can
promote. We should be able to cut out some of the
early stages. I do not suggest for a minute that we
should not carry out procedures such as feasibility
studies, which are important because there is no
point spending a lot of public money on something
that will not work.

The whole process that we had to go through
before we even got to Parliament was lengthy. It
would be good to shorten that process; the bill
looks as if it might be able to do that. Many of our
negotiations with landowners took a tremendous
amount of time, so if we could cut down on that it
would speed up the whole process.

Many residents in Midlothian have been
thoroughly sickened by the length of the process.
As Bruce Rutherford has said, people did not
know whether they could paint their windows or
replace their central heating. That was awful for
them.

Fergus Ewing: Why did negotiations with
landowners take so long? In the cases that have
led you to draw your conclusion, could the time
have been reduced? If so, how? Did you lack powers of compulsory purchase?

Douglas Muir: We lacked powers. Powers to purchase come only when the act is passed, so we did not need to purchase ground at the time. However, we had to access ground in order to carry out various surveys. As Bruce said, some landowners were open and helpful in letting us on to their land, but others who were objectors to the bill just refused. Until we got permission to go on to land, we could not carry out surveys; and if we could not carry out surveys, we could not do half the work. It appears that the Transport and Works (Scotland) Bill will give us the powers to go on to land.

Fergus Ewing: It will.

I understand that on roads projects such as the M74 there were legal powers to enable negotiations on compulsory purchase; indeed, it has emerged in the press that some negotiations were carried out before the M74 inquiry. Such powers appear to exist for certain roads projects and can be exercised before an inquiry takes place. Are you saying that that is not the case for rail projects?

Douglas Muir: That is correct. We have compulsory purchase powers for rail only after a bill giving the powers is passed and becomes an act. Under the Roads (Scotland) Act 1984, the roads authority has the power to go in and make a compulsory purchase of ground. That power does not exist for railways, so we cannot go in and buy the ground first, which would obviously give us the right of access. We have to wait until a bill is passed before we have the power to buy the land. We have also had to go on to the land beforehand, so we end up in a circle that we cannot get out of.

Fergus Ewing: The new bill will provide statutory rights of access to an applicant on application to the Scottish ministers, but will it confer compulsory purchase powers prior to the involvement of the reporter?

Bruce Rutherford: No, I think that the order has to come first, then compulsory purchase powers will be conferred.

Fergus Ewing: So there is an imbalance between road and rail.

Douglas Muir: Absolutely.

Fergus Ewing: For road projects, the state has more powers over my land than it has for rail projects. Why does it not have powers for rail projects?

Bruce Rutherford: I have been in the road business for 30 years and the railway business for about five years. When we build road schemes, they go through really quickly. The difference between road schemes and rail schemes is amazing; that has been really frustrating for me, Douglas Muir and the rest of the team. For some reason, as soon as you have a vision and a good idea for building a road, people say, “Yeah, that’s a good idea.” You do not have to prove that it is a good idea; you just build it. On the other hand, when trying to build a railway, you have to go through all the hoops—of legislation, of politics, of economics—to prove the case on way or t’other. In the early stages it is extremely difficult to prove that any mode of transport is a goer but, for some reason, rail has to jump through a dozen hoops whereas road goes through almost on the nod.

I know that I am oversimplifying, but if you are trying to promote a project, a rail project is more of an uphill struggle than a road project.

Fergus Ewing: They should have put you in charge of the M74 project. [Laughter.]

Bruce Rutherford: Yes.

Mike Rumbles (West Aberdeenshire and Kincardine) (LD): Do you consider the Waverley Railway (Scotland) Act 2006 to be of national significance?

Bruce Rutherford: Yes, we do.

Mike Rumbles: If the councils were engaged in a project that was not of national significance, it seems from the Transport and Works (Scotland) Bill that work could go on for several years; there could be a public inquiry; the reporters unit could produce a report; and the project could then go to a minister who might just say, “Sorry. Thank you very much, but away you go.” You could work for all that time but one person could just block the whole project, for whatever reason, and not even tell you why.

All the questions so far have been on the one side of the coin, such as Fergus Ewing’s questions about speeding up the process and so on. My question relates to the other side of the coin—the democratic process. What about the people whose lives will be affected by such projects? Where is the democratic input? Further, from the perspective of civil servants and council officials, can you say whether there might be a danger that too much power might be handed to one person?

14:30

Bruce Rutherford: If it can be decided quickly that the project is a goer, people will know where they are. After that stage, everything should be about the delivery of the project.

It is easy to convince people who want a project to go ahead that it is going to happen. However, there is a difficulty in convincing people who do not want a project to go ahead that it will be what
we call a real project. It can take a long time and, sometimes, almost a leap of faith to deliver it. That is really painful for the people who are involved. I agree that we need to try to shorten the time in order to give people an understanding that there is a mechanism that they can use to get out if they want to, either through advance purchase or voluntary purchase. That can help to take away their pain. We have always felt that the beginning of the process is quite long, but it also takes ages to get the design completed and to get compulsory purchase powers.

It took us two years to get a land bank together and it will take another three years to build the project. Starting from now, it will take us a minimum of four years until the first train is running on the track. However, people might still be living there until the minute their property must be taken from them.

If we could get to a stage in the process at which everybody would agree that the project was going ahead, all the forces behind it should drive it to delivery as quickly as possible, which will help people to move on with their lives.

Mike Rumbles: Perhaps I did not phrase my question particularly well. I will rephrase it and approach it from a different perspective.

Under this new legislation, you will apply for permission to start a project that is not a scheme of national importance and the minister will give you the right to proceed with it. The same person who gives you the go-ahead in the first place will give you the go-ahead at the end, without parliamentary scrutiny or any democratic input. Surely that cannot be right.

Bruce Rutherford: At an earlier stage, we will have gone through the structure plan process and the local plan process and we might well have been involved with the south-east Scotland transport partnership on a regional strategy. Each of those three processes—and there might be others—will have involved a democratic process and consultation. It is perhaps not for me to judge whether such consultation is sufficient to enable a project to go ahead, but certainly consultation will not be avoided by going ahead with a project early. If a project is blocked later in the process, an awful lot of work has already been done and expectations have been raised. If decisions are made before that stage, projects should not be blocked; they should be allowed to run and be delivered as quickly as they can. I know that we do not live in a perfect world and that things do not always work out as we want them to, but early decisions make things happen.

Douglas Muir: The process leading up to the final stage is quite democratic—the public are involved in the consultation and can object, and I would hope that the reporter would deal with that in a fair manner. At the final stage, it would be a bit worrying if the reporter who had taken all of the evidence suggested that the scheme should go ahead but had his decision overruled by one person who has decided that it should not.

Mike Rumbles: If you are happy for schemes that are not of national significance to go through the process, why should schemes of national significance have to get the Parliament’s approval? The system should be the same, should it not?

Bruce Rutherford: I am not sure whether I know the difference between national significance and local significance, to be honest. The Waverley project started locally but it ended up on the minister’s list of the top 10 projects to be delivered in Scotland. We always considered it to be of national significance because the weight of the minister’s powers and the Parliament were behind it. Projects should go through the same process, but a lot of projects start locally.

Douglas Muir: The other thing that might dictate what happens, to a degree, is finance. The scale of projects might lead to differences. I was going to say that local projects tend to be at the lower end of the scale and are not as costly, but then I thought about the trams and decided that that is probably not correct. Nevertheless, the bulk of local schemes are at the lower end and so, perhaps, do not have national importance. If we are talking about spending significant sums of public money, that is perhaps something that the whole Parliament will want to be involved in. We can probably do only two or three of the large schemes that cost £500 million, but we can do a raft of smaller schemes. Perhaps there should be some financial judgment in place to identify projects that are bigger than a certain size.

The Convener: We need to explore with the minister what is of national significance and what is not. It seems to me that, if a council promotes a small rail scheme that involves a line to link a distribution depot to the rail network, that would be regarded as a local initiative. If we build a new passenger rail line that links into the whole network, that might be regarded as local because it will serve the local area—in your case, the Borders—but it is probably of national significance because it will have contact with and an impact on the national rail network, for example at Edinburgh Waverley. We need to get more information on the definitions from the Executive, but do you regard as legitimate my reasoning on the differential between a local scheme and a national scheme?

Bruce Rutherford: I do not have a clear view on that, to be honest, I suppose because we have lived with a local scheme that became a national scheme. That is why I said that I regard them as
almost the same thing. There must be a stage at which a project gains national significance. We started with an idea, we developed it and we got other people involved in it. The next thing we knew, it was in a list of projects of national significance. I suppose that, if the process is the same, it must be correct.

The Convener: That completes our questions. I thank Bruce Rutherford and Douglas Muir for their helpful evidence and congratulate them on the success that they have achieved to date, certainly in helping to pilot their bill through the Parliament.

Bruce Rutherford: I take the opportunity to thank all the MSPs who voted for the Waverley Railway (Scotland) Bill to be passed.

The Convener: We move on to the second panel. Kevin Murray, from TIE Ltd, is senior project manager for the Edinburgh airport rail link and Susan Clark, also from TIE Ltd, is the delivery director for the Edinburgh tram. I welcome them to the committee and give them the opportunity to make introductory remarks about their experience of the existing private bill process and about how they feel the proposals in the Transport and Works (Scotland) Bill will take the process forward.

Susan Clark (TIE Ltd): Despite our job titles, most of my experience of the private bill process has been in relation to the Edinburgh airport rail link project, whereas most of Kevin Murray’s experience has been on the tram project. We have switched camps.

TIE welcomes the opportunity to give evidence to the committee and supports the proposals. TIE has been involved in three of the private bills that have gone through or are going through the Scottish Parliament, so it brings to the table experience from those three projects. The comments that we made in writing and our comments at the meeting today are based on those experiences.

The current private bill process is lengthy and complex for all concerned: the Parliament, promoters and objectors. Despite the length and complexity of the process, everyone has coped with it and much has been learnt. However, although we have been through a learning curve and the process is now operating fairly well, TIE supports the proposals for change. We have a number of reasons for doing so.

First, the proposals recommend moving to a set of dedicated rules—akin to the planning process—which are more widely understood by a wider audience. We believe that people will engage much more with the new process. It is much more easily understood, which will allow greater engagement by all concerned.

TIE applauds the recommendations on public consultation. It has striven to introduce such an approach, particularly for the Edinburgh Airport Rail Link Bill, because of what we have learned from previous bills. As a result, we published the draft EARL bill for consultation before it was introduced. We were then able to make a number of changes and could tell people what changes we had made as a result of the consultation process. We strongly support public consultation.

The link with planning is important. Parliament has struggled with the enforcement of the obligations that private bills place on promoters. The way around that that has been found is to put enforcement in terms of planning conditions. We believe that what is proposed in the bill aligns itself with that much more readily.

I have said that the current private bill process is lengthy and complex. We believe that an inquiry process is likely to generate much more paperwork and will focus on much more detail. There is a tension between the timescale for the private bill process and the expected timescale for the new process, but one proposal that will militate against the timescale being lengthened is the ability to appoint multiple reporters to deal with issues in parallel. That is to be welcomed.

Finally, previous witnesses have commented on access to land and we strongly support the proposals on that. Kevin Murray could probably add to my comments, but for EARL it has at times been difficult to negotiate access to land when we have no powers. One reason in addition to environmental reasons why promoters like to access land in advance is to understand some of the risks associated with a project. For the EARL project, one of the major risks was the amount of tunnelling and deep excavation. As part of the overall risk management process, we wanted to access land to carry out geotechnical investigations to understand the risks involved in the project and the suitability of the land for it, so that we could understand how to manage the project costs. Having powers to access land in advance of having an act will help us to manage the process more effectively.

14:45

The Convener: Thank you for those introductory remarks.

You will have heard our questions to the previous witnesses about projects of national significance. First, what do you expect to be regarded as projects of national significance, and what do you expect to be defined as more regional projects? Secondly, do you think that the right balance has been struck in not subjecting to
parliamentary scrutiny projects that are not of national significance?

Susan Clark: I would reflect the comments made previously. The devil will be in the detail and in the criteria for nationally significant projects. EARL was a project that linked Scotland into Edinburgh airport and crossed local authority boundaries, so I think that it would fit the criteria for a nationally significant project, and although the tram scheme is contained within the Edinburgh area, its cost could trigger a requirement for it to be dealt with as a nationally significant project. What is required is a definition of the criteria for a nationally significant project.

Michael McMahon (Hamilton North and Bellshill) (Lab): Having looked at the bill, do you think that it contains enough detail for you to have confidence that it will address your concerns? Has the proper balance been struck between subordinate and primary legislation?

Kevin Murray (TIE Ltd): The bill is generally well structured and the policy behind it is well placed. There is more to follow, and we look forward to reviewing that when it becomes available. In principle, the bill will serve its purpose well.

Michael McMahon: So there are no concerns about giving powers to ministers without their exact nature being clarified. What is your experience of disengagement from the parliamentary process in relation to other transport initiatives?

Kevin Murray: From our experience of the tram project, I suspect that the important points are about public consultation, awareness within communities and the wider public interest. Reading around the evidence given before today, I see the importance of the STAG process and the consultation that that engenders, of considering different options and of ensuring that the scheme that the bill produces is appropriate. A lot of emphasis should be put on that.

That approach will perhaps address some of the concerns that we heard earlier about the level of consultation and public representation. Combined with the opportunity for those affected to object formally and for those objections to be heard by a reporter, it will build on the work that has been done on private bills to date to develop consultation and listen to the concerns of affected parties.

On whether the process sides with ministers, I think that the bill is currently well structured and that the definition of projects of national significance is probably appropriate.

Mike Rumbles: In your written submission, you said: “it is sensible to suppose that Transport and Works inquiries will be broadly similar to planning inquiries. Judging by the advice we have been given regarding the planning process, it delivers projects over a period that is at least as long as that for Private Bills, and probably longer.”

Given the briefings that I and other members have received and other evidence that I have read, I have been under the impression that the advantage of the bill is that it will speed up the process. Of course, the corresponding disadvantage is that it will remove an element of democratic scrutiny from most of these matters. Am I right in understanding that you feel that the proposed process might well be longer, not shorter?

Susan Clark: I will lead off on that question and then see whether Kevin Murray has anything to add.

There is a risk that the process could be longer. However, over its life, the private bill process has speeded up as people have got used to it. To speed up the proposed process, the bill allows for the appointment of multiple reporters to deal with things in parallel. There is also an obligation on the promoter to ensure that, once an application is made, enough preparation has been done to allow the formal process to be as smooth as possible. The duration of the process can have a direct relation to the volume of objections, which can be managed by undertaking the detailed public consultation well in advance and involving the affected communities early on in the decision-making process so that, for example, unacceptable options can be ruled out.

Mike Rumbles: I am a little bit confused now. Do you still feel that the proposed process will probably be longer than the current process?

Susan Clark: I do not feel that it will probably be longer. It could be as long, but the bill contains provisions to speed up the process.

Kevin Murray: That is absolutely right. We should bear it in mind that, under the transport and works process in England and Wales, a number of inquiries have gone on for years and the private bill process for the tram proposals lasted 26 or 27 months. As EARL is in the middle of the scrutiny process, it is hard to say how long it will take—and, indeed, there are no givens—but at this point we are significantly further forward than we were with the tram bills. I suspect that for EARL the process will take 12 or so months compared with the 26 or 27 months that it took to deal with the trams. It has been an education for promoters and the process itself has been improved.

It is all about being prepared. Any case that goes through either the private bill or transport and works process should be subject to due scrutiny. In that respect, I draw members’ attention to the
importance of the STAG process, which the committee has heard about. We must also ensure that there is adequate consultation. As Susan Clark said, we found it tremendously helpful to publish the draft bill for EARL, because it allowed us to flush out and deal with a number of issues early on. Both processes have their merits, but it all comes down to how they are structured and managed.

The Convener: If we compare major roads projects with major rail projects, it appears that the bill’s reforms are likely to be advantageous. After all, since devolution, several major roads projects such as the M77 and the Glasgow southern orbital route have been completed but none of the really big rail projects has been finished, which suggests that taking an approach similar to that for roads projects might produce benefits. I am surprised by your concern that the process could be longer. Can you explain that?

Kevin Murray: I am not sure that I can explain the specifics. It all comes down to how the proposed process is structured. The bill itself sets out a particular framework. If there is a need to consider particular aspects of an order, and a couple of reporters are available to do so, that will definitely speed up scrutiny. A number of helpful elements in the bill, for example the provisions on access to land, will bring about greater confidence in the order that is brought for consideration and might reduce any uncertainties about the order when it is introduced. We are talking about building on the experience of the transport and works process in England and Wales and reflecting on our experience of the private bill process.

The Convener: The other aspect that is likely to improve the timescale for the completion of a project is the availability of parliamentary time. One reason for the delays that have occurred relates to the ability of the Parliament to run a number of private bills in parallel because of the pressures on the non-Executive bills unit and on individual MSPs, and the restrictions over which MSPs can serve on a particular bill committee. A reporter-based system would be able to deal with many such problems.

Kevin Murray: That is correct—there would be a dedicated resource.

Mike Rumbles: I want to ensure that I have got this right. You are saying that, just at the point when Parliament has matured, understands the private bills system and is getting better at it, we are going to go to a new system and that cutting off the learning curve, as it were, might elongate the process. Is that right?

Kevin Murray: That is not quite what I was saying. It is about ensuring that the schemes that come forward are well prepared and that the scrutiny of them is structured. For example, the appointment of a number of reporters to consider various aspects of a scheme will bring experience and having a dedicated resource of that kind will move things along quicker. Reflecting on the Transport and Works Act 1992, in England and Wales, reporters are given a certain period of time in which to report; thereafter, it is down to decision makers to make the decision. That too needs to be timely. We need to reflect on what has happened with transport and works orders in England and Wales and see whether that can be improved upon in the bill.

Mike Rumbles: Having heard your oral evidence, I am more confused now than I was after I read your written evidence. Do you feel that the bill will not necessarily speed up the process and that it could take longer than the current system? Have I misunderstood you?

Kevin Murray: It could take as long, but the level of scrutiny that will be applied and the dedicated resource are probably more appropriate. Thereafter, ensuring that decisions are made quickly depends on the decision-making process.

Ms Maureen Watt (North East Scotland) (SNP): When we were talking about engaging the public, the previous witnesses thought that the public could get involved earlier, when there is discussion of the structure plan and the local plan. Is there a conflict there? In my experience as a councillor and in community councils, people do not get involved so much in local plans and structure plans because they represent broad themes rather than particular issues. Under the new system, we may have a situation in which the public do not get involved at an early stage and cannot get involved at a later stage, and so will feel completely out of the loop and unable to make a contribution, put up objections or get routes changed.

15:00

Susan Clark: The ethos of the planning system is to get communities and people involved in structure plans, local plans and so on at a much earlier stage of the process. If people believe that something will have an impact on them, they will get involved in the process. When developing structure plans and so on, it is up to local authorities and others to ensure that the process involves communities and local people. The onus is on the promoters of transport projects to involve people at an early stage—even before we began the public
consultation process—reaped dividends. We were able to understand people’s concerns and get their local knowledge, which we used to tailor the project to remove some of the concerns. There is an obligation on promoters and local authorities to try to engage people in the planning process.

**Ms Watt:** The bill suggests that parliamentary approval be extended to cover harbour developments. Do either of you have comments on that?

**Susan Clark:** No.

**Kevin Murray:** No.

**Fergus Ewing:** I want to ask these two witnesses about the same issue that I asked the previous two witnesses about: time. Both of the schemes with which you were involved—the Edinburgh tram scheme and the Edinburgh airport rail link—have been under consideration for several years and, were they to go ahead, it would take more years before a tram collected its first fare and the rail link carried its first passenger. From your experience, do you consider that some of the time that has been spent considering those schemes has been wasted? Could time have been saved? Were some procedures overly complicated or unnecessary? Can you offer us suggestions from your experience about how the public might get national projects delivered more quickly?

**Kevin Murray:** Certainly, the tram scheme has been around for a while. However, one must accept that due process is involved. The scheme is a council-promoted one and a decision-making process is embedded in the council's operations. There must also be due and adequate consultation. With a scheme of that nature, which goes through the city centre, it is hard to see how the process could have been speeded up.

I suppose that a more joined-up, end-to-end, seamless process might be helpful, as well as the ability to continue developing projects while they are progressing through the scrutiny process. That enables other aspects of the project to keep moving forward. I certainly do not think that either the tram scheme or EARL were delayed significantly, but that has been the case elsewhere when schemes have awaited formal approval before going on to the next stage of development. We certainly argued on the EARL scheme—if I can stray across to it—that aspects of the scheme ought to continue to be developed while the bill was progressing. We did that with the support of our major stakeholder.

Such an approach must be helpful in the overall life cycle of a project and enable it to keep moving forward. There are many aspects to a project. It is not just about the statutory approvals, although they are a key aspect; it is also about the continuing development of the project and the readiness for procurement and for securing financial positions. I guess an overall, joined-up approach at an early stage can only help over the life cycle of a project.

**Susan Clark:** We have also heard about the constraints on parliamentary time and about what that has done to the bills that have been through the scrutiny process. There is a stop-start aspect to the process because of parliamentary recesses. However, the appointment of a reporter means that the process can be condensed into a shorter time. It will be intense, but it will be over in a short time, compared with having meetings one or two days a week over a longer period. That truncates the end-to-end process. It makes it intense for the promoter and the reporter, but it provides a much more informal environment for objectors, who might not be used to giving evidence as part of a statutory process. The proposed arrangements would make things much more relaxed for them.

**Fergus Ewing:** Mr Murray mentioned the processes of the council. I presume that it has procedures that must be observed, with notice, preparation, meetings and that sort of thing.

**Kevin Murray:** Absolutely.

**Fergus Ewing:** I am sorry if I am hitting you unawares with this; I do not particularly mean to, but I am just curious to know how long it took to get the two projects in question through the council's procedures. You said that the process took a long time. The alternative—this is my reason for asking—is that councils need not be promoters. Others might not need to go through procedures that take such a long time.

**Kevin Murray:** It was not a criticism; it was the reality. The process took a few months, rather than months and months. It is a question of due process. I do not think that there are many government bodies or bodies of a similar nature that can proceed without that due governance. I do not think that that process was overbearing; if anything I think that it was appropriate. Nonetheless, it built time into the process. However, the period was a few months, not more.

**Paul Martin:** I would like Susan Clark to elaborate on the informality of the reporter process. I appreciate that the parliamentary process may be considered to be formal, but where would the informality come in with the reporter? I have been to some such processes and do not remember them being informal.

**Susan Clark:** The setting is probably a bit more informal. It is fairly intimidating for a member of the public to come and sit in front of you ladies and gents at the best of times. People who are objecting to a bill might never before have been involved in such a process. Taking things offline with the reporter might make the process more
informal. It is part of the philosophy behind the bill to make people feel a bit more comfortable.

**Paul Martin:** Are you saying that the reporter would meet objectors in an informal meeting?

**Susan Clark:** No. It would not be an informal meeting. It would still be recorded, minuted and so on.

**Paul Martin:** There would still be a reporter and his team there.

**Susan Clark:** Absolutely.

**Paul Martin:** There would still be somebody keeping a record of the process.

**Susan Clark:** Yes.

**Paul Martin:** There is a good chance that the proceedings would be held in a town hall.

**Susan Clark:** They could be.

**Paul Martin:** Is there much of a difference? It would still be a formal process. For a member of the public who is not used to giving evidence, the only difference in the reporter process would be that they would not be giving evidence before the elected members of the Parliament. Why is it so frightening to go in front of elected representatives?

**Susan Clark:** I think that it is just a matter of perception.

**Paul Martin:** Have you had feedback on that from members of the public?

**Susan Clark:** Members of the public do a very good job when they come to give evidence, but it is not something that they do every day. Many people give up their time to give evidence, but without being trained to do so.

**Paul Martin:** Your concern is that, when members of the public attend a parliamentary committee, they are shy and retiring.

**Susan Clark:** They could be.

**Paul Martin:** It is your perception that people who come along to the Public Petitions Committee, for example, are shy, and that it is difficult for them to amplify themselves, but that if they went before a reporter, their evidence would be more robust?

**Susan Clark:** I am suggesting that that might make them a bit more relaxed—but not in all cases, as not everyone is shy and retiring.

**Paul Martin:** Is the evidence that you have received on that anecdotal? Have members of the public come to you and said that they wished that they did not have to come to the Parliament before a committee of MSPs and that it would be preferable to speak to a reporter in a nice, informal setting?

**Susan Clark:** I suppose that that is the perception from my perspective.

**Paul Martin:** So that is your perception rather than the public’s perception.

**Susan Clark:** Rather than being direct feedback from the public, yes.

**The Convener:** I am sure that the public would not be at all worried by Paul Martin’s style.

**Paul Martin:** I was going to say that.

**Mike Rumbles:** Nobody would be scared of Paul.

**The Convener:** We have asked all our questions, so I thank Susan Clark and Kevin Murray for their evidence.

I welcome our third panel, which has a solo panellist: Alex Macaulay, who is the partnership director of the south-east Scotland transport partnership. I ask you to give an introduction on how you think that the bill will influence the delivery of railway and tram projects.

**Alex Macaulay (South-east Scotland Transport Partnership):** We have submitted written evidence, so I will not bore members with chapter and verse on that. As members are all aware, SESTRAN is one of the newly formed regional transport partnerships. It involves eight local authorities in the east of Scotland. I am here because I am SESTRAN’s sole employee at present; we are building up the infrastructure to support the new body’s operations.

The committee heard evidence from two SESTRAN partners today, Midlothian Council and Scottish Borders Council, and it is important to note that the City of Edinburgh Council and Clackmannanshire Council have also had experience of taking private bills through the present procedure for rail-based projects. The SESTRAN response was based on those authorities’ experience and my experience as the project director of trams for TIE for the first 18 months or so of the parliamentary process to which Kevin Murray referred. That is the background to the written submission that the committee has received from SESTRAN.

SESTRAN’s board considered the bill at its meeting on 18 August and is very supportive of the proposals in the bill. As members have heard, that support is based on clarity and certainty of process and a recognition of the pressures that are on parliamentary time to take a transport project through the current statutory procedure.

SESTRAN has several points to make that are intended to be helpful additions to the bill process
rather than criticisms of the bill. We have suggested that, although the current process for trunk road orders has proved successful over the years, the committee may wish to consider whether trunk road orders could be rolled up in the bill. The primary reason for that is that it would provide the opportunity to roll up the statutory process for obtaining powers to construct and operate a facility with any road traffic regulation orders and supplementary orders that are promoted through different legislation. That may facilitate the objective of cutting the timescale for developing projects.

SESTRAN accepts that it will not be a promoting body for trunk roads and it is for Transport Scotland to give you evidence on them. However, in the case of non-trunk roads, we envisage particular projects, such as bus rapid transit schemes, falling within the scope of the bill. Although such schemes are not rail-based, the buses could be guided. As you are probably all aware, in England and Wales the offline sections of a bus rapid transit scheme are generally promoted through the transport and works order procedures. One of the disadvantages is that the associated road traffic regulation orders required for the on-street sections of a bus rapid transit scheme would have to go through their own statutory process under the Road Traffic Regulation Act 1984. We could therefore end up with two public local hearings or inquiries for the same project.

15:15

The Edinburgh fastlink scheme is the closest we have to a bus rapid transit scheme. Significant parts of its length are off-road, and other substantial parts of it are on-road. In its evidence, SESTRAN suggested that it would be appropriate to consider the ability to roll up into the procedures in the Transport and Works (Scotland) Bill the road traffic regulation orders for the on-road sections that are remote from the off-road section but are still an integral part of the total scheme. That would avoid potentially having two different sets of legislative procedure and two public local hearings or inquiries.

The other elements of SESTRAN’s comments are in line with the other evidence that the committee has heard today. For all the reasons that you have heard this afternoon, we are very supportive of the proposals for powers to access land in advance of the order being confirmed.

On an administrative issue, there are references in the bill to the “relevant authority”, which is defined as the local transport and roads authority. SESTRAN would like the regional transport partnerships to be recognised. That is particularly relevant where rights are conferred on the relevant authority to insist on or call for a public local hearing or inquiry if that authority is directly affected by a proposal that is being promoted, whoever the promoter might be.

In summary, if the committee were prepared to consider it, a more strategic approach to the consideration of the totality of a scheme might assist, particularly in the case of a bus rapid transit scheme. That might also shorten the statutory process a wee bit. My other point was of a general administrative nature about recognition of the changing status of regional transport partnerships.

The Convener: Thank you for those remarks. I open it up to members’ questions.

Mike Rumbles: To go back to the old chestnut, from your perspective what do you consider to be a national project?

Alex Macaulay: I would expect schemes of national significance to be defined within the national planning framework and to be defined nationally.

Mike Rumbles: I know that but, if it were up to you, how would you want the national planning framework to differentiate between what is in and what is out?

Alex Macaulay: It is very difficult. Being the director of a new transport partnership, which is a regional body, I am exercising my brain on that question at present. In the regional context, the exact same issue arises as to what is of regional as opposed to local significance.

In my view, we need to relate it to the development of the top-down policy approach. National transport policy should define the types of projects that are of national transport significance. Those are schemes that give international connectivity, connectivity between the major cities and centres of population in Scotland and connectivity across the border, and schemes that support developments that the national planning framework defines as being of national strategic significance—major land-use changes and so on.

Further down the hierarchy of strategic significance are projects that might be considered to be of regional significance. Those would be linked very closely with structure plans and the evolving city region development plans. They would be related to connectivity of the region to other regions in Scotland and connectivity between major centres of population and economic activity within the region.

Such thinking leads to the development of strategic national and regional networks. We need first to define what is either nationally or regionally strategic. To a certain extent, that structure is already in place. It includes rail schemes, other than sidings-type projects. In my view, the rail
network is of national strategic significance. The same is true of the national trunk road network.

**Mike Rumbles:** In your view, is the Waverley line a national issue? Would it be in the national strategic planning framework?

**Alex Macaulay:** The Waverley line is probably one of the most difficult projects to define. Strictly speaking, it is a cul-de-sac at present—a railway siding—but it has connectivity and raises major issues associated with the capacity of the national rail network, which brings it into the national context. In the longer term, probably beyond the life of my involvement in transport planning, who is to say that the Borders railway will not provide connections to the north of England from its southern end? In that context, it becomes of national strategic significance. I find it difficult to see significant investment in the national rail network in anything other than a national context, because it is very much a national asset.

**Fergus Ewing:** Far be it from me to help a Lib Dem Minister for Transport respond to sustained questioning from a Lib Dem colleague about what national development means, but section 13(2) states that “a national development” is

> “any development (within the meaning of the Town and Country Planning (Scotland) Act 1997 (c.8)) for the time being designated under section 3A(4)(b) of that Act (which relates to the content of the National Planning Framework) as a national development.”

So that is clear.

**Alex Macaulay:** That is exactly the point that I made. It is a scheme that is defined in the national planning framework as being of national significance.

**Fergus Ewing:** To be cynical, perhaps ministers do not want to be too clear because that would allow pressure groups to seek an interdict from the Court of Session, on the basis that the rules do not apply to a particular scheme.

I am concerned that rail schemes, in particular, and some road schemes take such a long time to complete. Broadly, the public want road and rail improvements throughout Scotland. If there is to be a new Forth bridge or other crossing, it may take 11 years to build. The public do not understand that. There is a gulf between us, who are privileged to be involved in discussions of this type, and the public. From your experience, can you think of ways in which we can shorten the process, particularly for major schemes—which at present often take twice the cumulative length of both world wars in the last century—while taking the public with us through consultation?

**Alex Macaulay:** I imagine that some of the measures that were resorted to in the world wars are not the type to which you would want to resort to reduce timescales in the transport planning process.

We cannot escape the significant fact that, as well as involving major public sector capital investment and in many cases on-going revenue expenditure, major transport projects affect a large number of people. Those who are affected include not just those who are adjacent to the route of the scheme, but, in many ways, the travelling public throughout the country. When we take a step back and add on the considerations about human rights that the European Parliament has brought to bear on us, I find it difficult to think of a mechanism through which we could at a stroke knock five years off the gestation period for major transport projects.

Those projects deserve the care and attention that they get. They deserve professional analysis to justify such a high level of public sector investment and they deserve the environmental and social analysis to ensure that human rights and the environment are protected appropriately. Much of the work that is done on projects happens before they even enter the statutory process. I support wholeheartedly Kevin Murray’s comment that he would not want feasibility studies to be curtailed. We must be clear that we are doing the right thing because, once such projects are completed, they have an on-going life of their own and a significant impact on how people lead their lives.

We could consider ways of simplifying the technical analysis and making it more strategic and less detailed. That is fine in concept, but when we consult the public, we might find that they want the detail. Alternatively, if we present them with the detail, they might really want the strategy. There is a catch-22 with the amount of detail that is given about a project early on. As I said, a potential way of shortening the process is to combine powers that are at present in different pieces of legislation and roll them up into one process. The Edinburgh greenways road traffic regulation orders took a year to 18 months to get through the statutory process. If such statutory processes were run in parallel with the consideration of major infrastructure projects, that would be a potential saving. However, as Kevin Murray, Susan Clark and others mentioned, much more detail would have to be provided in advance of the commencement of the statutory process. Once that process commenced, however, all the work would be done, which would allow the project to be expedited.

It is a sad fact—actually, no, it is not a sad fact, it is correct—that major projects take some time in their gestation. Rather than considering ways of waving a magic wand and magically reducing the time that it takes, we need to examine each
element of the process individually to find out whether the elements can be streamlined or parallel tracked. We also need to educate the public so that they realise that it takes a long time for such projects to come to fruition. That was not the answer that you wanted to hear, but never mind.

15:30

Fergus Ewing: I appreciate your answer. I appreciate also that projects need to be properly planned and thoroughly appraised, that objectors need to be clear, and that detail needs to be considered. None of those assertions is in any way contentious, but I am not convinced that it needs to take 11 years for there to be a new Forth crossing. From my experience of projects in Inverness—at Inverness harbour, for example—I am not convinced that so much money needs to be spent on worm and mollusc reports and so on, or that construction should take place for only six months a year because the dolphins might be upset by the noise.

I do not think that we have the right balance. When we drill down and look at the detail, we find that tens and hundreds of thousands of pounds are spent on ultra-technical reports about abstruse aspects of wildlife protection and so on. If the public knew how the money was being spent, they might draw some seriously negative conclusions. However, those are not things that you and I can alter in this meeting. In some people’s eyes they are valid, genuine and important considerations, but they come from national and international legislation. There are European designated sites of environmental quality and so on. If you want to change the environmental approach, you need to go back and change the statutory processes for the transport sector.

Alex Macaulay: You are quite right—we cannot alter those things in this meeting. In some people’s eyes they are frustrations and in other people’s eyes they are valid, genuine and important considerations, but they come from national and international legislation. There are European designated sites of environmental quality and so on. If you want to change the environmental approach, you need to go back and change the environmental legislation rather than necessarily to change the statutory processes for the transport sector.

Fergus Ewing: That may be, but on the other hand it may be that a different interpretation of the habitats directive would not involve the expense that I have seen in projects that I have studied in some detail.

In your first answer, you said that the European convention on human rights imposes certain obligations. I thought that you would be referring to the article of the European Convention for the Protection of Fundamental Human Rights and Freedoms—I think from memory that it is article 1 of protocol 1—which says that nobody shall be deprived of their possessions. That leads on to the question of compulsory purchase proceedings in inquiries.

It seems to me that inquiries, especially on roads, are largely about disputes between owners of property that is being compulsorily purchased and the reporter, but the public think that the point of an inquiry is to determine whether a project should go ahead. In fact, the Government has usually decided to go ahead anyway. There is a conceptual conflict between what the public expect from a public inquiry, which is that a reporter will decide whether the project goes ahead, and the actual content of the inquiry, which can be largely devoted to determining private property rights and compensation. Is that the problem that you were thinking of, or was it a different matter?

Alex Macaulay: The human rights issue that was in my mind was that if an individual objects to a proposal, they have the right to be heard by a tribunal or an independent body and to have their objection fully aired and considered before the decision is made. Not being a lawyer, I cannot tell you exactly which article that is in. In planning inquiries and transport works inquiries, it is difficult not to consider fully an individual’s legal right to be heard in the inquiry.

In the past, there has been a lot of criticism of planning inquiries taking a long time because of examination, cross-examination and re-examination, but that framework was established to ensure that everyone who presents evidence can make a fair and honest presentation of their case. It is possible to group similar objections together—the Parliament has done that—but the fundamental right is there, and things take time.

Fergus Ewing: Thank you for that clarification.

Ms Watt: Strathclyde Partnership for Transport suggested that the project approval process could be subject to a time limit. From what you said, I take it that you do not support that suggestion. However, if you did support it, how would you go about putting a time limit in place?

Alex Macaulay: If you mean that the public approval process from beginning to end should be subject to a time limit, I do not know whether that is possible, because it depends very much on the complexity and scale of the project that we are dealing with, the number of objections and the depth and validity of those objections. If, on the other hand, the suggestion is that we could place a limit on the time that the reporters take to produce their final recommendation to the minister, that is perfectly valid and reasonable. That could be achieved by pre-inquiry discussion and consideration by the reporters unit and the promoter of the scale of evidence and of objections that had already been lodged.
We have done that in the past. I hate to mention it, but we did it with the successful public hearing on road user charging in Edinburgh. We gave the reporters a time limit to produce their report and they agreed to that time limit. That was important to the project, but it was equally important that they should be prepared to deliver on that timescale. Such a timescale can be developed only through discussion and negotiation between the reporters and the promoters in the context of the scale of evidence that has been submitted for the hearing, but it can be done, and that can get rid of the fear that the inquiry will drag on and on while the reporter gives the matter endless consideration. Reporters have to focus their minds and produce a cogent report to a given timescale, just as anyone else has to do.

Ms Watt: I suppose that the time limit would have to be correlated to the amount of evidence gathered, but is there not a stage before that, when a reporter is appointed? We often hear about delays in public inquiries because a reporter has not been appointed for some reason.

Alex Macaulay: That is a straightforward resource issue. The reporters unit is of a finite size, just as the Parliament is, so it has a certain capacity for dealing with inquiries, although that capacity is variable, as the unit can call in temporary reporters to enhance the resources available. The way round that problem is to get a bid in early—to get the order for a reporter in well in advance—and to go and see the unit and speak to the head of the unit to identify the programme for the project and to agree that the unit will deliver the appropriate level of resource to accommodate that.

That is perfectly feasible. It is exactly what we did with the congestion charging inquiry. We went to the reporters unit well in advance and got a commitment that three reporters would be available for the period of months required for that public inquiry. It can be done, but we need to consider all the individual bits of the process and chip away at them to ensure that there is no dead time. Years of dead time can accumulate over the gestation of a scheme. I do not think that there is a panacea for reducing the amount of time involved. It has to be done by looking at the individual elements of the process.

The Convener: Thank you for your evidence, which has been useful. I am sure that, in due course, we will put to the minister some of the suggestions that you have made for relatively minor amendments to the bill.

Meeting closed at 15:39.
Introduction

TIE Limited (“TIE”) welcomes this opportunity to submit evidence to the Scottish Parliament’s Transport and Works (Scotland) Bill Committee.

TIE is a limited company established by City of Edinburgh Council (“CEC”) in May 2002 for the purpose of delivering transport projects. Although TIE is wholly owned by CEC, it also undertakes commissions for other clients. Acting for CEC, TIE was responsible for CEC’s promotion of the Bills for the Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006. The Scottish Executive has charged TIE with the promotion of the Edinburgh Airport Rail Link Bill, which is currently being considered at its Preliminary Stage. TIE is also acting as project manager on the delivery of the Stirling-Alloa-Kincardine Railway project authorised under the Stirling-Alloa-Kincardine Railway and Linked Improvements Act 2004 (the Bill promotion relating to that project having been undertaken by Clackmannanshire Council). TIE therefore has recent direct experience of the promotion of Private Bills in the Scottish Parliament to authorise railways and tramways and the delivery of transport projects.

Private Bill procedure – a success?

The promotion of Private Bills is a lengthy and complex process for all concerned. Throughout its dealings with the Private Bills Unit TIE has been very conscious of the demands that are placed upon the Parliament’s staff and, indeed, on MSPs sitting on Private Bill Committees. At the pre-introduction stage, a Promoter is struck by the exacting nature of the work involved in vetting the draft Bill and accompanying documents for competence and compliance with the Parliament’s Standing Order requirements, and the extent to which it calls for people from several different disciplines to work at speed to settle a wide variety of documents. Once the Bill has been introduced, the Clerk to the Bill Committee undertakes a significant administrative task in dealing with Promoters and objectors throughout the Bill’s process. No matter what efforts a Promoter may make to keep paperwork to a minimum, TIE’s experience is that the volume of paper produced for the purpose of a Private Bill promotion is large. Quantity apart, much of the material is of a highly technical nature. All told, while it is the nature of an MSP’s role to be able to assimilate unfamiliar information rapidly, the work involved in assimilating all necessary material and hearing evidence must be considerable.

Against that background, the Private Bill system has served its purpose rather well. Notwithstanding delays for a variety of reasons largely unconnected with the Private Bill procedure itself, it is a matter of fact that each of the four substantial projects (Stirling-Alloa-Kincardine Railway, the two Edinburgh Tram routes and the Waverley Railway) that have been authorised since 2001 has completed its passage from introduction to Final Stage within time periods that compare favourably with, and may well be better than, could be expected to be achieved by the comparable planning process from application to the giving of planning permission for a project of comparable size. So far as a Promoter is concerned, the work involved is different from that required on the planning context, but not greatly so, and the volume of work whilst considerable may overall be less.

Why change to Transport and Works Orders?

It might therefore be asked why the change to an order-based procedure as proposed in the Bill is desirable. It is a change that TIE supports. For the reasons just given, the present procedure is supportable and productive and TIE sees no difficulty in continuing to work within it. However, private legislation is by its nature out of the Parliament’s normal run. The procedures have to be made to fit for purpose. This means that processing a Private Bill produces process-driven strains which could be avoided were projects to be processed through a more dedicated procedure. TIE supports the Bill’s proposals as introducing such a procedure for Scotland.
Particular issues

The following are particular issues that TIE has identified. The selection is not comprehensive and is not in order of importance.

Dedicated rules

The Parliament’s Standing Orders were designed to deal with the procedural requirements of Bills affecting general policy rather than specific private interests. The specific rules for dealing with Private Bills have been grafted on to the main body of rules. They are also to an extent not fully ‘bedded in’, having been fully in operation for only four or five years. By contrast, the planning system offers is a long established method for dealing with development schemes both large and small. TIE anticipates that the process to be introduced by the Bill is likely to draw on that model (or on the English Transport and Works model, which itself came largely from the English planning regime). TIE believes that it will be beneficial to both Promoters and objectors for infrastructure schemes to be governed by dedicated rules the operation of which is widely understood.

Public consultation

The Parliament has made very clear its expectation that by the time schemes come to the Parliament they should have been the subject of the fullest possible consultation. TIE applauds this approach, which it has sought to adopt with all its promotions, especially with the Edinburgh Airport Rail Link Bill. The same level of participation will be required in relation to Transport and Works schemes. The important difference, TIE believes, is that the very unfamiliarity of a Private Bill hampers the consultation process because there is a limited public awareness of what is involved. The planning process is better understood. As a result, consultees are likely to engage more fruitfully with a consultation process that is linked to a procedure more akin to the planning process. TIE is also aware of and supports the mandatory requirement for public consultation under the Planning etc. (Scotland) Bill.

Promoter/objection participation

It is the nature of the normal Parliamentary process that proceedings are entirely in the hands of MSPs. The Private Bill process, however, imposes constraints in terms of the witnesses who must be called and the time the Committee must afford to individuals. The Parliament’s rules have had to be tailored to cope with, in particular, direct participation in the procedure by Promoters and objectors. The nature of the forum and the time constraints on Committee proceedings make it difficult to accommodate the needs and expectations of such participants. The Transport and Works procedures are likely to provide an inquiry procedure that is designed for just those needs. This is all an aspect of the dedicated nature of the Transport and Works proposals.

Link with planning – enforcement

One of the issues that has concerned several Private Bill Committees is the question of enforcement of environmental and other obligations given by Promoters. The solution that has evolved is to provide in the Bill that such commitments are to be enforceable as if they were planning conditions. The Transport and Works approach should allow for fuller integration. Compliance with commitments in Environmental Statements that are required for projects can be dealt with through planning conditions and planning agreements, just as they are in the case of development authorised by planning permission. The Scottish Ministers will also have the ability to secure that certain things (e.g. road improvements) are agreed in advance on the basis that, absent agreement, the Order will not be made. This should allow the Scottish Ministers a greater measure of control and certainty than is available to the Parliament operating the Private Bill procedures.
Length of proceedings and volume of work

As noted above, TIE believes that the Private Bill process works reasonably well. On the basis that the independent Transport and Works reporters will be selected from the Inquiry Reporters Unit, it is sensible to suppose that Transport and Works inquiries will be broadly similar to planning inquiries. Judging by the advice we have been given regarding the planning process, it delivers projects over a period that is at least as long as that for Private Bills, and probably longer.

The more concentrated nature of an Inquiry is also likely to mean that the overall volume of work for the Promoter will be greater under the Transport and Works procedure than for Private Bills. It follows that the resulting volume of material is likely to be greater. This is not to suggest that the benefits of a process are to be measured solely by the volume of paper it produces. An inquiry-based procedure will by the nature of the Inquiry almost certainly produce more technical information and an experienced Reporter will be well placed to report to the Scottish Ministers with his or her report and recommendations.

Developments of national significance

TIE notes the proposals for continued Parliamentary involvement with nationally significant schemes. It is entirely understood that there will be cases where it is only right that the Parliament should decide whether a scheme of national significance is acceptable as a matter of principle and public policy. It appears that any tension that might result from Parliamentary approval coming at the end of the exercise will not in fact arise because of the planning status of the projects to which section 13 of the Bill will apply.

Access to land

Promoters generally will welcome the policy behind section 18 of the Bill. The complete absence of legal rights for prospective Promoters to carry out the investigations (for example test bores to establish ground conditions) necessary to prepare projects or the Environmental Statements which must accompany them significant and practical difficulties. Such investigations may be required over extensive areas of land way beyond the proposed limits of deviation. A Promoter who cannot secure the agreement of landowners, can be forced to include land within limits of deviation purely because the suitability of the land cannot be ascertained. Similarly, there can be no advantage to anyone in Environmental Impact Assessment being hampered by a landowner who refuses access to land.

Section 18 proposes an administrative process, not simply powers for prospective Promoters. It is appreciated that this is designed to safeguard private rights. TIE believes that the proposed system is capable of being implemented without undue bureaucracy.

SUBMISSION FROM SESTRAN

The South East Scotland Transport Partnership (SESTRAN) is a statutory transport partnership of the eight Local Authorities largely within the Edinburgh travel to work area, namely the City of Edinburgh, East Lothian, Scottish Borders, Midlothian, West Lothian, Falkirk, Clackmannanshire and Fife.

SESTRAN is in full support of the proposal to introduce a Transport and Works Bill for Scotland which is designed to place the Scottish Ministers at the heart of an order making process and thereby avoid the need for private Bills for transport related development.

SESTRAN recognises the pressures on Parliamentary time and welcomes the proposal for scrutiny of orders to be carried out by the Scottish Office Reporters Unit. This should permit a significant reduction in the elapsed time spent in scrutinising transport proposals under the new process which is particularly welcome.
In addition, the format likely to be adopted of a Public Inquiry/Hearing should provide an environment that is more familiar to both promoters and objectors and allow a more structured and cost effective use of expert witnesses. It will also provide the comfort that both promoters and objectors require that their case has been given full and comprehensive consideration.

SESTRAN would like to make a number of detailed point relating to the proposed Bill in addition to these general points and these are outlined below with reference to the clauses in the Bill.

**Specific points**

It is noted (Clause 1) that the construction of motorways and major trunk road schemes are not included within the scope of the Bill. While we would agree that the procedure for ministerial approval of orders under the Roads (Scotland) Act 1984 had operated successfully over a number of years and was well understood, there is an argument for including the construction of motorways and major trunk road schemes in the scope.

The primary reasons in support of this argument are:

- If the construction of a motorway or a major trunk road scheme was a project designated in the NPF as being of national significance, why should a different approval process apply to that scheme? There should be consistency in the way that national projects are consented.

- The process under the Road (Scotland) Act 1984 does not allow the local roads authority or the Scottish Ministers to roll up within the consent to construct the road scheme other necessary consents for example any compulsory purchase orders, any traffic regulation orders or any prior approvals. This 'rolling up' of the required consents/orders is the benefit of the private bill procedure and is understood to be one of the benefits of the proposals in the Bill.

It is noted (Clause 1) that the scope of the Bill includes any system using a mode of guided transport that would include guided busways or Bus Rapid Transit. Bus Rapid Transit (BRT) is an intermediate mode lying between modern trams and bus priority schemes. It is likely to include extensive segregation from other traffic to provide high speed and reliability along with high quality stations, real time information, distinctive high quality vehicles, off vehicle ticketing and high frequency.

In addition, BRT has the advantage that the vehicles can operate both off and on street thereby providing a high degree of accessibility to potential users. This is in marked contrast to a tram scheme which is fixed to a specific route.

The statutory process for promotion of BRT in England is to use the Transport and Works Act to promote the off street sections and local Road Traffic Regulation Orders to promote the complementary on street requirements. Again, this is in marked contrast to the process for trams where the order can consider all strategic traffic management measures required for the delivery and operation of the tram system.

It is therefore suggested that the consideration of the total route of a BRT proposal should be considered as part of the Transport and Works (Scotland) Bill/Act process to allow a strategic view to be taken of the proposal as a whole. This would include both off street and on street sections and would lead to the powers for complete delivery and operation to be achieved by the promoter as part of one single process. This would still allow local concerns to be considered fully but would potentially streamline the delivery of these complex projects. It is not suggested that the ability to promote orders for on street sections associated with a BRT should be removed from the Road Traffic Regulation Act but that the powers in the Transport and Works (Scotland) Act should be available in addition to allow flexibility of approach. The promoting authority could then choose which legislation to use depending on the circumstances of the project.

It is noted that reference is made to the ‘relevent authority’ in the draft Bill. This is defined as including Local Authorities but no mention ids made of Regional Transport Partnerships.
SESTRAN would wish the existence and strategic role of RTPs to be recognised in the Bill through specific reference as appropriate. This is particularly important in clause 9(4) covering rights of objectors to an Inquiry, but is also relevant in Clause 4(7) and 12(17).

The proposals for making orders for access to land for purposes connected with construction, operation or works related to an order contained in clause 18 are welcomed. This has in the past proved to be a problem for promoters particularly in relation to collection of relevant site investigation in advance of definition of limits of deviation.

Conclusions

SESTRAN welcomes the proposals for a Transport and Works (Scotland) Bill and believes that this will result in a more streamlined approach to obtaining approval for transport proposals while still ensuring comprehensive scrutiny and providing adequate opportunity for both promoters and objectors to present their case and have it fully considered.

The references to consultation and public involvement are also welcome and should be in line with good practice adopted by responsible promoters.

SESTRAN will comment on the Financial Memorandum separately.
Transport and Works (Scotland) Bill: Stage 1

14:22

The Convener: Agenda item 5 is consideration of further evidence on the Transport and Works (Scotland) Bill. I invite the first panel of witnesses to take their seats.

I welcome to the committee Richard Evans, who is sites policy officer at RSPB Scotland; Paul Lewis, who is planning advisory officer at Scottish Natural Heritage; and John Thomson, who is director of operations and strategy at Scottish Natural Heritage. First, you have the opportunity to supplement your written evidence by giving the committee your views on the Transport and Works (Scotland) Bill.

John Thomson (Scottish Natural Heritage): Thank you for inviting us to give evidence to the committee. As we state in our written submission, we warmly welcome the bill. We are dissatisfied with the private bill procedures, our main complaint being that they do not provide for the early enough engagement of statutory consultees such as Scottish Natural Heritage. As a result, we could end up formally objecting to measures that support in principle, merely to ensure that the environmental issues are adequately addressed. That is an unsatisfactory situation. The bill should overcome that objection and enable the procedure to be integrated with other statutory regimes and procedures, we are convinced that in practice the new approach will speed up the approval of major projects, which by their nature are complex and early enough engagement of statutory consultees.

Richard Evans (RSPB Scotland): I too thank the committee for its invitation to give evidence. Although our involvement in the private bills process has been limited since the establishment of the Scottish Parliament, in the past we were involved in several private bills. In particular, we were involved in proposals for developments at Cardiff Bay in Wales and Sullom Voe in Shetland.

I ask members to consider our interest in the bill’s subject matter in the broader context of sustainable development. Our role in that agenda is to try to ensure that development projects that have economic and social benefits go ahead without damaging the natural environment. If the principles of sustainable development are embedded in consents regimes, future projects will be able to avoid having an unnecessary impact on the environment and the steps that are required of promoters in delivering sustainable projects will be understood from the outset.

The bill offers a significant opportunity to make that happen. Therefore, we want the bill to make clear reference to the regulations that transpose the European Union habitats directive into Scots law and to apply the regulations to orders made under the bill. Such an approach would ensure that projects that could have an effect on European wildlife sites—the best places in the EU for natural heritage—are properly assessed and that if there were an overriding need for projects to go ahead that could damage the sites, proper steps would be taken to compensate for the damage. The key principle of sustainable development is that development should not damage the environment, but if damage is required in the overriding public interest, it should be compensated for.

The Convener: Thank you. I invite questions from members.

Ms Maureen Watt (North East Scotland) (SNP): In your submission, under the heading “Inquiries”, you say:

“We would encourage the Committee to consider whether the list of persons in Section 9(4) is adequate.”

Will you expand on that? Who should be included in the list?

Richard Evans: If a proposed project would cause a large enough amount of damage on a site that was in the sphere of interest of the Scottish Environment Protection Agency or SNH—a European wildlife site would be in SNH’s sphere of interest, for example—and proposals to minimise and compensate for the damage as part of the scheme had not been agreed, the sustained objection of SEPA or SNH should trigger a local inquiry.

Ms Watt: You mention harbour authorities in your submission. Can you give examples of proposals in which you thought that you should have been involved at an early stage?

Richard Evans: Our interest in consents in harbour areas has been strongly influenced by our experience of proposals for ship-to-ship oil transfers in the Firth of Forth. The matter is complicated and has an interesting place in the context of the devolution settlement, in that some aspects are devolved and others are reserved to the United Kingdom Government. The ultimate responsibility to decide whether transfers go ahead rests with the statutory harbour authority, which has responsibilities to its shareholders under companies legislation as well as responsibilities under its establishing legislation and the Harbours Act 1964. The process is
The sort of measures that I would not regard that as a development with that degree of significance.

Personally, I would not link the definition of a scheme of national significance to the nature of the site that might be affected. Plenty of schemes that have the potential to impact on nationally important sites are dealt with under other legislation—planning legislation, primarily—but they could not be said to be nationally significant schemes; they just happen to affect nationally important sites. I would not, therefore, make that direct connection. There must be some criterion that relates to the overall significance of the project in the context of its own objectives, not environmental objectives.

Mike Rumbles: I was a member of the Robin Rigg Offshore Wind Farm (Navigation and Fishing) (Scotland) Bill Committee, which considered the proposal for a wind farm in the Solway firth. Do you think that such a proposal would be subject to parliamentary scrutiny? Or would it simply go through on the say-so of a reporter and the minister? What are the implications of that for your organisations?

John Thomson: I would not regard that as a development of national significance. It obviously raises complex issues because it has impacts in Scotland and in England. That perhaps puts it in a slightly different category; however, I would not otherwise see that as a development with that degree of significance.

Richard Evans: I echo what John Thomson said about the importance of Robin Rigg as a renewable energy development. However, its overall capacity was small and the difficulties that led to it being considered under a private bill arose from its location in the sea in an area that straddled the border between Scotland and England. Normally, wind farms of that scale would be dealt with under the Town and Country Planning (Scotland) Act 1997 or the Electricity Act 1989, depending on which side of the 50MW cut-off line they fell.

Robin Rigg is perhaps a special case that would still have had to be considered under a private bill even if proposals similar to those in the Transport and Works (Scotland) Bill had been in place.

Mike Rumbles: That would not be the case, convener, would it?

The Convener: I am not sure how the bill’s proposals would have applied to that particular wind farm. My understanding is that the bill focuses mainly on transport—for example, trams and railways. You would need to seek clarification on your point from someone else.

Paul Martin: In the SNH submission and in his oral evidence, Mr Thomson said that he welcomes the bill because it will mean that promoters must provide more detailed information prior to the start of a project. Do you not have sympathy with

opaque and slightly frustrating for everyone who is involved in it.

14:30

Ms Watt: I suspect that, if another member of the committee were here, he would raise the issue of Inverness harbour, which wants to undertake some developments but is being hindered, some believe, because of the consideration of the dolphins in the Moray firth. How can we reconcile the two? We obviously need consultation but, in many cases, development has to go ahead for the future well-being of the harbour and the hinterland.

Richard Evans: The Inverness case is not one with which I am familiar. I would like the clear process that is set out by the habitats regulations for certain types of consent regime to be applied more widely so that the promoters of schemes, including the Inverness Harbour Trust, know where they are and what steps have to be followed. One of the difficulties with harbour consents as they relate to the requirements of the directive is the fact that they fall back on what is called a general duty merely to have regard to the requirements of the directive. In all cases, it is not clear that that is adequate, or helpful to the promoters of schemes.

Mike Rumbles (West Aberdeenshire and Kincardine) (LD): I have a question on another issue. Under the terms of the bill, parliamentary approval of schemes will be limited to schemes of national significance. Do you think that that is appropriate? If so, what do you consider to be schemes of national significance?

John Thomson: I think that it is appropriate. For the most part, schemes of national significance will have been identified through the national planning framework.

Mike Rumbles: Which would be?

John Thomson: Major infrastructure projects of various kinds that could be seen as essential to the proper development of the nation.

Mike Rumbles: Can you give us some examples?

John Thomson: The sort of measures that have been included in the private bills procedure—for example, the Waverley line—would be seen in that light. It might be said to be of regional significance; nonetheless, it is the sort of project that would almost certainly figure in any statement of national transport priorities. Similarly, the airport rail link schemes would fall into that category. That is the sort of thing that we are talking about. We are not talking about minor transport improvements; we are talking about major new schemes.
promoters, Mr Thomson, who might have to provide a lot of information and spend significant sums of investment money at an early stage of a project, only for that to result in the project not progressing?

**John Thomson**: Inevitably, one must consider matters from the promoter's standpoint. However, the reality is that information will have to be assembled at some point, so there is much to be said for bringing it together at an early stage. One would hope that there would be constructive engagement with the statutory consultees and other interests, who could help to advise on the information that was needed and, indeed, on the direction of the project. I do not think that having to provide information before a project begins will add to the burden for a developer or promoter.

On the principle of developing a project, the national planning framework would probably signal whether a development was the sort that was likely to go ahead because it was sufficiently in the national interest. The promoter would get that signal before starting to invest significantly in pulling together the project’s details. Beyond that, I think that a promoter will gain considerable advantage from investing up front. Our experience with proposals that have progressed under the private bill procedure is that developing a project in an iterative way—doing little bits here and there—certainly spins the process out and probably makes a project more expensive in the long run.

It is important that there is a clear understanding up front about the nature of the information that is required.

**Paul Martin**: There will obviously be difficulties in doing that. For example, the Parliament building project probably had to address at its outset different SNH requirements from those that SNH required for Queensberry house at a later stage. Is it not the case that a project will always have difficulties if it speculates at an early stage? Would it not be better to do that later in a project when more investigations will have taken place?

**Richard Evans**: In your written submission and in our introductory remarks you referred to the habitats regulations. Are you suggesting that there should be an amendment to the Harbours Act 1964? Is it necessary for that to be in the bill, or could it be covered in secondary legislation?

**Richard Evans**: It is not necessary for an amendment to the Harbours Act 1964 to form part of the bill. It struck me, however, that having hit upon various bits of the general environmental duty of harbour authorities that we felt could be updated, the bill—particularly bearing in mind the
precedent of the Transport and Works Act 1992, which inserted section 48A into the Harbours Act 1964 and gave statutory harbour authorities their environmental duty in the first place—might offer an opportunity to address that issue. It is not the only means of doing that, though, and indeed the committee may consider that it is not an appropriate vehicle to do that. We would understand if that were the case.

The Convener: I thank all three of you for your evidence, which has been very useful.

14:45

The Convener: I welcome Linda Knarston, who is here on behalf of Lerwick Port Authority and the British Ports Association. I believe that you work for Anderson and Goodlad.

Linda Knarston (Anderson and Goodlad): That is right.

The Convener: I will first give you the opportunity to make some remarks about the bill, and then we will move on to questions and answers.

Linda Knarston: I would like first to thank the committee on behalf of my clients and the British Ports Association for the opportunity to appear today. I am sure that you are aware of the amount of consultative bumf that comes through one's door—you will get more of it than we do. When one does reply, one sometimes feels that it goes into a black hole somewhere. It is exciting, if a bit unnerving, to be here to give evidence in support of what we said.

I will make a brief statement—I am sure that I would not be permitted to make a long one. Subject to the committee's approval, it is inevitable, given the evidence that was given at the meeting on 5 September, that I will refer to the on-going dispute between Shetland Islands Council and the Lerwick Port Authority. Although it would be illustrative to do so, I am conscious that I must be careful not to address the merits of the cases because there are, unfortunately, a number of court actions, some of which are finished and some of which are continuing. That does not, however, mean that I cannot refer to them, because the issues demonstrate where we are coming from.

The Convener: Before I let you continue, I say for members' guidance that we should try, because there are on-going court actions, to stay away from the merits of a particular project and instead deal only with process issues, which are most illustrative in our consideration of the bill. That will keep us all in safer territory.

Linda Knarston: I am conscious of the delicacy of the situation. The issues are clearly of interest, but many are sub judice. For that reason, the submissions to the committee make no mention of the on-going dispute.

In so far as the primary thrust of the bill is to declog—to use a not-very-posh description—the parliamentary processes of the inordinate number of orders that were mentioned at the 5 September meeting, I understand and welcome it. That is not why I am here, but everyone appreciates that when there is no other way for a body to get powers to build a railway, for example, there is no choice but to follow the private bill procedure.

Special parliamentary procedure is different and has a fairly narrow compass. The procedure is designed to deal with situations such as SIC's seeking to build a fixed link by bridge to Bressay—an island with a population of about 300, which is close to Lerwick. The fact that the bridge would cross navigable waters would trigger the SPP. The same would apply to a tunnel, although there would not be the same arguments, but that is another issue. The reason the SPP would be triggered is the involvement of two distinct public authorities that have been created by statute. On the one hand, Shetland Islands Council has every democratic right to build a bridge within its area of governance and, on the other hand, the harbour authority is charged under the Lerwick Harbour Improvements Act 1877 with conserving, deepening and improving the harbour, which I suppose would be described nowadays as conserving, dredging and developing the harbour, which includes economic development. The problem is that although the aspirations of both bodies are perfectly reasonable in isolation, they could conflict in practice. That is what the current unfortunate row is all about. The first Bressay bridge application was advertised in The Shetland Times on Christmas eve 2003. I remember that, because it was a difficult time to have to consider framing objections.

Under the present system, the promoter has to put in a series of applications for consent. In effect, the applications are made to the Scottish Executive, although nominally they are decided by the Scottish ministers. In the case of a bridge, the applications would involve planning consents for the landward bits, or the bits above the low water mark, and for a roads scheme under the Roads (Scotland) Act 1984. If, as is often the case, the applications for various consents are made piecemeal, rather than through one walloping application, it is not apparent in legal terms—although it might be in practical terms—whether the SPP would come into play.

In the example that I have given, if Lerwick Port Authority, as the navigation authority, had not objected on the grounds that the proposed bridge would interfere with its dredging and harbour...
development functions and with the reasonable requirements of safe navigation, there would be no question of the SPP coming into play. If the objection had been made on other grounds, or had been made by other people, the matter would have been decided either by the relevant minister or through an inquiry.

The inquiry process itself is very strange. Under the present system, and under the bill, the minister has complete discretion when considering an application for an order to which there are significant objections—leaving aside vexatious and trivial matters and matters relating to compensation, which can be dealt with elsewhere, such as through the Lands Tribunal for Scotland. The minister can either go for a full-blown inquiry, appoint someone to hold a hearing for simpler cases or targeted issues, or do nothing at all.

I stress that under the present system, by virtue of the nature of the objections and the fact that they emanate from a harbour authority, the minister would not make the decision. The decision would be made where it should be made: the Scottish Parliament. However, under the new system, there might not even be an inquiry, which is regarded as being hugely important in Shetland. Unless a development is considered to be a national development within the terms of the proposed amendments to the Planning etc (Scotland) Bill—which I understand is still under consideration—the minister could just make a decision without any reference to an inquiry and with no parliamentary involvement.

I am sorry about this, but I will touch again on what has happened in practice. The first application that was lodged by SIC on Christmas eve—I must stop saying that—was for planning consent. Despite strenuous objections, which were repeated for most of the other applications and specifically for the roads scheme, there was no requirement for the council to apply to ministers for planning permission. As a consequence, deemed planning consent was given. To make the situation worse, the advice that was given and accepted was that the minister should be taken to judicial review, permission for which was granted. That illustrates how awful the present system is. The system will not get better under the proposed new legislation. In practice, what happened meant that the minister had to visit the matter anew, after which the decision was the same, although its wording was different. Surprise, surprise—a second petition for judicial review is going through the court. In the meantime, no progress is being made.

Ewan MacLeod referred to a "paralysis of process" arising from the SPP. I submit that it is not the system and that there is no paralysis of process other than one that might be seen as self-inflicted. That will certainly be the case once the bill has been passed, if it implements the main thrust, which is to take most, or all, private bills out of Parliament’s remit and to transfer that function to the Scottish ministers. If that were the case, on the very odd occasion when SPP applied under the transitional arrangements as set up by the Westminster Government, the promoter—the council in this case—would have to introduce a private bill, which would have to incorporate the provisions of a special parliamentary order for the project for which the promoter sought authority. In the case that I described, as matters stand, authority would be sought for the building of a bridge.

It might seem strange to say it, but one of the great successes of SPP is not that it is so limited in scope, or that it is particularly important in focused situations but that, in the past 61 years, there has been no SPP application in relation to harbours. The only two that we could find were in the Westminster Parliament, one of which related to the National Trust. I cannot remember the other one, but it had nothing to do with harbours.

It is difficult and daunting to prepare bills for Parliament. Large amounts of preparation and detail are required, which is perhaps why parties in such cases do what they ought to do and find ways to resolve differences without involving other people, whether those people be members of the Scottish Parliament or a reporter or the Scottish ministers.
Mike Rumbles: In your written evidence, as well as in what you have said just now, you say on behalf of your clients that the strongest evidence that you have received is against the proposed new procedure. In your written evidence, you go as far as to say that you hope that Parliament will be “prepared to reject the TWB as introduced”.

You offer three suggestions if that does not happen. I will focus on the first one. Correct me if I am wrong but, if I understand your view correctly, your objection is that, if there is an issue of national importance, there will be parliamentary scrutiny, whereas all other issues will not be scrutinised under Parliament’s democratic process. You give the example from your neck of the woods, which would be a local issue, rather than a national one, and would not be subject to parliamentary procedure under the new system. You suggest that the bill should be amended to ensure that if, following a local inquiry or hearing, ministers reject the recommendations of the independent reporter—which they will be entirely entitled to do under the bill—the matter should be referred to special parliamentary procedure.

Linda Knarston: That is right. However, I must stress that that is a fallback position. What I and my client authority are really trying to say is that the existing special parliamentary procedure should be retained, and that the special procedure that is envisaged under section 13 is not really parliamentary scrutiny. It would be rude to describe it as a joke but, if an issue is brought before the Scottish Parliament, either because it is of national importance or because the minister feels that it is an appropriate issue to bring to Parliament, all that Parliament is able say about the proposal, using the affirmative procedure, is yea or nay. It cannot amend the proposal; it would not be scrutinising it at all. It is a matter of take it or leave it. That seems to be a difficult issue for Parliament to resolve. To reject a development that might have a lot of good points because of some things that Parliament does not like about it would be quite a big deal that could have immense ramifications.

Mike Rumbles: One reason why the bill has been introduced is that there seems to be all-party support for speeding up the system. There is a balance to be struck, is there not, between democratic control of the process and the speed at which a proposal goes through? You feel that losing the current democratic scrutiny under the new procedures would be too big a price to pay.

Linda Knarston: Yes, but I go further than that. There is a very good document called “Scotland’s Transport—Proposals for a New Approach to Delivering Public Transport Infrastructure Developments”, which was published in February this year. What that paper envisaged forms the bulk of part 1 of the bill—that is to say, the abolition of the private bills procedure for the cases to which it currently applies, although I am not talking about the specific involvement of the SPP in that. If that abolition, which is the bill’s original objective, were to be agreed to, that would sort out any perceived concerns about delay—which is an important issue—because Parliament would not scrutinise projects. However, the plain historical fact is that such matters have not come up.

The second point is the assumption that the new system will be faster and more efficient. My colleagues at the British Ports Association—which Lerwick Port Authority is a member—are unhappy with the way the English system works. As far as I can tell, part of that unhappiness is due to how their system deals with objections. The bill will make some amendments that will ease that, but the association is not satisfied that it will make the system faster. It is talking about 12 or 13 harbour revision orders, which are a bit different, being clogged up in the system. The transfer of functions will mean that more reporters will be needed, so the system will not necessarily be faster, particularly if people like me go round raising court actions every time they are dissatisfied with ministers’ decisions.

Mike Rumbles: Let us assume that the new system was in place in your example, that there had been an inquiry and that the minister had rejected the independent reporter’s recommendation. From a legal perspective, would you have a case for judicial review? What chance would you have of having the decision overturned?

Linda Knarston: It is horses for courses, but it would be a jolly good starting point for a solicitor if the minister were to instruct an independent reporter on a project that, as was envisaged at the committee’s first evidence-taking session on the bill on 5 September, related to a manifesto commitment, the reporter were to produce a nice reasoned judgment and the minister were then to say no. I would be a happy solicitor in that situation.

I have a personal worry that is nothing to do with my remit today. At the meeting on 5 September, Mr Ewing, the deputy convener, said that if he were a minister and a reporter were to decide against a manifesto commitment, the reporter would get short shrift from him. That is understandable, but where does it leave the poor objector if the project is a manifesto commitment, which is not the case in my example? Would it be worth objecting if the outcome was predetermined unless resolved otherwise by the courts?
The Convener: Did we not have an example recently in which a minister—

Linda Knarston: The M74.

The Convener: Indeed. As I understand it, those who were pursuing the court case withdrew their opposition quite late on, either just before or just after the case started to be heard. If the case would be as strong as you imply it would be as a result of a minister’s not accepting a reporter’s view, is it not surprising that that case did not proceed to full consideration?

Linda Knarston: I should have said that it is always an encouraging starting point. The problem is that nobody—solicitors, reporters or ministers—has a monopoly on wisdom. A minister might have a perfectly good reason for turning down a recommendation by his reporter, because their decision was flawed. However, this is an encouraging starting point.

Mike Rumbles: I am trying to establish how effective the system would be. The convener has given one example, but I understand that the case was not pursued because the organisation involved said that it simply could not afford the legal costs. A hefty financial commitment is required to challenge such a judgment.

Linda Knarston: It depends very much on the decision in question. If someone has made a Horlicks of it and legally the matter is completely clear, that is not too bad. However, life is not usually like that.

The Convener: The fact that the special parliamentary procedure has been employed only twice in the past 61 years suggests to me that it is not of much general merit. It is at least reasonable for us to consider introducing a procedure that will update the law for dealing with major transport projects. There may be greater merit in some of your suggestions for amending the bill than in rejecting it altogether and retaining the existing procedure.

Linda Knarston: I appreciate that although I have come a long way it is an uphill task for me to get the committee to do everything that I want and to ditch half the bill. If the committee is not prepared to recommend everything that I suggest—I know that I am asking a lot—I have mentioned the sort of amendments that would be necessary. The bill does not acknowledge at all the role of harbour authorities, which are vital where, for example, a bridge is being built over a harbour. If section 9 were amended, harbour authorities would, in areas where orders would affect their work, be put on an equal footing with the National Trust for Scotland, local authorities and persons who come within the ambit of compulsory purchase provisions. If a harbour authority was to state in an objection that it wanted an inquiry to be held, the minister would have to order it. That is not the situation at the moment—an objection could just be ignored.

At the risk of trying the committee’s patience, I will make one more point. The fact that there have been very few applications in the past 61 years is a good thing. We have had experience of the provisional orders procedure, which is similar. That procedure is an alternative to harbour revision orders and was confirmed by an act of Parliament. It was used frequently and demanded a higher degree of precision, because it had a definite timetable and there was finality at the end of the process. People reacted by sorting out the issues, which is what they should do. I regard the fact that there have been so few applications not as a failure but as a resounding success. It is not the result of a lack of interest.

Ms Watt: At the beginning of the meeting we discussed Shetland transport partnership. Is Lerwick Port Authority a member of the partnership?

Linda Knarston: As far as I know, it is not. I do not think that it has been asked to join. However, I cannot really answer the question.

Ms Watt: Could we find out?

Linda Knarston: Yes.

Ms Watt: It would also be interesting to find out whether other harbour authorities are members of local transport partnerships.

Linda Knarston: At present, membership might or might not be thought to be desirable. Although efforts continue to sort out the issue about the proposed fixed link to Bressay, relations between the parties are not the best that they have been.

15:15

Ms Watt: I understand the local situation, but it seems a grave omission not to have harbour authorities as members of the transport partnerships.

Your submission draws the committee’s attention to the Harbours Bill, which is going through the UK Parliament. Does that build on the modernising trust ports agenda? Do you know anything about that?

Linda Knarston: Is that mentioned in the British Ports Association submission?

Ms Watt: Yes.

Linda Knarston: I have had a terrible time trying to understand precisely what the problem is in England, apart from a belief that the authorities are underresourced. The Harbours Bill seems to relate to the requirement that if just one objection is lodged to a harbour revision order, it is
necessary to have an inquiry. According to the submission, that seems to be the issue that the bill will address. I tried to check out the issue with my colleague in the British Ports Association, but he was somewhere in darkest Gothenburg and I could not find him.

Ms Watt: Some documentation that we have received raises doubts about whether pilotage is a devolved matter. Has the British Ports Association come to a decision on that?

Linda Knarston: That is still in doubt. My point will be mercifully brief. We are at one with the British Ports Association in taking the view that the current legislation on pilotage works. The Perth (Pilotage Powers) Order 2006 went through no bother. I suppose that our message is: if it ain’t broke, don’t fix it. I promise I will be short, but the concern is about the ambiguous terms of schedule 5 to the Scotland Act 1998. Under the heading “Reserved Matters”, the act states that marine transport is a reserved matter. However, exceptions to that are

“Ports, harbours, piers and boatslips, except in relation to” certain matters such as dealing with wrecks and dangerous vessels and aviation and maritime security. Navigational rights and freedoms are reserved, but the exception is the “Regulation of works which may obstruct or endanger navigation.”

Given that navigational rights and freedoms are reserved and obviously involve pilotage and safe navigation, which it is the harbour authorities’ duty to promote, I cannot understand why the “Regulation of works which may obstruct or endanger navigation” is not a reserved issue. That is merely an observation. I do not understand the issue, and that creates doubt.

Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP): I am sorry that I was late, convener, but I was detained on personal matters. I apologise to the witness, too, for missing her opening remarks.

Linda Knarston: That is maybe just as well.

Fergus Ewing: Not at all. I am impressed by your substantial contribution, and I say that not just because I, too, am a solicitor.

The committee is aware of the importance to the economy of ports and harbours. We visited Grangemouth as part of our recent inquiry into freight transport. Ports such as the one at Mallaig in my constituency are absolutely essential to the economy. I am persuaded that the voice of the harbours—by which I mean working ports, not places such as marinas—must be heard. However, I want to find out the exact rationale for the particular proposals that you make.

If I may, I will assume that the Executive is unlikely to scrap the bill after this meeting.

Linda Knarston: Indeed.

Fergus Ewing: To be fair, I have given the bill broad, principled support, particularly if it will speed up the process, although that might be an optimistic hope. However, there is broad consensus that the current parliamentary procedure is not appropriate.

I am concerned that the committee should explore the issue more fully at stage 2 and hear what the civil servants say about your analysis.

I have one basic question. You argue that a special procedure should be in the bill and should apply to harbours. Of course we accept that harbours are important—that is a given—for the reasons that you spell out eloquently in your submission. However, why do you assume that if no such special procedure exists, it is inevitable that ministers in a Scottish Executive of whatever hue will not consider harbours properly?

Linda Knarston: At the very least, I am concerned that that possibility exists. The bill basically provides a blank cheque to ministers. Although I have conceded that the first objective of the bill is to take the private bills procedure out of the Parliament, and not the abolition of SPP—for which page 7 of “Scotland’s Transport—Proposals for a New Approach to Delivering Public Transport Infrastructure Developments” states that there is no impetus—it could simply be excised and the fact remains that considerations could be totally ignored, because the whole process could be followed without any inquiry. A proposal certainly would not see the light of day in Parliament unless it were deemed to be a matter of national significance or the relevant minister felt that Parliament ought to consider it. I suppose that the special procedure that the bill will introduce is better than nothing, but I regard it as a sop more than a matter of substance.

Fergus Ewing: I am not here to speak for the minister; I am not usually willing to perform such a role. However, I would expect any minister to say that they treat with the utmost gravity the factors that you describe. Scotland’s share of the decommissioning industry could be £11 billion, which would mean that any transport project that could impede it fell into the national significance category, although some ambiguity exists about how that will be defined. We can ask the minister whether such a scheme would be of national significance; it will be interesting to see whether we get a straight answer. If we do not, I might start to support you.

Your argument is eloquently put, but I am not clear about how it is anything more than special pleading, albeit for a very important group. Many
other important groups could come here to ask to be included with local authorities and national parks, as you do in point 3 of your suggested amendments to the bill. Many other groups could argue the same thing and if we accepted your case, why should we not accept the case for canals, airports or railway stations and Network Rail? We would also get into chambers of commerce and trade unions, I have no doubt. Before we knew where we were, we would have a whole procession of what I believe are called stakeholders who would all clamour for their voices to be heard, which would mean that projects that might take 10 or 11 years would take 20 years. You have an extremely strong case, but do you accept that an element of special pleading might be perceived?

Linda Knarston: Of course. On the first day on which the committee took evidence, Mr Rumbles fairly upset Mr MacLeod by asking him whether Shepherd and Wedderburn was a firm of lobbyists. I would be a bit insulted if he asked that about Anderson and Goodlad. However, if you ask me to say honestly why I am here or why any other witness who is part of or represents a body is here, the answer is that they come here to approach the critical issues from their body’s point of view. That is what I am doing. Your comments about opening the floodgates or the thin end of the wedge are undoubtedly relevant.

Fergus Ewing: At that successful point, I will terminate this Tavish Scott performance.

The Convener: As there are no further questions, I thank Linda Knarston for her interesting evidence this afternoon, which certainly opened up and analysed an area of the bill into which we have not delved in great detail. I am sure that you have put into members’ minds questions that we will ask the minister and consider at later stages of the bill.

Linda Knarston: I repeat my thanks to you for inviting LPA here in the first place and for your courtesy. I apologise for the length of my opening statement.
The RSPB in Scotland is supported by some 74,000 members and employs more than 180 staff to promote the conservation of birds and biodiversity throughout the countryside and seascape. We have practical experience of managing land and coast for conservation, farming, forestry and other enterprises. We undertake biological and economic research to underpin our policy analysis and advocacy. We also have experience of environmental education and training for all ages. The RSPB is the BirdLife International partner in Scotland.

Our principal interest in the Transport and Works (Scotland) Bill is to ensure that processes for consenting projects covered by the bill allow the natural heritage and biodiversity interests to be taken fully into account in determining consent. In so commenting, we draw on considerable experience of engagement in c.400 items of planning and development casework, across the UK, each year.

Transport & Works (Scotland) Bill – general comments

The bill introduces an order-based consenting procedure, new to Scotland, to deal with applications for private legislation for specified types of transport development that would remove the need for Private Bill committees to consider such proposals. We welcome this simplification of process – and the intention to ensure greater involvement of, and provision of information to the general public. The degree to which expressed policy intentions (of meaningful public participation and
determination in a transparent manner) will be achieved depends on the detail of the rules made by Scottish Ministers under Section 4. We would encourage the Committee to consider what opportunities should be made for the Parliament to see and comment on these rules, in order to ensure that Section 4 of the Bill delivers the commendable policy objectives.

Developments of national significance

We welcome the retention of parliamentary scrutiny for projects “of national significance”. However, we would encourage the Committee to consider how much time may be required require between the laying before the Parliament of the statutory instrument and subsequent approval (or not) by resolution – in order that the Parliament’s key principles of accountability, access and participation can be met. In particular, consideration could be given to questions such as: how might the public be consulted; how might the public make representations to parliament; how will the issues be openly debated – in the spirit of implementing the Aarhus Convention (as intended for all orders under the Bill).

The definition of a “national development” as one set out in the National Planning Framework is logical – but gives us cause for concern due to the relative lack of examination of the Framework currently proposed in the Planning (etc.) Scotland Bill, also currently before the Parliament. The ability of Scottish Ministers to direct orders for developments not listed in the National Planning Framework also to be subject to parliamentary scrutiny is welcome.

The application of the special procedure for national developments proposed by orders under the Roads (Scotland) Act 1984 and the Harbours Act 1964 is logical and welcome.

Inquiries

Section 9 of the draft Bill proposes public local inquiries to be held in the event of objections being sustained by local authorities or national park authorities responsible for land affected by a proposed order – but not in the event of a sustained objection by any other statutory body (for example, SEPA or Scottish Natural Heritage). We would encourage the Committee to consider whether the list of persons in Section 9(4) is adequate. RSPB Scotland would recommend that, in
cases where natural heritage or environmental interests of national or international significance are affected, SNH and SEPA should be added to Section 9(4).

The Conservation (Natural habitats &c.) Regulations 1994 (as amended)

These regulations, known as the Habitats Regulations, transpose into UK law the EU Habitats Directive and (in Part IV) include important measures intended to ensure the integrity of European Wildlife Sites. The procedures set out in Part IV currently apply to orders under both the Transport and Works Act 1992 and the Roads (Scotland) Act 1984. Therefore, an amendment will be needed either to the Bill or to the Regulations) to ensure that the measures set out Part IV of the Regulations apply to orders made under the Bill. For the sake of consistency, Part IV should also apply to orders made under the Harbours Act 1964. This would:

- Enable Scottish Ministers to require specific environmental information to be provided by the applicant;
- Require Scottish Ministers to consult SNH;
- Require Scottish Ministers to consult the European Commission regarding "imperative reasons of over-riding public interest";

before making an order that might affect European Wildlife Sites. It is particularly important that orders under the Harbours Act 1964 are brought under the regime set out by Part IV, as new powers under the Bill are specifically made unavailable where an order under the Harbours Act 1964 can achieve the same end.

It is also our view (particularly in light of our experience so far of the current proposals for ship-to-ship transfers of oil and other substances in the Firth of Forth) that the measures set out by Part IV of the Habitats Regulations should apply to all consents in harbour areas.

The Transport and Works Act 1992 imposed a general environmental duty on statutory harbour authorities by the insertion of Section 48A into the Harbours Act 1964. This duty predates the introduction of the Habitats Regulations, as well as legislation implementing the Aarhus Convention – which is clearly referred to in the policy memorandum with regard to the proposed procedure for orders under the Bill. The intentions are to “encourage meaningful public participation” and to ensure transparency and confidence in the process – both of which have been conspicuously absent in the Forth of Forth ship-to-ship process.

Therefore, we suggest that the Committee considers the introduction of an amendment to the Bill, to insert a Section 48B into the Harbours Act 1964, bringing the environmental duty of statutory harbour authorities in Scotland up to date by:

- Applying Part IV of the Habitats Regulations to plans and projects that may affect European Wildlife Sites and which are determined by harbour authorities (for example under byelaw powers, or by issuing orders to mariners);
- Clarifying the status, under the Environmental Information (Scotland) Regulations 2004 as Scottish public authorities, of statutory harbour authorities as regards their statutory functions (of a public nature);
- Ensuring that the appropriate measures enabled by the Aarhus Convention are applied to consents by statutory harbour authorities.

Given the precedent set by the Transport and Works Act 1992, the Bill presents a significant opportunity to bring the responsibilities of statutory harbour authorities into line with current environmental legislation and policy – without a requirement to review the harbours Act 1964 in its entirety.
Paragraphs 93-101 of the policy memorandum, referring specifically to the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters.

Between s13(3)(a) and s13(3)(b)

http://www.scottish.parliament.uk/business/bills/51-planning/index.htm

http://www.rspb.org.uk/Images/planningdebate_tcm5-87092.DOC

Statutory Instrument 1994 No.2716

Special Protection Areas (SPAs) for birds and Special Areas of Conservation (SACs) for other species and habitats, collectively known across the EU25 as the Natura 2000 network.

Section 1(2)

SUBMISSION FROM SCOTTISH NATURAL HERITAGE

We warmly welcome these proposals to reform the current Private Bill process. In our view they would substantially improve the current arrangements. In particular, the proposals should make the procedures involved much clearer, in turn facilitating input from all interested stakeholders. This would be entirely in accord with the objective of the planning reforms contained in the current Planning Bill.

We have discussed these proposals with colleagues in the Executive Bill Team and have highlighted a number of important points relating to the need to take account of other environmental regulatory processes arising from European legislation. These carry with them a requirement to provide detailed environmental information at the time an application is submitted. Our previous comments are generally reflected in the Bill and supporting documents, and the policy memorandum notes the importance of pre-application consultation, in part to ensure due reference to environmental considerations (para 40), and the need to provide adequate information at the time of application (para 35). There is also reference to the need to comply with UK and European legislation regarding Environmental Impact Assessment and the consideration of potential impacts on Natura sites (Special Areas of Conservation and Special Protection Areas; para 45).

These are welcome statements of principle, and it will be important to ensure that they are carried through into the secondary legislation which will specify the details of the process, in particular the rules under Section 4 which will indicate the pre-application procedure. Against this background, and in view of the weight which attaches to the relevant European Directives, it may therefore be helpful to briefly restate the key points.

Relationship with other regulatory regimes

The new arrangements will apply to developments of considerable scale and complexity, with corresponding potential for effects (both positive and negative) on local communities and the environment. Such developments will in turn be subject to a wide range of regulatory regimes, including the Environmental Impact Assessment (Scotland) Regulations, the Conservation (Natural Habitats etc.) Regulations and the planning process (including the GDPO and GPDO), and clear guidance will be required to ensure that these link efficiently with the new procedure.

Early identification of key issues

The new procedure must allow the impacts of developments on the natural heritage to be identified and addressed as early as possible, and certainly before the critical decisions are taken; this process should be well in hand by the time a proposal is submitted to Ministers. This consideration also highlights the need for close and early consultation with relevant bodies, including SNH. The Executive consultation which preceded the Bill suggested a period of six months between the promoter publicising initial proposals and presenting an application for an Order to Scottish Ministers. While recognising the need for a defined timescale, our previous experience with Private Bills indicates that the resolution of natural heritage issues can take longer than this, and this...
period should be regarded as a minimum. This is particularly true if further environmental information is required, as the necessary survey work may be subject to seasonal constraints, for example where migratory birds are involved.

**Appropriate assessment of impacts on Natura interests**

The process must allow, where necessary, for an appropriate assessment of potential impacts on Natura interests under the Habitats Regulations. These indicate that a project likely to have a significant effect on a Natura site can only be allowed to proceed if it can be demonstrated that the integrity of the site will not be adversely affected (unless there are overriding reasons of public interest why it should proceed). This can only be adequately considered if detailed information on the design, construction, maintenance and operation of the project is provided. The importance of this point must be emphasised; this requirement is underpinned by the full weight of European legislation and the assessment must be completed at a sufficiently early stage in the process to inform the eventual decision by Ministers.

**SUBMISSION FROM ANDERSON AND GOODLAD ON BEHALF OF LERWICK PORT AUTHORITY**

Lerwick Port Authority and our Firm, Anderson and Goodlad, as their legal advisers for over fifty years, have grave concerns about the terms of the Bill and the underlying policy behind it which in the case of a port such as Lerwick raise issues of crucial national and local importance.

Lerwick Port Authority are in an almost unique position to give evidence to the Committee given the challenges they have faced over the years.

In common with any port serving an island community which does not have a fixed link to the Scottish mainland, fishing and the transport of goods and people by sea are of crucial importance. However, in addition, Shetland, in particular the port and harbour of Lerwick, required to rise to the challenge of North Sea oil exploration which involved unparalleled and urgent expansion of harbour facilities to meet the needs of the oil industry resulting in immense benefits to the local and national economy. Lerwick Port Authority are now addressing the challenge of attracting oil rig decommissioning work and further harbour development will be vital if Shetland is to maximise its share in this lucrative market.

A vital part of this process involved the obtaining of Parliamentary authority or authority of Ministers to create the necessary facilities and as a result of which Lerwick Port Authority and our Firm, as its advisers, were actively involved in Private Legislation Procedure including the promotion of eleven Acts of Parliament and eight Harbour Revision Orders.

The promotion of Acts of Parliament by means of Provisional Orders involved a procedure virtually identical to the existing Special Parliamentary Procedure (SPP) which the TWB seeks to abolish. In our view, abolition of SPP is a retrograde step. The existing system, SPP, insofar as relating to ports and harbours, only applies in restricted areas and provides an effective tried and tested balance between the Parliament, Ministers and the Civil Service/The Scottish Executive and a like fair balance especially where the competing interests of public bodies are involved.

The existing SPP, where it applies, also provides for detailed open and democratic scrutiny of issues of national as well as local importance. The emasculated special procedure provided for in Clause 13 of the Bill singularly fails to provide this.

The terms of the Bill transfer the functions of the Scottish Parliament in areas where SPP applies to the Scottish Ministers but in practice, except in the most important and controversial areas, these functions will be exercised by the Scottish Executive.

The experience in England and Wales under the Transport and Works Act 1992 has not been a happy one. The British Ports Association have already expressed their members’ frustration at the
delays encountered in the operation of the system under this Act which the current Bill in general terms seeks to emulate.

It is fair to say that there are certain policy differences contained within the TWB in the sense that Clause 13 of the TWB provides that a Statutory Instrument relating to national development, being a development of national significance, or any other Statutory Instrument which the Scottish Ministers decide to refer to the Scottish Parliament cannot come into force unless the Parliament, by resolution, approves the instrument.

However the power entrusted in the Parliament is very limited, namely a power to approve or not to approve the Instrument. There is no power to amend the Instrument and if representations are made and accepted in principle that the Statutory Instruments should be amended, the Instrument laid before Parliament has to be withdrawn and the process has to be recommenced by the introduction of a new Statutory Instrument.

The Scottish Ministers and in practice we believe the Scottish Executive, are given more or less unfettered discretion in the event of the objections being lodged to an application for an Order in terms of Clause 1 of the Bill to decide whether or not to hold a public local inquiry into said objections or a hearing in relation to said objections by a person appointed by the Ministers. Alternatively, a decision can be taken without any hearing and unless developments of national significance are involved without any Parliamentary scrutiny. This is neither open or transparent nor is it democratic.

It is accepted that SPP is a complex and expensive process involving detailed Parliamentary scrutiny plus a great deal of MSPs’ time. However, in practice the combination of complexity and detailed scrutiny by Parliament has led in almost every case to negotiated agreement with objectors.

In support of this contention we enquired at Westminster and we were advised that only two opposed Orders which were subject to SPP had gone through the Westminster Parliament since 1945.

SPP was introduced, in the main, to deal with matters regarded to be of national and strategic importance and only operates in limited circumstances in relation to ports and harbours where bridges over and tunnels under navigable waters are involved and only applies to objections under the Roads (Scotland) Act 1984 where a harbour Authority such as Lerwick Port Authority as the navigation Authority has objected on navigational grounds. In other words, if the navigation authority objected on different grounds, SPP would not apply.

The thinking behind this approach is obvious. The protection and promotion of the right of navigation is a fundamental duty of any port or harbour Authority and takes on important additional significance where other vital issues national or local importance are involved such as at present the prospect of attracting oil rig decommissioning work which has an estimated worth of £860 million to Shetland alone, increasing sizes of vessels including pelagic trawlers and shipping generally and national defence.

The importance of decommissioning to the Scottish economy as a whole cannot by stressed highly enough. A report by Scottish Enterprise Service to Industry Groups Offshore Decommissioning (2002) suggests that Scotland may secure just over 43% of the North Sea decommissioning market valued at an estimated £25.7 billion of which Scotland’s estimated share might be over £11 billion.

In this regard we annex a copy of section 6 of a Report by DTZ Pieda Consulting, Edinburgh dated August 2004 jointly commissioned by Lerwick Port Authority and Shetland Islands Council regarding the likely value of decommissioning to the Scottish economy in general and the Shetland economy in particular.

As a separate issue, it is noted that the suggestion that special consideration be given to islands was rejected and island communities are treated in the same way as mainland Scotland. In our
view this is a mistake as island communities such as Shetland, whose only links with mainland Scotland are by way of sea and air, are in a different position than the rest of Scotland.

Without the existence of sufficient links to the mainland by sea and by air, such island communities will cease to be viable. This will not only have a disastrous effect on the island community involved but in the case of a community such as Shetland will have a disastrous effect on the national economy as well.

If the Parliament is not, as we hope it will be, prepared to reject the TWB as introduced, we would urge that three significant amendments be made: -

In the event that the recommendations following a public local inquiry or a hearing by an appointee of a Minister are rejected by the Minister concerned the Order in question should be subject to Parliamentary scrutiny under the existing SPP.

At the very least if the existing SPP is not to be retained the proposed special procedure set out in the TWB should automatically apply to orders in respect of bridges over and tunnels under navigable waters. This is because particularly bridges seriously affect the fundamental duties of any harbour authority in respect of safe navigation and future harbour development.

In any event, navigation authorities such as Lerwick Port Authority should be included as one of the bodies entitled to demand an inquiry into their objection to an Order proposed to be made under the TWB. At the moment the only bodies with that right are local authorities, the national park authority for national parks in which any works authorised by the proposed order are to be carried out and certain persons to whom notice have to be given off a compulsory purchase order in terms of the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947. Clause 9(4) of the TWB needs to be amended to include navigation authorities.

The foregoing comments are addressed to the abolition of the application to SPP to certain orders under the Harbours Act 1964 and the Roads (Scotland) Act 1984.

The Bill however also applies to the provisions of the Pilotage (Scotland) Act 1987. In our view, there is no justification for removing the potential application of such orders under this Act to SPP. In our experience, the Act works very well as presently framed and we have not been involved in any pilotage order which has attracted objections which then became subject to SPP.

Given that the procedure set out in the 1987 Act has worked swiftly and efficiently in practice, there is no obvious justification for amending it purely in the interest of consistency.

As the Committee may be aware the Pilotage Act 1987 was introduced only after extensive consultation and scrutiny of the then position as governed by the Pilotage Act 1913. The 1987 Act reflects what was perceived as meeting the requirements of modern shipping as the Act still does.

A further issue arises in relation to pilotage, namely the vexed question of legislative competence.

Schedule 5 of the Scotland Act 1998 at Section E(3), which include navigational rights and freedoms, entitled Marine Transport, sets out what matters are reserved to the Westminster Parliament. There are certain exceptions to this which apply to inter alia ports, harbours, piers and boat slips.

It appears to us that pilotage may not be included in these exceptions.

From our reading of the Scotland Act 1998 it is not at all clear that pilotage is a devolved matter.
Scottish Parliament
Local Government and Transport Committee

Tuesday 26 September 2006

[The Convener opened the meeting at 14:04]

Transport and Works (Scotland) Bill: Stage 1

14:05

The Convener: Item 2 is further evidence at stage 1 on the Transport and Works (Scotland) Bill. The witnesses on the first panel have experience of the current system of consideration of public transport projects from their perspective as objectors. I welcome Odell Milne, Alison Bourne and Kristina Woolnough.

I look forward to hearing your evidence today. Have you decided among yourselves whether any of you will make introductory remarks or do you all want to do that?

Kristina Woolnough: I represent Blackhall community association, which circulates a newsletter three times a year to more than 3,000 households, so it has a broad opinion base.

Mrs Odell Milne: I am here as an individual and in a personal capacity. I am not representing Brodies LLP solicitors or any of its clients.

Alison Bourne: I am quite happy to say nothing.

The Convener: As you do not want to make any broader introductory remarks, I open up the meeting for questions from members of the committee.

Michael McMahon (Hamilton North and Bellshill) (Lab): In your experience of discussing bills, did members of the Scottish Parliament bring anything helpful to the discussions that might not be there if objectors deal only with a reporter? Please be honest.

Kristina Woolnough: No—nothing.

Mrs Milne: No.

Alison Bourne: No.

The Convener: As you do not want to make any broader introductory remarks, I open up the meeting for questions from members of the committee.

Michael McMahon (Hamilton North and Bellshill) (Lab): In your experience of discussing bills, did members of the Scottish Parliament bring anything helpful to the discussions that might not be there if objectors deal only with a reporter? Please be honest.

Kristina Woolnough: No—nothing.

Mrs Milne: No.

Alison Bourne: No.

Michael McMahon: Did MSPs bring an interest in the subject, which—

Kristina Woolnough: No—they had no interest whatever in the subject.

Alison Bourne: Quite the contrary, really.

Kristina Woolnough: The conversations among women MSPs in the toilets were about how boring the process was and what a waste of everybody’s lives it was. They were not interested in the process or the procedure.

Alison Bourne: I have to say that, from the outset, most of the objectors pinned their hopes on the committee. The objectors had hoped that MSPs, as elected representatives, would be genuinely interested in the problems that were
associated with the Edinburgh Tram (Line One) Bill, but it quickly became apparent that, because of the number of objections and the time pressures, the committee was in a hurry to get through the bill as quickly as possible.

**Kristina Woolnough:** Margaret Smith MSP made an important point to us.

**Alison Bourne:** She is my MSP.

**Kristina Woolnough:** Margaret Smith said that, because none of the MSPs who were on the committee represent the area that would be affected, they had no democratic interest, as it were, in responding to voters.

**Michael McMahon:** Two questions arise from that. First, do you think that that might have been a good thing because the MSPs could consider the matter dispassionately through having no vested interest? Secondly, if in the future MSPs are not involved in the deliberations on objections and objections are instead handled by a reporter, will that be an advantage? Would you have more confidence in talking to someone who has technical expertise?

**Kristina Woolnough:** The MSPs should have taken on board all the evidence. There was a lot of evidence and, if I was an MSP, I would have been anxious about making a decision when I did not know the beginning, the middle and the end of all the arguments. I think that you are suggesting that a reporter will have that knowledge, unlike MSPs. However, objectors will not have a representative who hears all the evidence on their behalf and then makes a representation, so there is an issue of accountability and information.

Your first question was about MSPs taking a dispassionate view. To be fair, it was hard going for everyone because the subject was technical and there was a lot of information. Perhaps the experts enjoyed talking endlessly about trams, noise, sound and vibration, but I do not think that anybody else did. As Alison Bourne said, we had hoped that the MSPs would listen to the people and be robust in getting answers to our questions, but that did not happen. Our questions are still unanswered.

The key point is that we feel that the process was party political. The delivery of the tram project in Edinburgh had the support of all the parties at council level, which was pretty much reflected in front of the committee. We felt that it was a done deal because it was a politically motivated project that already had party-political endorsement.

**Michael McMahon:** I take on board what you say: you think that the involvement of MSPs did not bring anything beneficial to the process. That is why we are trying to change it, so there is no real conflict. I am just trying to find out your perceptions of the problems.

If the process were changed to involve a reporter, would you have more confidence in it? Do you think that you would have greater opportunity to argue your case if you were dealing with an official?

**Kristina Woolnough:** It is difficult to say. Thinking back to my involvement with the congestion-charging inquiry in Edinburgh, I remember that the council appointed three reporters and provided the remits for them. A reporter is given a brief only to examine detail—what use is it if they are not allowed to examine the principle of a scheme? There are also problems with the reporters who are appointed by the Scottish Executive. With regard to the tram proposal in Edinburgh, we were perfectly aware—because Edinburgh is quite a small place—that the high-up people in the Scottish Executive’s Enterprise, Transport and Lifelong Learning Department were desperate to deliver the tram. We did not feel that there was impartiality at any level. There was a desire to have the scheme in principle, but there were no exit points at any time.

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**Tina Woolnough:** I have explained previously that, in America, there are expert panels that scrutinise public projects for their public good—almost on a pro bono basis—which I think is a good idea. A panel of experts from, say, the Institution of Civil Engineers Scotland could scrutinise a scheme from its outset to ensure that the sifting process is done in accordance with Scottish transport appraisal guidance—which was not the case with the tramline 1 project—and that the funding is in place to deliver the entirety of the scheme. If that does not happen, you will end up with the situation that the tramline 1 project is in: basically, the project has disintegrated into one small section of line for which there are no supporting data. The big issues that caused the difficulties would have been identified by independent experts well before the objectors ever got their hands on that sort of information, which would have meant that there would have been a chance to fix those problems at an early stage.
States of America involves professionals giving their time as volunteers—they see it as a way of giving something back, as it were. Because they are not being paid, there are no issues of client loyalty and so on. I would have liked paragraph 50 of the policy memorandum to have included an obligation on the promoter to produce a statement about the contentious issues. Right up front, there should be recognition by the promoter of the problems. We experienced a welter of spin and, as I said, the main issue that we had with the project—which was, basically, the need for it to serve the front door of the Western general hospital—and the issues relating to how the project would fit into the space that the promoter was planning to put it in are still unresolved. However, if there were right from the outset a list of key contentious issues, which MSPs could also see, the promoter would have to admit that there were problems and it would be possible to show whether the points had been answered by the promoter. The promoter has never admitted that there are any problems with the tramline 1 proposal.

**Alison Bourne:** I can think of nothing that the private bill process did to answer any of my concerns. I have more questions today than I had when I went to the first public consultation meeting.

**Michael McMahon:** I do not think that we are at odds with the MSPs who served on the committees that dealt with the Edinburgh tram projects, which is why we are implementing this change.

**Alison Bourne:** It is not a personal thing.

**Michael McMahon:** I totally understand that.

**Alison Bourne:** Given that we were talking about local MSPs serving on committees, I should say that the only time Margaret Smith, my local MSP, was able to officially put her views to the committee was during the final stage debate. That is ridiculous. She has told me that the issue of access to the Western general hospital is far and away the number 1 concern in her constituency. I would hope that a reporter would be in a position to listen to local MSPs so that the public would have the opportunity to raise concerns by that route.

14:15

**Michael McMahon:** That is the important thing. People identified the fact that there were problems with the private bill system, so it was suggested that a new approach is required. First, we want to know whether you believe that the new system will be an improvement on the system that you experienced. Secondly, in what ways will you feel more confident about consultation and people’s ability to object under the new system, compared with what you experienced?

**Alison Bourne:** Unless there is an independent and on-going peer review from the start, there will be the same problems as with tramline 1. Major issues will not be addressed early so it will, by the time a bill is introduced, be too late to make the necessary decisions. Unless something is done to address that, the problems will be the same. If it was assumed that there were no big fundamental flaws with a proposal, it would reach the parliamentary bill stage and an inquiry would be undertaken by a reporter—I would have a lot more confidence in a reporter’s understanding the technical issues.

I heard Jackie Baillie give evidence to the committee on 5 September and was surprised to hear her say that the tram route alternatives for serving the Western general hospital in Edinburgh were quickly discounted due to gradient. However, not one of the alternative alignments for serving the Western general had a gradient issue. There was a gradient consideration in respect of two of the alignments but, because the promoter admitted that it did not actually consider any alignment other than its preferred one in any great detail, the promoter could not say whether or not gradient would have been a showstopper.

I was also disappointed to hear Jackie Baillie say that the decision on the Western general was taken at an initial stage, which implied to me that it had been decided at the preliminary stage of the Edinburgh Tram (Line One) Bill that changing the alignment to serve the hospital was not a goer. We had to submit a mountain of evidence at the consideration stage, which I suppose was purely to show that the Edinburgh Tram (Line One) Bill Committee had somehow ticked the right box and listened to the public’s concerns. It was already too late for that, however.

**Kristina Woolnough:** The key argument that we can make is that, whatever process is devised for MSPs and for reporters, the public must be meaningfully involved. That requires that whatever input they make will have a clear outcome. People might not have their way, but there must be acknowledgement of their input. In the tramline 1 process, there was not.

The policy memorandum for the Transport and Works (Scotland) Bill says that the promoters’ proposals should be “fully detailed and feasible” and that “there should be no scope for any substantive amendment”. There is therefore not much point in public participation, which runs contrary to the public’s continuing to be involved. If there are not going to
be any changes, there is no point in people being involved. As Alison Bourne said, at the pre-inquiry stage we would need a monitor—someone watching over the so-called consultations and meetings between the promoter and potential objectors. Someone is needed to check independently that that is done properly. Promoters, whoever they are, will say that they have done everything well and successfully. “Look,” a promoter will say, “we’ve had all these meetings and sent out this questionnaire,” but that does not mean that things were done well and it does not mean that there was a measurable outcome, if I may use that favourite phrase. There needs to be some sort of monitoring before the inquiry stage, and it must be really robust. Every point that a member of the public raises has to receive a proper answer.

Alison Bourne: That does not just go for members of the public. In the case of the Edinburgh Tram (Line One) Bill, TIE Ltd submitted a list of bodies that it had apparently consulted, including Lothian Buses plc and NHS Lothian. Those bodies later testified to the bill committee that they had not been consulted at all, and that they had been told by TIE where the tram would run. They were not asked for an opinion. TIE was able to tick the box and say that it had consulted such organisations despite their saying that they had not been consulted, but had simply been told what was happening. That becomes important when we consider who the organisations were. Lothian Buses was not asked for a reaction to the tram scheme at the consultation stage, and was not asked what changes to bus services it would be prepared to make so that the tram could be a success. However, in its Scottish transport appraisal guidance document, TIE had made lots of assumptions about what bus services would change. TIE’s consultants were the people who said, “We anticipate that Lothian Buses will remove 47 per cent of buses from Leith Walk,” but Lothian Buses itself had not said that it would.

Michael McMahon: So, from your point of view, the important thing is that local communities should feel confident that they are being listened to.

Alison Bourne: Yes, but it should be the whole community that is listened to—not just people like us, but the big people who could severely impact on the project. If Lothian Buses does not withdraw its services, where will the tram get its passengers from? That seems to be a fundamental question. Lothian Buses should have been allowed to comment on it right at the start.

Michael McMahon: I am not sure that we should go back over evidence that has been taken previously.

Alison Bourne: No.

Michael McMahon: You have experience of the old system. Do you have more confidence in the proposed new system? What caveats should we know about in terms of consultation? Will you tell us your concerns so that we can ensure that they are built into the new bill?

Alison Bourne: My first concern is that there should be independent scrutiny from a very early stage, so that everything is carried out properly and thoroughly, following Scottish transport appraisal guidance. An independent person should be able to say, “Let me see your sitting tables. Let me see the criteria. Did you use the five national criteria? Did you weight them? Why did you weight them? Why didn’t you use those criteria?” That person should be able to say to the promoter, “No. I’m not happy that this has been done in accordance with the guidance. You need to go back and do it again.”

As an ordinary member of the public I would be concerned about the timescale in giving evidence to a reporter. One of the primary objectives of the bill is to speed up the process, but our experience was that the volume of work in putting evidence together was a real problem. It was a particular problem for me, because I was covering the issues to do with the Western general hospital. I could not possibly have put that evidence together within a few days if it had been required for a reporter.

After a thorough and detailed assessment of the bill, a reporter may have reservations about it, but I am concerned that MSPs would be able to override the reporter. Mr Ewing has spoken previously about dualling the A9. I can absolutely understand why MSPs want projects to be delivered, but I would have serious concerns if that were done at the expense of discounting what a technically qualified expert reporter had said.

Kristina Woolnough: The hurry is a matter for concern. You want fast decisions, but speed is not necessarily a good thing. The decisions have to be right; it does not matter how long they take as long as they are right. If the decisions are right, the public will feel confident in the system. Hurry for the sake of hurry seems to be ridiculous.

My area of expertise, as a member of the public, was the environmental impact assessment. I would have concerns about a lack of peer reviews of that. European legislation on EIAs is quite robust now, but my concern is that there will be no independent scrutiny and no reviews that might say, “Actually, this isn’t good enough.” The EIA for tramline 1 missed out a human amenity, but it was a requirement that that be included. The EIA had only to be adequate. Is that what you will be looking for in the bill? Is adequate good enough?
Mrs Milne: The bill as drafted will not give frontagers—which is what we all were—the right to be heard in an inquiry. I understand that that is the position in England, as well. However, frontagers generally are heard, and it should be enshrined in legislation that they have a right to be heard. Often, frontagers are worse affected than people from whom land is to be taken. If you are taking land from a big estate, the person might not be very badly affected and will get compensation. By everybody’s admission, the compensation for frontagers is pretty poor, yet they are the people who are genuinely badly affected by such projects.

A reporter would be easier in some ways. Preparing a week’s evidence, for example, means that one does not have to keep on going back over the evidence. One of the problems with the previous system was that we kept having to review the evidence, which we had not looked at for six months. One might speak to the committee then go away for another four weeks; by the time we came back we had forgotten it all. Also, people have work commitments and cannot attend all the hearings. If it all took place in a week and one was committed enough, one could take a week’s holiday, go to the reporter and make one’s points. There are attractions in the idea of there being a reporter, provided that people are given adequate time to prepare. It should be recognised that, for members of the public, that is what they are going to be doing on their weekends and evenings. Given the volume of information we are given, that is quite important. I agree that there is room for some kind of peer review of the evidence before it goes to the reporter. Both my co-objectives have made valid points about provisions that appeared to be unsatisfactory.

Kristina Woolnough: I was anxious about the definition of “nationally significant” because I feel strongly that there should be transparent and clear criteria for that. It should be possible early in a project to say why it will be nationally significant and to produce the evidence for that—ditto for the environmental impact. Many transport projects have severe environmental impacts. A proper loss-gain assessment should be set out in black and white so that we can say, “We’re paying a price for that but it’s worth it,” or, “That’s too great a price environmentally.” However, if one is promoting a transport scheme that is supported by Government policy, there can be an essential contradiction in that environmental damage may also run contrary to Government policy. We need to consider projects head on.

Mike Rumbles (West Aberdeenshire and Kincardine) (LD): From your evidence, it is clear that you are not happy with the private bills system. I find it fascinating that Alison Bourne says in her submission that her main concern regarding the private bills process is that it does not ensure accountability. I find that curious because, according to other evidence we have received and in my reading of the bill, the bill would take away accountability. The question is whether and to what extent other factors would outweigh that. I think that there would be such other factors, but your main concern is that the current system does not ensure accountability. Surely the proposed system would ensure less accountability because, if a reporter conducts an inquiry, there will be nothing to stop the minister—he or she is all-powerful in such cases—ignoring the reporter.

Alison Bourne: The minister will become accountable.

Mike Rumbles: To whom?

Alison Bourne: To the public. If a minister went against the findings of a reporter, with all the reporter’s technical expertise and knowledge, that minister would become accountable to the public for the eventual outcome of the scheme. Odell Milne made the point that we were surprised that the final stage report went into so little detail. It did not deal with people’s objections or with the major issues that we had. A reporter would do that.

Mike Rumbles: I bring you back to the word “accountability”. I do not want to go over the same ground as Michael McMahon, but I am trying to focus just on accountability.

Alison Bourne: A reporter will make the whole process more transparent. The nature of the process is that the reporter will ask questions and we will answer them. That is not like a private bill committee meeting, in which one depends on a particular question to be asked in order that one can submit one’s evidence. One will be able to submit whatever evidence one wants to a reporter and he will base his recommendations on all the evidence. If a minister overrules what the reporter has said after consideration of all the evidence, the minister must assume responsibility for anything that happens after that.

Kristina Woolnough: I am slightly with Mike Rumbles on the accountability issue. It depends on the reporter. The difficulty is that there is no guarantee that anybody will get the decision they want. In terms of accountability, it is about who has access to the information, who has seen the process through from beginning to end, and who has observed, listened and taken the information on board.

Our experience seems to have been different from that of the convener of the Edinburgh Tram (Line One) Bill Committee. The information was put in front of the MSPs, but we could do nothing about what they did with it or about what further questions they might ask. However, we had the strong sense that because of the wealth of...
information from objectors—there were piles of it—the clerks did most of the work. We got the feeling that the clerks rather than the MSPs had all the information in front of them. What is the difference between clerks having all the information and a reporter having it? Perhaps it would be a good idea to have more than one reporter. Again, it would depend on the remit that MSPs give a reporter. If a committee gave a clear brief to the reporter, it would be accountable for the subsequent report and for what was done with it.

14:30

Mike Rumbles: The point that I am trying to focus on is strictly about accountability, because that is the issue that you raised. Admittedly, the MSPs on private bill committees are not the MSPs for the localities that are affected by the bills—to ensure that no bias is shown, local MSPs are not allowed to be members of such committees—but it is the case that there are public representatives on private bill committees and the bill comes to us all in Parliament. Margaret Smith was able to get up in the chamber and challenge the bill. That is what accountability is, as far as I can see. However, under the new procedure that the bill will bring in, that accountability will be removed.

Kristina Woolnough: I agree. There is no doubt you would lose control of the process, to a degree—at any rate, you would lose control of the flow of information. However, the advantage is that you would gain about 260 MSP hours a year. What is this bill for? It seems to me that it is about reducing the workload for MSPs, but I am not sure that the outcome for the public would be any different. We have not tried any other way.

Accountability is an issue for MSPs. As a member of the public, I must say that we rarely see a politician being held accountable for something or admitting that they are accountable for something. I think that you are describing a wonderful situation in which MSPs are truly accountable for their decisions and put their hands up to say, “Yes, it was me.” That is a nice picture, but it is not the reality.

Alison Bourne: Relevant examples from the tramline 1 process are the Western general hospital and the funding for the project. The trouble with the private bill process is that witnesses rely on the committee asking them questions to get relevant points out. I submitted a 64-page witness statement, with 90 supporting documents, to the Edinburgh Tram (Line One) Bill Committee. I sat through hours of examination and cross-examination of the promoter and other objector groups. However, when it was my turn to be questioned, the committee members did not ask me one question on the Western general aspect. I realised then that they were not going to ask me questions because they did not want to give me a platform that would make them responsible for the recommendation that they were going to make.

It was the same with the funding. The objectors knew in 2003 about the funding shortfall for tramline 1. We e-mailed every councillor and said, “Do you realise that this tram scheme is going to be more than £200 million short?” They all voted for it anyway. We could see from TIE’s background papers, as could the Scottish Executive, that there would be that shortfall. The Executive knew, so why did the public not know? To this day, having gone through all the private bill process, with all those MSPs scrutinising the bill, we are still left with a funding shortfall that nobody knows how to meet.

At what point does somebody—I hope that it will be a reporter—take a grip of a project and say, “We have a major problem here that may affect whether this project is delivered or not. We really need to get some answers to this question”? That is not happening, which is why people such as me become so exasperated at the number of schemes that we see being promised. Issues such as funding are not addressed early on and are allowed to slide, and we end up with—what?

Kristina Woolnough: Is it possible to have a hybrid system? We are talking about accountability for information and decisions. Does it matter to MSPs whether a clerk or a reporter sifts the evidence and information and pulls out the key points? I am not sure that it should matter. However, what is done with the sifted information is important. Is it possible to have a system in which a panel of MSPs looks at what the reporter determines are the crucial issues and then takes evidence from whomsoever it sees fit? Is it possible to have a two-tier approach before going to a full parliamentary debate?

Mike Rumbles: What we are taking evidence on is a bill produced by the Scottish Executive to change the system that you experienced. I am trying to focus on accountability, and I will ask a particular question to tease out the issue some more.

The bill proposes a system in which a report goes to the minister, who can either accept or reject a plan. Let us say that they reject it. In that case, they are accountable to Parliament, and through that to the people, only if that plan is of national importance. If the plan is not of national importance, they do not have to go anywhere near Parliament. Even with an issue of national importance, they have only to lodge a statutory instrument that cannot be amended. As your public representatives, we can say only yea or nay—we cannot change that instrument.
That is the proposal and what we are taking evidence on. I do not want any misunderstanding. Are you saying that your main concern is that the current system does not ensure accountability? To me, it seems that the bill will make the system less accountable.

Kristina Woolnough: We are not here to support the bill. As I understand it, we were invited to make contributions. I am not expert enough to say that the bill is watertight, although clearly it is not. In a way, with what you are describing, the system becomes more of a fudge and it is less clear who is accountable. At least we know that we sat in front of a committee of MSPs and tried to put our evidence to them. What they and their clerks did with it is a matter for them, but we know who they were. If reporters or another level of civil service were introduced, what would go on behind the scenes?

Mrs Milne: I do not think that accountability is a major problem forobjectors; it is more your problem. The objectors need to have confidence in the forum in which they are heard. If the minister makes a decision that is completely at variance with what is placed before him, he will have to be answerable. Ministers will have to put a plan of national importance before Parliament, and you will be able to make a decision on that. There is nothing to say that you cannot amend the bill so that the minister has to put a plan before you if he makes a decision that is at variance with any aspect of the recommendation.

From the objectors' point of view, the important point is that they should feel that they have been heard and that their views have been taken into account in a report fairly and squarely in a quasi-judicial situation. That is what the whole system is supposed to be about. The bill committees did not perhaps act quasi-judicially. We have a lot of confidence in other forums that are not accountable to the Parliament. We go to courts all the time. We need to have confidence in the forum that we speak to.

Alison Bourne: We are pinning our hopes on the fact that a reporter would not have a political agenda to follow or electoral promises to deliver. We imagine a reporter as a purely technical expert who examines evidence with proper independence and makes recommendations based on it.

Mike Rumbles: But the reporter reports to the minister.

Alison Bourne: Yes, but the report comes to ministers and MSPs.

Kristina Woolnough: I do not have that confidence. The idea of independent peer reviews at various stages was mentioned, and that is because people do not have confidence. Everybody says that everybody is political.

Paul Martin (Glasgow Springburn) (Lab): One issue that you have raised repeatedly follows on from the last point and is a concern about political interests. Could you be more specific? It is quite a—

Alison Bourne: You are opening up a floodgate there.

Paul Martin: It is quite a serious allegation to say that—

Alison Bourne: We felt right from the start—

The Convener: Could you let Mr Martin finish his question?

Paul Martin: It is a serious allegation to make that the Edinburgh Tram (Line One) Bill Committee’s interrogation and conclusions all had some political background or reasons. I do not know whether you would make the same allegation about this committee’s questioning today.

Alison Bourne: My comment was aimed at the whole process from the consultation period onwards. From an early stage, we were aware that there was massive political will behind the tram scheme. When we spoke to the council about the need for the scheme to serve the Western general hospital, we had discovered that TIE had failed to identify an eminently viable route to serve the hospital. We took that proposal to the full council, but the transport convener said that the bill had to be lodged on Christmas eve and that the council could not afford a delay. Why not? Serving the hospital was an important issue, but we were told that the council could not afford a delay. That was because the scheme was politically driven—the council wanted to deliver the scheme before the elections in May, which is why the financial proposals were voted through without any questions. The issue was not just the private bill committee; it was the whole process. The scheme had overwhelming support from all political parties—it was politically driven. I pointed out fundamental flaws with the scheme but, because everybody supported it, nobody addressed them and the flaws still exist.

Kristina Woolnough: There is a misunderstanding. We are not saying that each member of the committee was acting politically; we are saying that there was massive political will to deliver the project. In a way, that will to deliver the scheme appeared to weaken the committee’s role slightly—I would not say that it was redundant. The effects of that political will were evident in the committee. The members were interested in us as human beings—they were good with us and helped us through a difficult process—but we felt a flatness in that, whatever they did or we said, it did not make any difference.
Alison Bourne: I will refer again to Jackie Baillie’s comments to this committee on the decision on whether the scheme should serve the Western general. She said that the alternative routes were discounted because of the gradients. However, she went on to state:

“The process allowed us to determine whether the closer examination of alternative routes, beyond an initial sift, would have any benefit and we felt that doing so would have meant lodging an amendment to the bill. That would have meant reopening our consideration of the bill, which would have been quite difficult to do and would have taken us back almost to the start of the process.”—[Official Report, Local Government and Transport Committee, 5 September 2006; c 3913.]

Because the committee had a timetable, the issue was not about getting the project right.

Paul Martin: Do you accept that similar timetables would be attached to a reporter’s inquiry? The reporter would not allow the process to go on for the next three years or as long as it took; they would have a timetable, too. Do you also accept that communities want a timetable, too?

Alison Bourne: Yes, but if there was an ongoing peer review from the start, big issues would be resolved way before the reporter process started. A reporter would have been able to consider the proposals to serve the Western general once the public, through the consultation, expressed a desire for the hospital to be served—which is what happened. A reporter could have considered that.

Paul Martin: Can I just finish the point about political input? You have no proof whatever—

Alison Bourne: That is not what I am suggesting.

Paul Martin: You have no written proof, such as a press release by a member of the private bill committee, that any member was pressurised by a business manager. You say that it seemed as though there was political persuasion or pressure, but you have no proof of that.

Alison Bourne: I am suggesting not that the committee members were reacting to direct political pressure but that the whole project was politically motivated because of the will to deliver the project among all political parties. That is what I meant.

Kristina Woolnough: One key point is that the process became more important than the project. The hurry with the process and the timescale meant that the committee could not divert its attention. As I said in my submission, there were no exit points, but we were not told that. The member suggested that MSPs act independently when they are on private bill committees. I acknowledge that that is the intention but, to members of the public, politicians are party political—end of story. They may not open their mouths and follow a party line, but they are party politicians. On the Edinburgh Tram (Line One) Bill Committee, there were two Labour MSPs, one Scottish National Party MSP and one Conservative MSP. There was a spread, but the members represented their parties, all of which had voted early on in support of the tram scheme.

Paul Martin: I turn to the issue of the independence of reporters. You have raised repeatedly the technical expertise of reporters. Will you elaborate on that, because my understanding is different?

14:45

Kristina Woolnough: I do not know enough about reporters, but I know enough about planning reporters, who sometimes have to deal with transport projects. The reporters who dealt with the congestion charging scheme were an architect and representatives of two other professions. Reporters come from diverse backgrounds and there is no guarantee that they will be technical experts. If the process is more like a planning inquiry and expert witnesses give evidence for and against the proposal, the arguments are heard.

Paul Martin: Should it be the reporter’s role to interrogate and to gather evidence from witnesses on the technical expertise that is available? No disrespect to reporters, but very few of them will be environmental experts, transport experts and experts in all the areas to which the process relates. Surely the reporter’s role is to gather evidence, which is the same as a committee’s role.

Kristina Woolnough: Yes, but we think that there should be a peer review early in the process, before a bill is drafted. We need another system that does not involve reporters or MSPs and that makes provision for robust peer reviews. We should identify problems early and get them sorted out. If we do that, we will end up with good projects. Early on, before a lot of public money has been wasted on getting nowhere, people should have an opportunity to say, “This is a good thing. Let’s go for it,” or, “This is not a good thing.” I am talking about the general good rather than individual objections. As I have already said, we need to demonstrate public benefit. We need criteria for proving national interest and significance. Those criteria are missing.

Paul Martin: Some years ago, a road was built in the centre of my constituency of Springburn. An inquiry was held, but I will never agree with its outcome, regardless of how many technical experts were involved and how independent the reporter was—even if the reporter was
independently appointed by the local community. Do you expect ever to get to the stage of being able to say that you are very happy with the process, although it did not have the outcome that you wanted?

Mrs Milne: We would have liked to see a report that responded to the evidence bit by bit, weighed it up and gave an answer. If the report had said, “We have considered all the pieces of evidence and reached the following conclusions,” I would have accepted that there had been a quasi-judicial review of the Edinburgh Tram (Line One) Bill. However, the report was very short and provided no answers to many of the questions. I am not saying for one minute that the committee did not discuss and consider all the evidence—I am sure that it did before making its decision. However, not only was justice not done, it was not seen to be done. In the report that we received, we did not see the basis on which the committee made its decision.

Alison Bourne: The situation is not helped by the fact that the private bill procedure requires objectors to show that the bill will have a direct adverse effect on them. People have to be directly affected, because so much is going on all the time and people lead busy lives. Plans for big transport projects should be flagged up in key statutory ways before they come out of the sky. Transport projects should be flagged up to the public so that they wake up. It takes the public about five years to wake up, because so much is going on all the time and people lead busy lives. Plans for big transport projects should be flagged up in key statutory ways before they come out of the sky and become, for example, a tram project with an alignment that is already chosen.

Kristina Woolnough: I am not directly affected by the tram scheme. I gave evidence as a community representative. It would not have mattered if there had been a public inquiry or some other process. As Odell Milne said, the point is that the process should be seen to be doing what is necessary, that people should be seen to be being heard and that answers should be found. That is what the process should deliver. People may not like the outcome, but they should at least feel that it was worth their taking part. We discussed why we are here today and why we are reliving the Edinburgh Tram (Line One) Bill experience. We are here because we were dissatisfied with the process. Any process that leaves us with unanswered questions is a bad process.

The committee is concentrating on whether reporters or MSPs should have power in the process, and we are caught in the crossfire. The issue for the public is whether they were properly heard and whether proper answers were given to their questions. If not, the process was faulty. We want any bill to ensure that people are given proper, respectful answers to the points that they make. We are here because we are still angry about the process, because it left us in no better position after three years than we were in at the beginning. Nothing changed and our arguments did not change.

David McLetchie (Edinburgh Pentlands) (Con): I declare an interest as a resident of Blackhall and a recipient of one of Tina Woolnough’s many newsletters, which are very good, I have to say. I have listened to the evidence and it seems to me that part of the problem is that you did not feel that there was proper public consultation about the big prior question of whether Edinburgh should have a tram system at all.

Kristina Woolnough: And where it should go.

David McLetchie: Perhaps that is the second question. I want to try to separate out the two elements. There was obviously the big transport policy question of whether Edinburgh should have a tram system at all—regardless of whether it would be line 1, line 2, composite versions thereof, or line 3, which never got off the ground. You feel that that question was answered by the politicians beforehand, but the same thing might happen if we have an inquiry process as opposed to a private bill process. People thought that the private bill procedure was meant to debate the big question as well as all the subsidiary questions of where a line might go, what the appropriate compensation packages might be and what to do about noise and vibration. If I understand your evidence, you are saying that in order to improve the level of public satisfaction, we have to be sure that there are processes to deal with the big questions before we get to the subsidiary ones.

Kristina Woolnough: I agree. Any big transport project should be in local plans and structure plans, which should be flagged up to the public so that they wake up. It takes the public about five years to wake up to anything unless they are directly affected, because so much is going on all the time and people lead busy lives. Plans for big transport projects should be flagged up in key statutory ways before they come out of the sky and become, for example, a tram project with an alignment that is already chosen.

There should be room for manoeuvre. The grant allocation was £375 million for the tram projects. Most people, including the tram promoter, would agree that there are cheaper ways of providing mass transit operations than there were when the tram bill was lodged and the scheme was devised. There is no flexibility to consider better options later on. Sorry, I am digressing again.
**David McLetchie:** In effect, such public projects are funded by the taxpayer so, in a sense, the issue of funding is subordinate at an inquiry, because if there is the political will for a project, somebody will always write the cheque to bring it into being. How much the cost has risen is a legitimate concern, but it cannot be the basis of an objection to the scheme if there is someone standing in the background who can make a political decision to give another £200 million to the Edinburgh trams or the airport rail link, as opposed to spending another £200 million on a new hospital or a few schools.

**Alison Bourne:** Yes, but so much seems to be done without proper consultation with the public. That relates to my point about political involvement. The decision was made that Edinburgh would have a tram scheme, but the public were not allowed to choose which line to have or say where they wanted the line to go.

There is no shadow of a doubt in my mind that the public would have chosen line 3. The new Royal infirmary is the key access problem in the city and there would be a real social benefit in running the tramline past the hospital. Line 3 would have gone along the city’s biggest bus corridor and past the university. It would have served the new biomedical park, the Craigmillar regeneration area and Fort Kinnaird and there would have been a park and ride at the end of the line. People could see the sense of that, but they were not asked which line they wanted.

The political decision was taken to promote the tramlines. The public looked at the scheme and asked what it was going to fix. That is why the level of support for it has plummeted. People like trams. None of us was born a tram objector—we like trams, too. The issue is with the tram scheme, what it is going to do and what the public are going to get for their money. If the line had gone to the Royal infirmary, Craigmillar and Cameron Toll, people would have been able to see the benefits of it.

**Kristina Woolnough:** What David McLetchie said is absolutely right. The big in-principle decision to have trams had already been taken, without any public involvement. Unfortunately, the decision was taken by all the political parties; we had no politicians to go to to see us through the process or speak for us. That was another problem and I do not know whether a reporter system would make any difference to it. The bill proposes lots of discussions before an inquiry and before an order is laid. However, someone needs to monitor that to check that it is done and someone needs to ask the big questions, such as whether the proposed project is the right thing. That brings us back to the point that the first question should be what the public benefit is. The benefit should not be political; it should be a demonstrable public benefit. That should be the number 1 criterion for any project.

**Alison Bourne:** Many of us feel quite aggrieved. From the beginning, we asked questions such as, “Why is the tram not servicing the hospital?” and, “Why is it not addressing any key areas where there is an access problem?” We did not back down but kept asking those questions and, because we never got the answers, did so ever more loudly. However, because we did that, we were labelled enemies of the tram scheme. We do not object to trams; we wanted to know what that tram project would do for the city with our money. For that, we were labelled subversives. It is ridiculous.

It is impossible to have an open consultation to ascertain exactly what the public want because, if somebody disagrees with what the promoter or the local councillor says, they are called an enemy of the scheme. That is not a good climate in which to make important decisions about transport projects. Ordinary people know where they need to go.

**David McLetchie:** Was there a good enough understanding of the interconnecting nature of the various parties in the project, such as the council and TIE, which is in effect a subsidiary of the council? You also mentioned Lothian Buses, which is wholly owned by the council. There are at least three players that, on the face of it, look as though they are all independent.

**Alison Bourne:** No.

**Kristina Woolnough:** We had the sense that it was a high-stakes game. We did not want to play any games; we just wanted questions to be answered. The people representing the other parties—TIE, the council and Lothian Buses—were paid to do so, but we were there as volunteers to get an answer. We are sitting here because we still have no answers.

The neighbours opposite me knew that their house was up against a former railway corridor. Had the tram gone to the Western general hospital, they would have understood the need for the scheme because they would have seen the public benefit. They are not nimbys—absolutely not—but it was impossible to get that point across and to get it addressed because the promoter wanted to pigeonhole us.

**Alison Bourne:** I also think that there is a certain amount of tension between the parties.

**Mrs Milne:** Sometimes, we found that if TIE wanted to do something, it could do it, but if it did not want to do something, it had to ask the council. The promoter was supposed to be the council, but all the way through it was “TIE this” and “TIE that”.

**Kristina Woolnough:** It is not—it is impossible for us to have public benefit. It is impossible to have an open consultation to ascertain exactly what the public want because, if somebody disagrees with what the promoter or the local councillor says, they are called an enemy of the scheme. That is not a good climate in which to make important decisions about transport projects. Ordinary people know where they need to go.
There was definitely confusion about those two entities.

**Alison Bourne:** From examining all the evidence on the Western general, I feel that there were people in the council who wanted the Western general to be served. I have with me the document on the sifting procedure for the hospital. It shows that somebody in the council told TIE that they were not happy that the Western general would not have a tram stop and instructed it to go back and examine all the other alignments in order to put a tram stop outside the hospital. TIE just did not do it; it is as simple as that. There is definitely tension somewhere between those organisations.

**Kristina Woolnough:** The question is how the bill will address those issues. It comes back to the same point: there must be impartial, transparent criteria that demonstrate public benefit. The STAG process should show up some of that, but serious peer review is needed. A promoter cannot be trusted to carry out an appraisal properly.

**David McLetchie:** I was going to ask about the STAG process, because it is mentioned in Alison Bourne’s further submission, which indicates that it was inadequate for the appraisal of alternatives.

15:00

**Alison Bourne:** To be fair to TIE, the guidance was being introduced as tramline 1 was progressing, but by the time TIE had prepared its STAG 1 document, it knew perfectly well that it needed to have assessed all the routes and gone through the route-sifting procedure according to the guidance. I think that Mr Halliday said to the committee a few weeks ago that that guidance states that projects must be assessed against five national criteria. Because of what I said in my submission, I have brought along a copy of the work package 1 document, which the objectors finally got hold of. That document shows that TIE knew about the requirement to assess alternative links against the five national criteria, but it chose to use different criteria. I have the details with me. The promoter applied the criteria of safety, environment, economy and technical difficulty, which are not the STAG criteria. The purpose of the guidance is to ensure that a promoter will identify a route that is most likely to deliver a range of benefits to the public. Following the guidance provides protection to the public.

**David McLetchie:** So you think that the responsibility for conducting such assessments and the oversight of projects of such a size should be removed from the promoter.

**Alison Bourne:** No. I am saying that the promoter should carry out an assessment and that somebody should be there—

**David McLetchie:** To evaluate.

**Alison Bourne:** I had to submit two freedom of information requests to obtain the document. Once I obtained it, I knew exactly what I was looking for—the sifting tables to find out about the criteria. That took me five minutes. Somebody who was conducting a peer review would have got hold of the document two and a half years before I did and would have asked within five minutes why the STAG criteria had not been used. The process would not have been long, complicated and expensive—it would have been easy-peasy. One simply needs to know where the information is and to find it.

We are talking about a major flaw in the tramline 1 project, especially given that the STAG criteria were used for tramlines 2 and 3. How can one prove that tramline 1 should have been the priority if all three lines have not been assessed in an identical way, using the same criteria? How can one demonstrate that tramline 1 was most likely to deliver the greatest benefits to members of the public for their money? A reporter could have spotted the problem in five minutes two and a half years before I did and could have said to TIE, "Why have you not used the STAG criteria? Go away and do the work again."

I have a strong hunch that if that had happened, there would have been plans for front-door stops at the Western general hospital and Edinburgh’s Telford College rather than for one for British Gas, with its 1,000 employees, and that a stop would have been planned a damn sight closer to Waverley station than on St Andrew Square. Spotting such things is easy for reporters. They know all about STAG—it is not an obscure area of expertise. A reporter could have sorted out the problem when changes could have been made to the alignment of tramline 1 and the public could have seen what problems would have been solved. The line could have served the Western general, the 21,000 students of Edinburgh’s Telford College and Waverley station directly. That is the difference that an on-going peer review could have made at an early stage.

**The Convener:** Colleagues have no more questions to ask, so I thank all three witnesses for giving evidence, which I am sure will be helpful.

I welcome Joanne Teal, who represents McGrigors solicitors. I remind members that in our discussion of the bill, I am happy to accept examples from bills that have been passed, but members should be careful in talking about bills that are in progress, because they are still being considered quasi-judicially. I ask members not to refer directly to the benefits or disadvantages of any public transport bill that is in progress.
I offer Joanne Teal the opportunity to give an introduction, after which we will have questions and answers.

Joanne Teal (McGrigors): I have represented a wide variety of objectors under the private bill process as it was and after its recent change. I broadly support many provisions in the bill and have more practical examples of how it could be improved. I hope to give a practical perspective.

Michael McMahon: Your submission says:

“there also requires to be a mechanism to incentivise applicants to negotiate out objections prior to the examination stage.”

Will you give examples of what you mean?

Joanne Teal: When TIE, for example, as a bill promoter considers a bill, it identifies people such as landowners who will be affected and serves notifications on them. Even without speaking to people, it is easy to know their main concerns— they need services and they want their employees to be able to go to and from work safely. Those are easy and practical issues to resolve, yet my experience of representing charities and companies that employ workers and of representing land and property owners is that they have not been approached about the practical issues that are on their agenda.

The promoter has no incentive to make such an approach. It lets the situation trickle on until the date looms on which the committee will meet. My impression is that the clerks then push the promoter hard to negotiate. The promoter does a lot to show that it sends letters, but it does not take concrete steps to address clients’ concerns, which could be easily resolved. People do not ask for unreasonable measures, but they cannot rely on a draft code of construction practice or the generic supporting documents as a basis for withdrawing objections—they want specific matters to be dealt with. The process provides no incentive for TIE or any other promoter to negotiate.

Michael McMahon: Would such negotiation speed up the system?

Joanne Teal: Very much so. I mentioned in my submission section 4 of the bill, which is on applications. It provides for the Scottish ministers to make rules about the steps that need to be taken as part of an application for an order and includes measures on the consultation that is to be undertaken, documentation and information. A qualitative threshold could be set so we could say, “Until you come to me with a package that shows that you have spoken to people and anticipated concerns that arise in common property-holding and employee situations, and until we think that you have undertaken a proper consultation and got the usual suspects and usual concerns out of the way, don’t bother.” That is front-loading and it is exactly what the previous witnesses spoke about. I support that approach.

Michael McMahon: By front-loading, do you mean steps taken before the process starts or before an application goes to a minister?

Joanne Teal: Both, for different aspects.

Michael McMahon: So if negotiations were not concluded by the time a reporter made recommendations, would that be a reason to hold back the process? Would negotiations have to be completed before recommendations were made?

Joanne Teal: Much of the negotiations could be carried out before the application is lodged. I accept that in some situations property owners might act unreasonably, which could result in the matter being referred to the reporter. However, my experience suggests that the vast majority of objections could be knocked out if there was a reasonable qualitative bar at the outset.

Another pertinent point is that, as a result of commonsense feedback from a variety of objectors, some of whom I acted for and some of whom represented themselves, the route of the tramline was changed through what could be described as a bill-within-a-bill process. That should not have happened at such a late stage. We had to take part in this fiction of representing our clients with regard to the original alignment and then, after the intended alignment was introduced, we had to go through the proper process of representation. If there had been a qualitative bar, that situation would not have arisen.

The Convener: Do you agree with the bill’s proposal that parliamentary approval should be required only for transport projects of national significance or do you think that, as a result, some significant regional transport projects would not be subject to the appropriate level of scrutiny?

Joanne Teal: In the bill, the phrase “Developments of national significance” is defined in a planning context and, as I am not a planning lawyer, I am not entirely sure what it means. However, I have some concerns about accountability. I agree with the earlier point that an accountability stage should be introduced to deal with cases in which, for example, the reporter’s recommendations are not accepted.

I must point out, though, that my perspective on the matter is geared to the front end of objections by individuals and companies. The accountability stage would come much later in the process and I have not had enough experience of that end to be of much help to the committee.

Ms Maureen Watt (North East Scotland) (SNP): You said that a lot of consultation could be carried out before the application is lodged.
Section 9(4) sets out a range of organisations whose objections to a project would trigger a public local inquiry. Is that list adequate or should it include other organisations?

Joanne Teal: I had a look at that list, which includes national park authorities, local authorities and landowners. The bulk of the people for whom I have acted fall into the third category, but I have also represented people who are not landowners but who institute planning inquiries or carry out vast consultations in communities on, for example, regeneration projects. Although they might not own land, they invest a lot of money in consulting communities and they have interests, which could of course include land ownership. However, they would not be able to trigger a public inquiry.

I understand the need to strike a balance between driving forward a project and taking into account private and community interests. However, looking again at the list, I note that the objectors I referred to would not be able to trigger a public local inquiry. That could in some cases lead to unfairness or, at the very least, dissatisfaction in a community.

Ms Watt: The previous witnesses said that people do not get involved in the drawing up of local plans unless a major development lands on their doorstep. How can we get communities and other interested bodies involved earlier?

Joanne Teal: With the tramline bills, there was an exercise that was called a consultation and the tramtime leaflets were produced, but they were more like advertising flyers. They did not amount to a proper consultation. There should be a bar at the beginning of the process so that, in order to make an application, the promoter has to trigger a proper, meaningful consultation. It should be possible for the promoter to be told, “No. Go away and do this part again, because you have not engaged with people properly.”

It is good to have meetings. I act for lots of local authorities and it is always difficult to engage people, but if one tries a variety of methods and considers what has worked before rather than just producing a flyer with the option for people to tick a box to say yes or no to the whole scheme, it is possible to get responses that are worth looking at.

15:15

Paul Martin: Would it help if members of the public could apply to an appeals process or a judicial process—or something between the two—and say, “We do not think that there has been a meaningful consultation”?

Joanne Teal: Yes. I suppose a provision could be introduced in the bill so that, unless a qualitative bar is passed, the promoter has to go back and do the consultation again. However, who would decide whether the bar had been passed? Would it be the minister, perhaps even when they were promoting their own bill, or would it be somebody impartial? It might be a good idea for the reporter to have that role earlier in the process.

It is important for the process to be seen to be impartial. If a member of the public is unhappy with the level of consultation, and the decision about the adequacy of the consultation is taken by someone who represents the promoter, they will not feel that the decision is impartial. However, there could be a role for the reporter earlier in the process.

Paul Martin: Does your company have any information on how such objections are dealt with in other countries?

Joanne Teal: I am sure that I could get that information, but my experience is of Scotland and, to some extent, of harbour developments in England and Wales.

I am intrigued by the drafting of section 9, which states:

“The Scottish Ministers may cause a public local inquiry to be held”

and goes on to say that, in certain circumstances, there will be a public local inquiry because certain categories of people request it. However, what happens if everything is negotiated out and there are no objectors left? In England, promoters work hard to negotiate out every last objection because, if they can do that, they are allowed to skip the inquiry. It might just be my reading of the bill, but I do not think that that situation has been dealt with. I looked at the Scottish Parliament information centre briefing, but I could not see what would happen in that scenario.

Tommy Sheridan (Glasgow) (Sol): My question is linked to the point that you just made. In your submission, you mention the idea of a mechanism to incentivise the negotiating out of objections, which you say is done in England. Will you give some examples? Is it the case that objections are genuinely negotiated rather than ignored or sidelined?

Joanne Teal: Unless a person feels that the promoter has addressed their concerns—for example, about access or safety issues—they will keep their objection in place and an inquiry will be triggered if the person is in one of the categories of people who are entitled to ask for a reporter. However, some parties could fall into a black hole because they do not own land and they are not a national park authority or a local authority. We might think that they have a valid claim to ask for
their concern to be heard, but they will not have the right to trigger an inquiry.

The incentive for the promoter is that, if they can negotiate and satisfy the objector’s concerns so that they withdraw their objection, there does not have to be a public inquiry. The incentive to negotiate could also be introduced at an earlier stage if the promoter could be knocked back from an application process because it could not demonstrate that it had properly engaged. The number of times I have had correspondence with a promoter that just repeats its last position or refers to a draft code of construction practice as if that is going to make me recommend to my clients that they should withdraw their objection. How could I possibly do that without my negligence insurance premiums going up massively?

There is no incentive for promoters to propose a proper, commonsense, sensible solution that will allow me to tell my client that they do not need to bother with the expense of a witness statement because we have a satisfactory solution to all the concerns that they have raised, and that we can withdraw the objection and enter into a binding legal agreement that satisfies my client that their workers can come and go safely, that they can still park nearby and that they do not have to get rid of their disabled parking spaces, for example. All those issues have come up before. It is not rocket science—the issues are not complicated—but there are no incentives.

Tommy Sheridan: Is there room in the bill to add an extra tier, so that if a promoter can show that they have already engaged in negotiations on objections before they submit plan B—assuming that plan A is the one that caused the original objections—plan B should be fast-tracked? I am trying to figure out how you would express that incentivisation in legal terms.

Joanne Teal: One way would be for a qualitative bar to be applied before the application process and the period for lodging objections. It would be about the quality of the discussions into which the promoter had entered and of the information that it had provided, such as whether traffic surveys were carried out to see how many people and cars go in and out of the area. All that must be front-loaded in the process. It would make the process less expensive for those individuals who find themselves embroiled in a private bill that they did not see coming, for example if the first they heard of it was when they received formal notification with the attached plan showing the plot where they work. That is not the best way of carrying out the process now.

Refusing to start the process before the engagement with people who will be affected has reached a certain standard is not a huge step. That is my main point about introducing a qualitative bar right at the start of the process—if the promoter does not meet that standard, it will not get past go. There could be other stages beyond that, especially if there is a concern about what would trigger an inquiry and who had the right to do so. The details of that are going to be in secondary legislation, so it is impossible to know right now whether the bill will do what it claims it will do.

Tommy Sheridan: My final question links to that and is about projects of national significance. You said that you are not a planning lawyer and that the bill is hedged in planning terms. Would there be a problem if politicians wanted a particular project to be of national significance or did not want it to be of national significance? Does the term “national significance” not have to be given a bit more legal weight and understanding so that everybody can interpret it?

Joanne Teal: Yes, because otherwise a lot of lawyers will make a lot of money out of it. The term will never be tied down and its meaning will always be up for grabs. I know that this has been discussed in the committee before. I agree that the term needs to be defined, otherwise I predict that there will be problems. However, I do not have any useful information to offer from my own experience.

David McLetchie: My question continues the discussion about incentivising to negotiate out objections. Do you accept that your argument starts from the premise that the objections are valid in the first place and that the objector requires to be compensated through some kind of agreement?

Joanne Teal: Yes.

David McLetchie: But if you incorporate into the system a prior requirement for negotiation, that assumes that there is an objective way of evaluating what is and is not a valid objection, which would not necessarily be accepted. What you regard as a valid objection I might think is a spurious one.

Joanne Teal: Yes. When you think about it in the abstract, you can think of lots of problems, but when you plug in a scenario, it does not seem so complicated in practice. It is probably one of the few things that seems less complicated in practice.

For example, somebody who owns a building or a pensions charity that wants to carry on operating from its site will have a list of obvious concerns, just like any other business that is trying to operate in an area where there is going to be severe disruption due to a big transport project. There could be a scenario in which an objector is unreasonable and is asking for far too much. However, if it could be demonstrated that the promoter had engaged with services, safety and
access topics at the beginning of the process and had asked for the relevant information—although there might be situations in which people are unco-operative—its time would have been well spent. Without that, there might need to be a bill within a bill, as the promoter might need to change the route halfway through consideration stage because simple questions were not asked at the beginning and the first that people heard about the project was notification of it landing on their doorstep.

In theory, there could be a difficult objector. However, in practice it is possible to make the process more objective and set down certain things that need to be looked at. There is a power in the bill to allow people to enter land to take samples for environmental purposes, for example. When I looked at that, I imagined a really helpful situation in which people entered an area and surveyed traffic or people's routes to and from work, for example. That would be really helpful in some busy hubs, for example Haymarket. Both tramlines will go through Haymarket, and it would have been helpful to have had that objective information to point to.

There are steps that can be taken to make the process work, and it is worth taking the time to look at those rather than letting it drag on and on, especially when there is a feeling that people are being asked to speak but are not being heard and there is no opportunity for things to change because a project is too far down the line.

**David McLetchie:** The general law has a compensation structure built into it in relation to the compulsory acquisition of land and land that is materially affected by developments. Given that that is the general law of the land that applies to all schemes, why should we put into the bill processes and steps that would make the process more expensive, because the promoter would have to satisfy everybody in advance and incentivise them? Some people would say that incentivising to negotiate out objections is basically buying people off on a statutory basis.

**Joanne Teal:** But hardly any money is ever exchanged—it is just about practical issues such as someone being told that they do not have to change their emergency procedures; that they can still use an exit at the back of their office; or that they can still use a bomb disposal chute, in the case of the Post Office. When compensation is mentioned, money issues immediately come to mind, and objectors are always confused by the complex arrangements surrounding compensation and blight issues. However, I am talking about more practical issues, which arise in cases in which there is no intention to sell land or in which people want to carry on with business as usual, to the extent that that is possible. Such people need to be given assurances. The bulk of the work that I have done has not been to do with the selling of land.

The private bill committee clerks do a sterling job producing lists of objectors and summarising the issues that are raised in objections. If one looks at the issues that objector groups feel strongly about, one finds that many of them are to do with what their surroundings will look like once the project has been completed. Someone who has paid for their site wants to be able to carry on working there or to ensure that it is not turned into a concrete roundabout. The issues that come up are not always about money; for example, a company might simply want to know what the promoter's landscaping provisions are.

When I have raised such concerns with the promoter, I have often been sent the text of a draft policy document that includes a flimsy statement of intent for the whole project, to the effect that the landscape will be reinstated whenever possible. Such statements do not provide a sufficient basis for me to say to a concerned client, "Don't worry, because the matter is addressed in this supporting document." I cannot do that, because the statements are not specific enough.

Even though the bill emphasises up-front resolution, in many cases there might still be compensation issues. However, I have not been involved in work on such matters; my background has been dealing with the practical issues that I mentioned in my written submission.

15:30

**The Convener:** That is all the questions that we have for you. Thank you for your evidence, which has been insightful.

We move on to our third panel, which comprises representatives of Network Rail. I welcome to the meeting Ron McAulay, who is the company's director for Scotland, Nigel Wunsch, who is the principal route planner, and Karen Gribben, who is a legal adviser.

I ask witnesses and members not to refer directly to the advantages, disadvantages or otherwise of specific aspects of the project that Network Rail is promoting in the private bill that is part of the way through its parliamentary consideration. Rather than engage in a debate on the pros and cons of particular aspects of that project, the Network Rail representatives should focus on the processes in the existing system and whether the bill will improve them.

I invite Ron McAulay to make some introductory remarks.

**Ron McAulay (Network Rail):** We welcome the proposed introduction of a mechanism that will
help to facilitate faster consideration of transport works and projects. However, we recognise—as I am sure the committee does—that any change to the existing system must ensure that processes are put in place to protect the operational interests of any affected parties, which should include sufficient consultation, a preserved right of objection to protect operational interests and, if appropriate, consideration by independent parties. I believe that the bill will do that.

We want to draw to the committee’s attention a key issue that we raised in our written submission, which relates to the proposal on statutory rights of access. We fully accept that, in principle, there is a need for people to be able to secure approval to enter land for preliminary investigations and that applications for such approval should not be constrained by a lengthy process. However, in the interests of safety and to ensure the operational reliability of the railway, it is unacceptable for Network Rail, as the statutory undertaker, to allow anyone to access an operational railway without our permission. It is essential that only people who are properly safety qualified can access an operational railway and that such access is made at a time and in a manner that does not introduce risk to the operation of the railway or to personnel. The accessing of operational railways by unqualified people is an unacceptable safety risk and would have to be considered in terms of some of the conditions in the bill.

The Convener: I presume that existing legislation would prohibit unqualified persons from accessing an operational railway and that this bill could not supersede United Kingdom health and safety legislation.

Ron McAulay: I hope that that would be the case, but the bill is quite specific about giving the promoter the right to access land. It is worth emphasising that the health and safety aspects of railways should overrule anything that would arise from the bill. The matter is of extreme concern to us.

The Convener: Effectively, you are arguing that if, for example, access were required to operational Network Rail property, that would not be obstructed but qualified railway personnel would be required to supervise the presence of non-qualified people.

Ron McAulay: Exactly. We would not try to hinder access, but we would not expect someone to turn up on a Monday morning and say, “We have an act that says that we can just walk in.”

Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP): That seems perfectly reasonable and I am sure that your point will be taken account of in the appropriate way.

I have three questions. The first relates to who would be the best promoter of a railway scheme; the second concerns clarification of the point that you made in your letter of 28 August about voluntary purchase schemes, which I did not fully understand; and the third relates to heritage railways.

First, without mentioning any project in particular, I should say that it occurred to me that a body such as TIE is, perhaps, not best placed to be a promoter of a railway scheme. As I understand it, Network Rail is the licensed operator of the railways, which means that you have the responsibility of ensuring that the changes that are made to the rail network in Scotland fit in with all your other obligations to ensure that the trains run on time. It seemed to me that fielding a body such as TIE for the task instead of Network Rail is a bit like having access to the Brazilian, Italian or French football teams and then deciding to put on Monaco or Andorra instead. I am not trying to butter you up—although I might be doing so—but I would like to know whether you think that it would make more sense to require Network Rail to be in charge of promoting a scheme, given that any scheme on the rail network will have ramifications—sometimes quite severe ones—for the rest of the network.

Ron McAulay: It is kind of you to compare us with the Brazilian, Italian and French football teams. I am not sure that the Italians are doing so well at the moment, but never mind.

The Convener: They are world champions.

Ron McAulay: Yes, but they only drew one all with Lithuania or somewhere like that.

Anyway, back to railways. There is no doubt that any project that impacts on the current rail network requires a huge amount of involvement on the part of the network owner and operator, which is, of course, Network Rail. We will be involved to some extent in all the projects that are going forward at the moment. There is an argument that it should be Network Rail that promotes the schemes from beginning to end. That is a possibility, but I would not have said that it would be a definite given. I am sure that Strathclyde partnership for transport and TIE are perfectly capable of promoting bills, providing that we have plenty of good dialogue to ensure that all the issues are addressed.

Fergus Ewing: I appreciate that, but would it not be possible for a geographically based body, such as the Highlands and Islands strategic transport partnership, the south-east Scotland transport partnership, another of the new regional transport partnerships or a local authority, to take a scheme up to a certain stage, representing the local area, its people and their aspirations, but
then to have the scheme come to you? Before it goes forward to the reporter—or whatever the procedure becomes—you could effectively become the statutory agent so that, at that early stage, all the timetabling problems and so on could be considered before the parliamentary process was reached. Otherwise, you could end up being asked whether the timetabling will work, for instance, and you would have to answer, “We can realistically predict that it may be a possibility.” If we want to avoid such situations, would it not be better if you could act as a statutory agent in cases in which schemes have come from a body that represents a strand of opinion or geographical area?

Ron McAulay: There will always be different ways of doing these things. Network Rail is an enthusiastic promoter of railway schemes and is keen to be involved in any proposals that will affect the network in the future, but it would be wrong of me to rule out the option of another organisation being the promoter. Some organisations have greater, or lesser, levels of expertise compared with Network Rail. Some councils will be well placed to kick off a process and then hand it over to another organisation. It would be wrong to say that we are the only organisation that could possibly promote bills or railway schemes, but we are very keen to promote those that result in the expansion of the railway, not just in Scotland but throughout Great Britain.

Fergus Ewing: You have statutory responsibility under railways legislation to deliver the instructions of the Executive to provide a new rail route from A to B. Is it correct to say that the Executive would instruct you to deliver?

Ron McAulay: There is a process that allows the Scottish Executive to specify its shopping list, if I can put it that way, over a particular regulatory control period. That is called a high-level output statement. The Scottish Executive could undoubtedly include in that statement something like “Deliver us a railway scheme that goes from wherever to wherever”; I will not say a scheme that goes “from A to B”, as one is already doing that.

Fergus Ewing: Perhaps we can ask the minister about that later.

I turn to your letter, which relates to the voluntary purchase scheme and section 26 of the bill. That section states that there will be powers requiring the voluntary purchase of properties that are not required for the delivery of a rail scheme, but

“which are, or may be, adversely affected”

by that scheme. You welcome that—that is fine, and I understand the point. However, I did not understand the part of your letter that says:

“However, we are concerned by any suggestion that there should be a link between a VPS approach, funding of such a VPS and schemes to be authorised under the new procedure generally.”

I am afraid that I did not understand what you were driving at there. I am sure that there is something very Machiavellian going on underneath. Could you make that plain for the simple mortals who are facing you?

Ron McAulay: I ask my colleague Karen Gribben to give you a clear explanation.

Karen Gribben (Network Rail): Thank you—I am being set up for the fall here. It will be simpler if I explain what we think a voluntary purchase scheme and an advance purchase scheme should do. If the committee will bear with me, I will repeat to some extent the evidence that we gave yesterday to the Airdrie-Bathgate Railway and Linked Improvements Bill Committee.

We do not think that a one-size-fits-all approach works in the context of major rail projects, with an initial premise that it will automatically be possible to confirm everyone who is affected. The interaction between the project and the people involved in it must be considered. Some of the issues do not come out until the detailed design stage, particularly when it comes to the voluntary purchase element. It is possible to tell which properties are directly affected by the project—certain things cannot be moved from in the overall outline design. In the VPS situation, mitigation measures will often be taken. It is a matter of working with the affected home owners or businesses to find measures to mitigate the situation. If it is not possible to find such measures, it then becomes a matter of acquisition, which involves going through a process of iteration to calculate and assess the monetary considerations.

That is what we were trying to get at. It is very oblique in the letter, unfortunately, but we are saying that it is not possible to assume automatically that, when you submit your statement of expenses, you will have a cast-iron view on where the VPS elements will go. It is a process of iteration, working with the affected home owners.

15:45

Fergus Ewing: Is your objection that any scheme might be stymied because insufficient financial provision has been made for the voluntary purchase of property?

Karen Gribben: That is a risk, because the VPS elements have not been fully identified.

Fergus Ewing: Can the risk not be catered for through a risk allowance of some sort?
Karen Gribben: Of course—there are many ways to address the problem. However, we would not want there to be any absolute determinations, with no room to revisit the situation. That would not be an appropriate way of dealing with the impact of a project.

Fergus Ewing: Thank you—I think that I understand a little, but not fully.

Karen Gribben: I apologise if the explanation was oblique.

Fergus Ewing: It would be helpful if you could give us some examples. It seems to me that this could be a serious issue that could stymie many projects. The price of a project could escalate because of the difficulties of ascertaining which properties would require voluntary purchase as opposed to compulsory purchase. I am not sure that I have sufficient grasp of this; perhaps other committee members do and I am a slow student. It would be helpful to have examples before we hear from the minister next week.

Ron McAulay: We would be happy to provide that information, and we will try to lay it out as clearly as possible.

Fergus Ewing: If there is time, convener, I would like to come back to a constituency matter later on.

The Convener: Okay. Does Mike Rumbles have a question?

Ms Watt: Fergus Ewing had another point.

The Convener: No—he is saving it for later.

Mike Rumbles: Section 21 of the bill says:

“No order is to be made under the Light Railways Act 1896”.

The committee has received written evidence from the Deeside Railway Company Ltd, which is in my constituency, saying that section 21 would cause the company real financial problems. It is a small company, like many other heritage railways across the country. I do not understand why that provision is in the bill; why do you think that it is?

Ron McAulay: I am not sure that I have an answer. To be honest, we have not considered the issue closely.

Mike Rumbles: Section 21 will affect the company.

Ron McAulay: I do not doubt that it will affect the company, but it will not affect us, which is probably why we have not considered the issue closely.

Mike Rumbles: Okay, thank you. Perhaps we can ask the minister about that when he comes, or even invite another witness to give us some information on the issue.

The Convener: I know that Fergus Ewing wanted to raise that issue, but in light of Network Rail’s response do you want to save it for the minister?

Fergus Ewing: I have been gazumped by Mr Rumbles—and, to use a Rumblesesque phrase, that is an utterly appalling position to be in.

Mike Rumbles: But you had two bites at the cherry.

Fergus Ewing: Mike Rumbles has raised the point and we will ask the minister about it next week.

David McLetchie: I want to revert to the point that Mr Ewing raised about voluntary purchase schemes—probably because I did not understand enough about the issue to start with.

I have a slight conceptual difficulty with the whole idea of a voluntary purchase scheme being in legislation. It seems to me that, if I am promoting a project and want to build a railway line or a bridge or whatever, it remains open to me at any time to go to any landowner and say, “I want to buy this,” or, “I want to buy that.” I think that the phrase used by a previous witness was “incentivising people to negotiate out objections”.

What is the big deal? Why cannot any promoter buy what it needs from someone who may or may not be affected by a project but who may be felt to have a pertinent interest? Why does the measure have to be in the law of the land?

Karen Gribben: Your position is broadly correct: people can indeed go and buy. Obviously, there are separate rules about the triggering of compensation, depending on whether a property is blighted. We can put to one side the properties that would be subject to compulsory purchase, but for other properties it would be open to you to offer to buy if you thought that that could lead to a benefit for the project.

Obviously, for a publicly funded project, you would have to be able to account for the reasons why you chose to do that and for the amount of compensation that you offered as part of the purchase process. To repeat the evidence that we gave yesterday on the Airdrie-Bathgate Railway and Linked Improvements Bill, although we consider that there are no voluntary purchase candidates, we will keep the situation under review, and if there were such candidates, we would operate under the code of compensation to ensure clarity of expectation and that how we would approach any purchase was understood. Does that system need to be enshrined in legislation? It works at the moment—people make voluntary purchases and private treaties.

David McLetchie: That is my point. Why are we discussing it? Why is it in the bill?
Karen Gribben: We do not see the need for specific powers.

Ron McAulay: Karen Gribben has covered the point. At the moment, we do not envisage the need for a VPS in our Airdrie to Bathgate project, so we have difficulty understanding why the provisions are in the bill.

David McLetchie: We are at one on that. We will ask the minister.

Mike Rumbles: Another one for the minister.

Ms Watt: Much of the bill is based on the current legislation for England and Wales, of which the witnesses will have had specific experience. Have they found that, under the Transport and Works Act 1992, developments are delivered more quickly and cheaply than is likely to happen in Scotland under the new procedure?

Ron McAulay: I confess that I have no personal experience of promoting a development under the TWA in England and Wales, and I do not think that my colleagues have either. My impression is that the TWA process can be rather lengthy, which would worry me. I think that if someone were to pull together the statistics on the time taken to put through a development under the TWA in England and Wales, they would find that it takes longer than the current process in Scotland.

That does not have to be a given. It is a case of ensuring that the Transport and Works (Scotland) Bill includes aspirational timescales for each stage. The bill includes such provisions; for example, it states that the minister must deal with something within six weeks. I would hope that an element of discipline was attached to those aspirational timetables to ensure that the process did not become terribly long. If it did, those affected by the project would be in a state of uncertainty for much longer.

Karen Gribben: It is difficult to compare the time that each project takes, because they are all incredibly specific. A lot of it comes down to how well the promoter prepares in advance, which is a fundamental issue that the bill seeks to address in front-loading the work to ensure clarity and transparency, and to how many properties are affected. A major infrastructure project in a built-up or congested area unfortunately takes time—as it should, because there has to be a full exposition of the issues and an opportunity for people to put their case. Many of the projects in recent years have involved heavily built-up or congested areas, so there have been a great number of objections to consider. That inevitably affects the time that the process takes.

Ms Watt: Is it possible that the process is used to delay a project because of other factors, for example if funding does not exist, and then gets the blame?

Ron McAulay: Any process has that risk, but I would hope that promoters would not attempt to hide behind such excuses. I would hope that if there were issues with the financing of a scheme, it would not appear in front of the Parliament in the first place. As part of the private bill procedure, we have to provide confirmation that funding is in place or that there is a will to fund the project. I would hope that something similar would apply in the Transport and Works (Scotland) Bill.

Paul Martin: I want to go back to front-loading and preparation. Most witnesses have said that they support that, but I suppose that organisations such as Network Rail would become more concerned when we get down to the detail. Would you be concerned about a fiercely bureaucratic process that required a number of boxes to be ticked and the spending of quite substantial funds that could have been spent after the project had been approved?

Ron McAulay: We listened to the evidence of Joanne Teal from McGrigors. In principle, I agree with her that many issues should be resolved up front. A great deal of effort should be put into consultation, to explain proposals to people before a bill is introduced. Joanne Teal spoke about a qualitative process, but I would like to see what such a process looked like. Qualitative processes can be subject to all sorts of different interpretations. Who would give those interpretations? Such issues would have to be addressed.

Not every project is the same. As Karen Gribben explained, in each case there are many different issues. Human beings take different approaches to resolving objections. In many cases, it may be impossible to resolve an objection because a person views it as a principle on which they are unwilling to move. Such issues worry me. If we had a bureaucratic process that insisted that boxes should be ticked to indicate that all objectors had gone away and were satisfied, that could be extremely difficult.

Paul Martin: Previous witnesses questioned the objectivity of the assessment process. Do you see that as a problem? They are concerned that any assessment that you carry out could be reconfigured or that someone could find a way of saying what they want in the final report, although that does not reflect the way in which the process was conducted.

Ron McAulay: There is no question but that two people can interpret the same thing in different ways. It is hugely important that in the consultation process the promoter stops and listens to what is being said to it. If what is being said is sensible...
and reasonable and there is an alternative way of addressing issues, the promoter should try to address them differently. However, the promoter is operating within certain constraints. It may cost an extra £0.5 million to resolve an objection. Is that reasonable? Is it good value, and does it make proper use of public sector money? It is very difficult to satisfy everyone completely. In fact, it is probably impossible.

Paul Martin: I agree.

Ron McAulay: Dare I suggest that not one politician sitting around the table received 100 per cent of the vote in their constituency?

Mike Rumbles: Fergus Ewing is hoping.

Karen Gribben: When dealing with private bills or with orders under the Transport and Works Act 1992 in England and Wales, we find that a great deal of the information that people are seeking is information that we are unable to provide until the detailed design phase has been completed. As Ron McAulay said, in public projects we need to consider how far in advance to go through the detailed design process, because if the ultimate determination is that a project should not go ahead there will be a lot of abortive and sunk costs. However, we have learned from and built on the experience of others who have taken private bills through the Parliament. The consultation process improves with each bill.

Fergus Ewing: I forfeited my original third question, so I will ask an entirely different question that encompasses the scope of the bill. It relates to the pressure that Network Rail and the engineering sector—First Engineering Ltd and so on—will be under to deliver rail projects. As well as the many plans for major national projects there is your route utilisation strategy, which identified 29 gaps and 44 action points all over Scotland and produced a programme estimated at £300 million. You will recall that last September Janette Anderson made a controversial contribution to the debate, suggesting that the public sector was far too cluttered, that she did not really know who was in charge of delivery and that work on the London Olympics, which will go ahead shortly, may suck all the capacity from Scotland, so that we are left with a lot of transport projects that we have approved but no one in Scotland to do the work. What is your view on that issue?

I have said in the past, and I shall say again, that, with careful planning, we can get round those issues, but careful planning requires a joined-up approach to the projects that are being proposed. They must be joined up not only with other railway projects but also with the renewals work that Network Rail will be doing in Scotland and elsewhere. By trying to plan those resources properly over the timescale that we are talking about for delivering the projects, we should be able to reduce the risk of finding ourselves with inadequate specialist resources to be able to deliver all the specialist bits and pieces.

One example is signalling resources. We have a big signalling renewal proposal, and we must ensure that we plan that around the work that is required at Waverley station and the work that might be required on the Glasgow airport rail link and so on. If we plan around those projects, we can ensure that the work is co-ordinated across the patch. Providing that we all take a sensible approach and do not get too hung up on the commandment, “Thou shalt meet an absolute deadline date,” and if some flexibility is allowed, we can make it work.

Fergus Ewing: That is encouraging. We are not allowed to talk about the projects that are currently under way, but it is fair to say that many of the top-level rail projects have been significantly delayed, from their intended timetable to a much later planned arrival. Given that that is the case, is not there a risk that there might be a substantial period, perhaps of a year or so, in which no work can be done, or in which there would be only very little work, insufficient to use the available capacity?

We heard evidence from Alan Watt of the Civil Engineering Contractors Association (Scotland), who argued successfully and persuaded the Executive to change its approach to trunk road works. The M74 was delayed through court action, which meant that the Executive had to fill the gap with the Dalkeith bypass, the Kincardine bridge and some other works that it had prepared. If it had not had those works in a preparation pool, on the prompting of people such as Alan Watt, there would have been nothing for the firms that rely on a steady chain of work—the big engineering companies—and all the people whom they employ to do. However, the committee was able to persuade the Executive to take a preparation-pool approach.

Is there a comparator in the rail sector? If so, can you explain how it works? If there is not, do you think that there should be an equivalent to the preparation pool for road works, so that not only can we get the projects but we can ensure that there is a steady stream of work, so that the

16:00

Ron McAulay: I share the concerns that you are expressing. We need to ensure that we resource those projects properly, so that we can deliver them efficiently and effectively and so that we do not find ourselves with an overheated market that gives rise to escalated costs.
companies that actually do the work have the work to do?

Ron McAulay: There are two parts to my response. First, to ensure that we balance the workload that we are giving to specialist railway contractors across the country, we should examine the situation not only in Scotland but in Great Britain, taking into account the pool of projects that have been proposed south of the border. We should ensure that that is balanced out as much as possible and, to a large extent, Network Rail already does that in its overall forward planning.

Still on that first point, we also have some fairly good discussions with Transport Scotland on that very issue. We are able to put into the pot what we are doing in Scotland by way of our renewals programme and major enhancement projects, and Transport Scotland is able to feed in what is happening with major road schemes as well. That helps to bring an overall programme together, so that we can see what the likely resource requirements are. It is early days with that work, but we are beginning to get a clearer picture.

My second point is that we should remember that many of the projects that are being dealt with at present will not necessarily require rail-only contractors. For example, a large part of the Glasgow airport rail link, the bill for which is going through the Parliament, involves a viaduct that could be built by a civil engineering contractor that is not experienced in rail projects. By considering the projects sensibly, we can open up the pool of available resources to feed into the schemes.

Nigel Wunsch (Network Rail): Ron McAulay is absolutely correct. We are working closely with Transport Scotland on the development of other much smaller projects, such as some of the measures in the route utilisation strategy, which Fergus Ewing mentioned. We are developing projects that can be turned on or off at the right time, depending on the contractor and fund flow at that time. In effect, although we do not use the term “preparation pool”, we are developing projects in the background that could be implemented at an appropriate time to develop the existing railway.

Fergus Ewing: I am grateful for that response. It would be interesting to hear from the private sector, which has to deliver the work, to find out what its take is. The view that Janette Anderson gave just a short while ago was particularly critical. It might be useful for us to get an update on that, as we are considering the issue in so much depth. Perhaps the Minister for Transport can help us out, as always.

Ron McAulay: I can give some specific details. The Stirling-Alloa-Kincardine railway project is to be completed by about July of next year and the Waverley project, which is on-going, is to finish at the end of 2007 or the beginning of 2008. We hope to start additional work on the Bathgate branch, which does not require parliamentary powers. Work will come in as other work finishes. In addition, as Nigel Wunsch said, we have proposals for projects in our route utilisation strategy, some of which are a fairly significant size. There is a pool of projects. We can almost start to see the balance of that emerging.

Fergus Ewing: If I may say so, cutting by 45 minutes the journey time for the train service from Inverness to Perth and through to Glasgow and Edinburgh seems to me to be a good priority for early scheduling in your preparation pool.

Ron McAulay: I could not possibly comment on that, as I live north of Inverness—but I agree with you.

The Convener: That takes us to the end of our questions. Thank you for that non-comment in response to the final question. I thank the three representatives of Network Rail for their evidence.

I welcome our final witness for today, who is James McCulloch, the chief reporter with the Scottish Executive inquiry reporters unit. The committee felt that it would be useful to hear from the unit because of the impact that the bill will have on the reporters' workload. We are interested to hear your views on the progress of the bill and your perspective on whether the proposals will be an improvement on the existing system of approval for major public transport projects. I will allow you to make any introductory remarks, after which we will move to questions and answers.

James McCulloch (Scottish Executive Development Department): You have had a long afternoon, so I do not propose to say very much by way of introduction: I will simply set the context. Thank you for the invitation to speak to you.

I head the inquiry reporters unit, which provides a service to the public—it is important that it is seen as a service-delivery organisation—ministers, the Parliament and business and industry in promoting developments. Our primary business is determining or making recommendations to ministers on planning appeals. We deal with roughly 1,150 to 1,200 appeals a year, but our caseload is growing all the time. We also deal with objections to local authority development plans, transport orders such as compulsory purchase orders and side-road orders—all the stuff that delivers major transport schemes—and, on behalf of the private bill committees, we are dealing with the three private bills that are going through the Parliament. We are providing a service to those committees.
You have heard quite a lot about planning modernisation. The Planning etc (Scotland) Bill is going through stage 2 at the moment. Ministers’ objectives are to improve the efficiency and inclusiveness of the process that we operate. In future, we will be expected to operate in transport and works the process that we operate in planning. I am sure that the objectives will pass across to the Transport and Works (Scotland) Bill in that we will be expected to be efficient and effective in discharging our responsibilities, be as inclusive as possible and generate inclusion in the processing of cases.

The Convener: Thank you for those remarks. To what degree was your unit involved in giving the Executive advice on the drafting of the bill?

James McCulloch: The unit is not formally involved in giving advice, but we have been asked for our views on some of the provisions—and the policy memorandum in particular—the nature of the process that we envisage the bill enabling and the financial implications. We are part of the Scottish Executive Development Department, but we are located away from ministers—in Falkirk, rather than in Edinburgh—to keep us at arm’s length.

The Convener: You said that you have discussed the financial implications of the bill. I presume that that includes how many staff you will need to employ to provide services. Has any agreement been reached between your unit and the Executive about the workload implications and has the Executive made a commitment to meet the costs?

James McCulloch: The policy memorandum suggests that the costs of the unit’s involvement in processing transport and works act inquiries will be recovered from the promoter. As far as my unit’s budget is concerned, the legislation should be cost neutral in any year, because we would simply take the resources back in.

On the work that might be involved, the conclusion that has been reached is that we would simply be replacing processes like for like. For example, we have been involved in the Kincardine bridge, the M74 and various other major road proposals, such as the Glasgow southern orbital route. We will still be involved in the future, but under a different statutory process.

The Convener: On the recovery of costs from the promoter, from the point of view of the Scottish Executive will the process not be circular. Concern has been raised about accountability in terms of the independent reporters unit making its reports to ministers. Cases such as a previous Minister for Transport’s decision to reject the independent reporter’s recommendation on the M74 come to mind. Is that usual or unusual? What
proportion of your recommendations to ministers is overturned?

James McCulloch: A very, very small proportion.

Mike Rumbles: Such as?

James McCulloch: Fewer than 5 per cent.

Michael McMahon: I am not sure whether you heard the evidence from our first panel this afternoon, on their experience of the private bill process.

James McCulloch: Unfortunately, I did not.

Michael McMahon: If I may, I will read you an extract from the Blackhall community association submission. The core of its concerns is that “There should be additional independent third party scrutiny where the Promoter of a scheme is either the Scottish Executive, Transport Scotland or a local authority in order to ensure that projects actually meet public need and are financially viable, rather than represent a politically-driven agenda. Appointing a Reporter may not achieve this”.

Do you want to comment on that?

James McCulloch: The reporter is appointed to scrutinise objections. Under the bill process, if the issues are substantive and they have gone through the filtering process that is envisaged, they will go before the reporter and a recommendation will be made to ministers. Those matters could be considered and included in the reporter’s recommendation.

Michael McMahon: But what about peer scrutiny? The association calls it “third party scrutiny”.

James McCulloch: Ministers might not take very much notice of what is said in that way. In this context, I am not sure what is meant by peer scrutiny.

Michael McMahon: I am not sure, either. We tried to get the evidence from the witnesses. Essentially, they are concerned about the hurdles that objectors have to overcome. They want to see some form of independent, external assessment of whether the hurdles have been crossed.

James McCulloch: Right. I assume that the people from Blackhall community association are concerned about one of the tramline routes.

Michael McMahon: Yes.

James McCulloch: I am really at a loss to understand their real concern in that regard.

The Convener: One of the assertions in their evidence is that the Edinburgh Tram (Line One) Bill did not go through the full STAG process. They want a system in which independent transport experts are asked to say whether every aspect of the STAG appraisal has been followed, and so forth. If the process has not been followed, they want objectors to be able to use that information to put pressure on the promoter to meet the requirement.

James McCulloch: Fair enough. If objectors perceive a defect in the process—whether in STAG or in the EIA regulations—and they make that point as part of their objection, it would have to be considered. If the reporter did not have the technical expertise to make that assessment, that capacity would have to be brought into the inquiry process to advise him and then to advise ministers. The policy memorandum refers to the possibility of technical assessors being appointed, and that is exactly what we would do in such a situation.

It should be borne in mind that the inquiry process is supposed to be a public process, so it is incumbent on any promoter to be able to explain to the public in terms that they will be able to understand—I am not belittling their approach in any way—whether a process has been properly followed. That is one of the objectives of making it a public process rather than a private process involving a panel of experts.

Michael McMahon: I have one more question, which follows on from what you have just said. One of the concerns that has been raised is the fact that although TIE Ltd, which was supposed to ensure that consultation was effective, claimed that it had consulted Lothian Buses, Lothian Buses said that it had never been consulted. Would that form the basis of concerns from your perspective? Do you think that the bill gives you the power to address such concerns?

James McCulloch: Let us say that I was dealing with that case. If I thought that the views of Lothian Buses were substantive in respect of the proposal, I would find out what those views were, even though the developer might not have approached the company.

Paul Martin: We are comparing the current process with the proposed process. Would not the convener of the private bill committee also be able to ask the question and seek that information?

James McCulloch: I imagine that the convener of the private bill committee would ask that sort of question.

Paul Martin: I have two questions that relate to that. Last week, we heard from a witness who was concerned about the formal atmosphere of the private bill committee compared with what they thought the independent reporters process would be like. How do you think the two compare?
to other lawyers and said, "Don't try it in front of the committee." Maybe the message has got through.

We want to ensure that the process that we use in the examination of objections best fits the nature of the issues that are raised. For example, when a particularly technical issue that requires deep probing is involved, it could be subject to an adversarial process, but when opinion is involved—for example when local residents want to make their views known and have strongly held opinions about a development and its impact on them—I and other people in the inquiry reporters unit would not see that as appropriate for adversarial examination. It is not necessary to have an advocate to cross-examine on that; it is necessary to understand better why the local residents hold the opinions they hold and what the parameters of those opinions are. That could be dealt with by a hearing, which is a structured discussion that is led by a reporter and subject to an agenda that is produced in advance.

When an issue is pretty straightforward and we can understand from an objector’s written submission exactly what they are concerned about, we would deal with the matter simply on that basis. We might ask for further clarification from them, whether in writing or by asking questions, but the matter would be dealt with simply through an exchange of written submissions.

**Paul Martin:** I will get back to the human element. The witness was concerned that the parliamentary committee created quite a formal atmosphere and thought that the inquiry reporters process would be a much more informal alternative. My experience is different. What is your view?

**James McCulloch:** Planning inquiries, as currently processed, are pretty formal. The objective of planning reform is to get away from that and to move towards the kind of process that I have just been talking about, which is a hierarchical and hybrid approach that is tailored to the individual matters in dispute in each case.

**Paul Martin:** The witnesses referred to the fact that MSPs are not experts on the technical issues and cannot be advised on them. Would the reporters have an encyclopaedic knowledge of every subject that was raised, or would they seek to interrogate the issues, as MSPs have done?

**James McCulloch:** No, the reporters do not have an encyclopaedic knowledge. They have to understand exactly why a particular party holds a certain view. They would probe and ask questions or, if the matter were being dealt with adversarially, perhaps rely on someone else to ask the questions and then come in afterwards to ask the questions that had not been asked and still needed to be covered.

**Paul Martin:** Could the process that you describe not be simulated within the parliamentary process?

**James McCulloch:** As I understand it, private bill committees have found it extremely difficult to resource the process because MSPs have many other responsibilities to discharge, and that has caused a logjam in processing the bills that are currently before the Parliament, which is why we are advising private bill committees on the three bills that are currently being handled. We are not replacing the committees’ consideration; we are advising them. The committees will then take a view, based on the report that we provide, on whether they need to take further evidence.

**Ms Watt:** I got the impression from evidence taken today on peer scrutiny that it seems to be about expecting experts to come forward voluntarily and give their views. Another argument is that objectors always feel that they are on the back foot because they are lay people and do not know the technical stuff. Calls have been made for objectors to be given technical and financial assistance before they appear at a public inquiry. Is that practical? Would such a step benefit the reporter when they come to make a decision?

**James McCulloch:** That issue has already been raised in the planning sphere. My understanding is that, in Scots law, legal aid may be available to objectors in some circumstances, but it is not generally available in practice. The important point about planning inquiries and inquiries that will be held under the new legislation is that they must be publicly accessible. I mean that in both a physical and an intellectual sense. The issues must be explained in a way that people can understand. The important point about the reporter—the independent person who conducts the examination—is that they are interested in the issues that are raised.

If an important issue is raised by an unrepresented group, it will not matter to the reporter that the group has not been able to provide a full technical assessment to underpin the argument. In inquiries, crucial issues are often raised by local people who do not necessarily realise that those could be the crunch issues that determine whether the scheme proceeds.

I can see why the idea of local residents being provided with technical assistance is attractive. In some major infrastructure projects in England and Wales, the developer has provided that resource and borne the expense on behalf of the community. That has happened in waste rather than in transport. In such situations, the developer has indicated that provided the objectors—who
obviously have different interests and concerns—are prepared to band together as a single group behind an individual spokesman, it will fund environmental analysis on their behalf. Those who conduct the analysis have been answerable to the group rather than to the developer. That has been quite successful, but it is not something that we would have any power or locus to suggest that a developer would have to do; it is just an enlightened approach that has been taken in some cases.

Ms Watt: Could that be incorporated in a bill?

James McCulloch: You can do anything you want to in a bill, provided you are prepared to do so. That is really a matter for ministers—not me—because it is a policy issue.

16:30

Ms Watt: We hear of objections to proposed projects. As a community councillor, one goes through all planning applications. Often, there is a substantial number of letters in support of a project. I know you receive such letters, but do you feel that you get a balanced view in a public inquiry? In my experience, those in favour of a project feel a bit intimidated about presenting their views in front of a load of vociferous objectors. How do you handle that?

James McCulloch: I understand exactly what you mean. I have seen it in waste water treatment—what we used to call sewage works—cases, in which those who want better sewage treatment are unlikely to present that argument if a vocal minority, or possibly majority, does not want it to happen. That is the case in some parts of Scotland. We cannot force anyone to appear at an inquiry—that is a matter of choice—but the present arrangements for planning inquiries and the arrangements that would be used under the bill allow any person who wants to make their views known and to have them taken into account to do so without having to appear. They can put in a written submission, which will be considered.

You said that you have come across several instances when there were written submissions in support of a project, but the only evidence that was put forward on behalf of the community was against it. At the end of the day, a balanced judgment has to be reached on the nature of the representations, including those for and against. Obviously, the developer is putting forward a cogent case in favour of the development. That is his responsibility. The important point is the balance.

Fergus Ewing: I want to ask about the procedure for inquiries and hearings. Section 9 of the bill says that ministers

*may cause a public local inquiry to be held*.

Will you explain the ways in which that can be done?

James McCulloch: The minister would indicate to us, through a unit that is to be set up to deal with authorisations under the bill, that objections had been received and that they required to be examined. We would be asked to provide resources to do so. My expectation is that we will have some kind of dialogue with that unit about the potential workload over the forthcoming year or 15 to 18 months. We would expect to know what was coming through the system and to relate it to our likely resources in the light of work that we have to do on planning appeal inquiries and so on.

We have not had a dialogue with the responsible parts of the Executive about how the instructions on how such a case should be handled might be put to us. In planning law, there are situations when ministers indicate to us the matters on which they particularly wish to be informed for the purposes of their consideration. Similarly, in this case, we may be told that there are particular areas that ministers want examined in detail, for example adversarial areas. It may be left to us to decide whether other areas should be dealt with by hearing or by written submissions. On the other hand, we may get no instructions whatever and be told simply to examine the objections. On the other hand, we may get no instructions whatever and be told simply to examine the objections. It is then up to us, or the allocated reporter, to decide whether the matters are dealt with formally and adversarially or in a less formal process.

Fergus Ewing: That is to be determined under section 10—regulations are to be made to determine the procedure to be followed.

Will you help me with something that I do not understand and which I raised at a previous evidence session? An inquiry was held into the M74 extension project and, as Mr Rumbles said, the reporter made a recommendation but the minister took the opposite view. That inquiry and inquiries under the bill have more than one function: their remit is to consider not simply whether a scheme should proceed, but how it would proceed, how objections would be met and how compensation claims would be met. An inquiry has multiple functions.

I was slightly puzzled about the M74 process, which might be part of the 5 per cent that you mentioned. Surely the Executive should have said to the reporter—perhaps you can tell me whether it did—that it wanted an M74 extension, because it was a national project. The Executive should have said, “We have a mandate. We said that we would give people an M74 extension, so there’s going to be one. Your job, Mr Reporter, is to decide not whether there should be one, but how best to deliver it, taking into account all the relevant circumstances.” Was the reporter given such a remit?
In general, would that be a reasonable way to approach a national transport inquiry? The job of the reporter should not be confused with that of being the ultimate arbiter of a national project. The reporter’s role should be made clear, to avoid the reporter taking the flak for matters that may not be his responsibility.

James McCulloch: My personal view is that it is never appropriate for a civil servant to determine the national interest. Ultimately, that is the job of ministers, although their decision might be based on civil servants’ recommendations.

The reporter’s recommendation on the M74 extension was slightly less stark. His principal recommendation was against the project, but he also said, “If you do not propose to accept that recommendation, why?”

Fergus Ewing: What was the reporter’s remit? Did it include the fact that the M74 extension should proceed?

James McCulloch: I understand that the clear policy base was explained to the inquiry in several different documents, but I do not think that the remit was in the terms that you suggested.

Fergus Ewing: Do you accept that that creates a fundamental confusion among the public? The public thought that the inquiry’s purpose was to consider whether the M74 extension should proceed, but my reading of the papers suggests that that was never the purpose. The M74 extension was to happen; it was just a question of where and how. I am not asking you to make a value judgment, but do you accept that unless the remit is clear, confusion will almost inevitably result, as will an unsatisfactory situation in which civil servants might be blamed for matters for which other people should be blamed?

James McCulloch: You anticipated what I planned to say. The scenario in which the bill will operate is that the second national planning framework will be in place. You will be aware that the bill contains provisions on the national planning framework. In the future, I expect a scheme such as the M74 extension, which was an established plank of ministerial policy, to appear in the national planning framework, which Parliament will scrutinise. That would commit that element of the process—the need for the project would be established. The examination of objections that would be mounted to such a scheme would consider whether the alignment was correct, whether environmental mitigation was appropriate and whether land acquisition should proceed as proposed, as you said, but it would not scrutinise whether the project was needed.

Fergus Ewing: I will make a final plea. I gather that one procedure that can be used to determine an application on appeal is a hybrid between a full public inquiry and written submissions—an informal hearing without lawyers, expense or the time commitment. In a local case in Dalfaber in my constituency, objectors did not have the chance to have such a hearing. The arrangement was stitched up by the developer and the national park authority, and the inquiry reporters unit seemed unwilling to engage objectors or even to give them information about how the matter would be dealt with or about the right to a hybrid hearing.

A hybrid hearing without the cost, the lawyers or the adversarial approach is a good way to operate. It allows people to feel that they have at least been listened to, particularly if a site visit has been made. I hope that your colleagues will think about that, because it left quite a bitter taste in the mouth.

James McCulloch: I am sorry that that happened. However, I know—because I held one—that hearings in your constituency have worked.

Fergus Ewing: I know. I have given evidence at one or two of them.

James McCulloch: Right.

Mike Rumbles: Fergus Ewing’s comments have muddied the water for me. I thought that the reporters unit had a clear remit and that it was indeed independent—that it looked at the pros and cons of an appeal or whatever and made a recommendation to the minister—but the bill introduces a new scheme that will cover anything in the national planning framework, which will have been approved by Parliament. Is that not quite a different kettle of fish?

James McCulloch: Yes, and it would stray—if I can use that expression—into planning. Although some schemes in the national planning framework will require planning authorisation instead of authorisation under transport and works legislation, they will be dealt with in exactly the same way.

David McLetchie: My question is supplementary to that and perhaps pins a tail on this discussion. If the determination of need is made in the context of the national planning framework—which means that, in a sense, a project is deemed to be needed—will people who come along to one of the inquiries envisaged by the bill to lodge objections to a scheme’s principles and, indeed, the wider policy decisions be ruled out of order and told, “Go away—your evidence isn’t pertinent and doesn’t interest us”?

James McCulloch: That is a rather pejorative way of putting it, but that is how the system will operate. Because a project has been included in the national planning framework, ministers will believe that they have a mandate to take it
forward. The question—at least for some of them—is not whether, but where and how, that will be done.

David McLetchie: But you accept that in the present system the principles behind a project and its practicalities can end up being confused?

James McCulloch: That can happen.

David McLetchie: Certainly the public understand that. In that case, do you agree that, with particular reference to the national planning framework, we must ensure that the Planning etc (Scotland) Bill, which the Parliament is currently considering, and all the subsidiary provisions and subordinate legislation that will flow from it fit with this bill? After all, if the principles and practicalities of a project are to be clearly identified and if the public concerns expressed by our first panel of witnesses, who objected to the Edinburgh tram project, are to be dealt with, the mechanisms for public consultation, inquiries or whatever on the national planning framework must work correctly. Surely that process of front-loading must take place before the mechanism set out in the Transport and Works (Scotland) Bill can come into play. Is that a fair assessment?

James McCulloch: Yes, although we should bear in mind that there is probably a continuum that runs from commitments in political manifestos through to the justification for particular schemes. By and large, these are flagship projects. They are not schemes of major, but essentially local, significance; they are national projects that are pursued in the national interest. As a result, the justification for them must be clear and up front.

The Convener: That brings us to the end of our questions. Thank you for your evidence, which has been useful to our consideration of the bill.

James McCulloch: I appreciate that.
Firstly, I would like to say that I found the individuals responsible for the procedure to be always helpful and courteous and found that the various members of the team at the Private Bill Unit were helpful and patient at all times.

The MSPs themselves were always courteous and pleasant and the actual experience of giving evidence was made as pleasant as possible for all objectors within the framework within which the Committee and Private Bills Unit had to work.

Nevertheless, my experience as an objector was that the procedure was unsatisfactory in that I consider it did not give objectors a fair hearing. Had I had the resources, I would have seriously considered seeking a Judicial Review. I note below my comments which are in roughly chronological order, not order of importance:

Standing Order Procedure does not provide a fair hearing in compliance with Convention rights

In my opinion, the procedures set out in the Standing Orders and the Private Bill hearings in Committee do not provide appropriate procedural safeguards where a Private Bill contains provisions which interfere with Convention rights for the following reasons:

- If the Private Bill contains provisions which interfere with Convention rights, it is essential that the Scottish Parliamentary procedure has safeguards put in place which ensure that the ECHR is not breached.

Some of the Private Bills (including the Tram (Line One) Bill) contain provisions which deal with acquisition of land and termination of legal rights over land. Procedures which may have been acceptable in the 19th Century when railways were being constructed may not be adequate to satisfy modern requirements of a right to a fair hearing. Effectively, the procedure under the Standing Orders must protect ECHR rights to ensure that any CPO following on from a Private Bill is in conformity with the ECHR.

Article 6 of the ECHR provides that:

"in the determination of his civil rights and obligations ....everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Expropriation of a right in land is considered to be a determination of civil rights and therefore the procedures set out in the Bill must provide everyone whose land is to be expropriated with a fair and public hearing.

However, it seems that the procedure contained in the Private Bills makes no provision for those who, under compulsory procedure under the Acquisition of Land (Authorisation Procedure) (Scotland) Act ("the 1947 Act") would constitute "statutory objectors", to be heard at a public enquiry.

Had the compulsory purchase been promoted under the 1947 Act all objectors would have been entitled to be heard at a public enquiry. Under the provisions of the Bill there is no provision for a public enquiry.

If the Private Bill is passed it will be equivalent to a compulsory purchase order. The 1947 Act and The Compulsory Purchase by Public Authorities (Inquiries Procedure) (Scotland) Rules 1998, SI 1998/2313 ("The Rules") make clear provision for a public enquiry in the event of compulsory purchase by a local authority. These provisions are designed to ensure that the conflicting
interests of the public authority in promoting a public purpose and the individual are balanced. The Bills do not contain these safeguards.

- This is prejudicial to an objector for the following reasons:
  - At a public enquiry held under the 1947 Act and The Rules, the onus of proof of need for the compulsory purchase lies on the acquiring authority (Coleen Properties Ltd v Minister of Housing and Local Government [1971] 1 All ER 1049). It is not clear from Tram Line Bill nor from the Scottish Parliamentary Guidelines on Private Bills (“The Guidelines”) nor from the Explanatory Note to the Bills on whom the onus of proof will rest. If the Parliamentary Committee decides that it is not incumbent upon the promoter to prove need for the compulsory purchase, objectors will be prejudiced by use of the Private Bill procedure.
  - At a public enquiry, an unbiased reporter hears representations from the local authority and from any objectors. This is important since it is a basic principle of Scots Law that justice not only be done, but also that it is seen to be done.
  - Parties are only entitled to object to the Bill on payment of a lodging fee of £20. It is not equitable to make it a condition of being able to object to one’s human rights being taken away to have to pay £20 in order to be heard. The argument put forward in support of this fee is that this is intended to dissuade frivolous or vexatious objections. However, this argument does not seem to be sustainable because the fee is not large enough to dissuade rich frivolous or vexatious objectors but only to dissuade poor ones. It seems entirely unacceptable in a democratic society for the opportunity to object to be dependent on ability to pay - the fee itself is discriminatory between rich and poor.
  - The procedures set out in The Guidelines provide that parties who lodge objections may be called to give evidence.
  - If The Rules are not to be followed, objectors may not be able to comment on the responses of the Promoter. This means that the Promoter might be able to put forward arguments to refute the written objections raised by objectors without the objector being allowed an opportunity to respond. This situation would be avoided in a public enquiry situation since the procedure at the enquiry is designed to ensure that each party is aware of the case it has to meet, and if new evidence is introduced the Reporter will normally allow an adjournment to allow the other party an opportunity of responding.
  - The Guidelines provide that in order to object to a Private Bill all objections must be “admissible” and comply with certain requirements. It is inequitable, if basic human rights are being threatened, to insist that the party whose rights are so threatened complies with criteria of admissibility which that party may not understand. If human rights are being threatened, he or she should be able to object without having to overcome hurdles which make it difficult for him or her to do so.
  - Indeed, the hurdle of compliance with admissibility criteria has already been tested in connection with the Tram (Line One) Bill. It appears that no objectors who submitted an objection to the principle of the whole Bill managed to overcome this hurdle. The fact that no “whole Bill” objections were found to satisfy the criteria of admissibility is evidence of the extent to which this hurdle is interfering with the right to be heard where Convention rights are threatened. It is also evidence of the lack of clarity in the Guidelines with regard to what constitutes an admissible objection to the principle of a Private Bill.
  - It appears that the decision to reject almost all of the objections to the principle of the Bill was made following consideration of a paper on Preliminary Consideration of Objections (which I assume was prepared by Bond Pearce, advisers to the Committee). This paper put forward a view (not necessarily the correct view) on interpretation of the meaning of Rule 9A.8.2. It then provided a summary (again, not necessarily a correct summary) of the contents of the objections and the arguments contained therein.
On the basis of that paper, and without giving objectors an opportunity of challenging the view put forward in the paper or the accuracy of the summary of the objections, it appears that the Committee formed a decision that none of the objections satisfied the criteria for admissibility i.e. that none of the objections contained "a reasonable claim that the objector's interests would be adversely affected by the Bill".

The Standing Orders' criteria for admissibility contain no requirement that the adverse effect of the Bill need be substantial or significant. Any reasonable claim of adverse effect should suffice to satisfy the criteria of admissibility. (Whether or not in the opinion of the Committee the objection, if found to be admissible, carries any weight is a matter to be dealt with later but does not affect admissibility).

It seems that a very tiny degree of adverse effect should justify an objection being admitted but none of the objections was found to satisfy this criteria.

For the benefit of future objectors to future Private Bills it would be useful if the Committee were to provide an example of the type of objection which they consider would satisfy the criteria of admissibility to the principle of the whole Bill. Perhaps the Committee could provide guidelines on what does, in the opinion of the Committee, constitute a reasonable claim of adverse effect.

It is assumed that something must satisfy the criteria since the Standing Orders allow for objections to the principle and to the detail - there would be no need for two bases of objection if no objections to the principle can be admissible.

It seems to me that in the context of the Tram (Line One) Bill any objection which contains a reasonable claim that the objector's Convention Rights are adversely affected by any provision in the Bill must satisfy the criteria of admissibility for the following reason:

Article 8(1) of the ECHR provides that everyone has the right to respect for his private and family life and his home. Article 8(2) provides:

"There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others [emphases added]."

It cannot be argued that the Tram Line proposed by the Tram (Line One) Bill satisfies any of these criteria. The Promoter and/or the Scottish Parliament may consider that the scheme is a good idea for Edinburgh or even for the economic well-being of the City of Edinburgh, but it is not necessary for national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health of morals or for the protection of the rights and freedoms of others.

Any interference with Article 8(1) rights which does not satisfy the criteria contained in Article 8(2) is a breach of Convention Rights.

If the Bill contains provisions which breach Convention rights then, so far as it does so, the Bill is outwith the legislative competence of the Scottish Parliament.

Certain objectors have claimed that provisions of the Bill, e.g. certain works authorised by it, interfere with rights under Article 8. It seems difficult to see how the Committee could conclude that any objection based on a claim that a provision of the Bill breached such Convention rights could be found inadmissible as an objection to the principle of the whole Bill.

In this respect, I disagree with the conclusion contained in paragraph 42 of the Preliminary Consideration of Objections paper (ED1/S2/04/3/1) which states that if the objection contains a claim of adverse effect relating specifically to alleged impacts of the Bill on an objector's home and
family life, these constitute objections to the detail of the Bill only and not to the principle of it. This might be true of a Bill in the Westminster Parliament but is not true of one in the Scottish Parliament since the Scottish Parliament is bound to comply with ECHR. Thus, if any part of the Bill contravenes ECHR rights, then it is to that extent outwith the competence of the Scottish Parliament and should not be passed. Any objection to the principle of the Bill on the grounds that it breaches ECHR rights should therefore be admissible. This is because the objection is to the effect that if the Bill were to be enacted, part of it would be outwith the competence of the Scottish Parliament. Since a Bill must be enacted as a whole, a Bill where any part is incompetent, should not be enacted. This type of objection seems to be objection to the whole Bill and not just to the detail so it seems to me that such an objection should be admissible.

Objection Number 185 to the Tram (Line One) Bill (to which I was a signatory) contained this point in Schedule 12 to the Objection – but this Objection was not mentioned in the Paper on Preliminary Consideration which was prepared for the Committee under the heading of ECHR objections, and so it can only be assumed that no consideration on the human rights claims in that Objection was given by the Committee before this objection was rejected on 22 September.

- The procedure does not give the objector advance warning of the hearing nor an opportunity of being heard when the admissibility of the objector’s objection is being determined. Although the Committee meeting at which such a determination is made may be open, there is no notice procedure apart from advertisement on the Parliamentary website. Objection Number 181 (my own) was considered in the Paper on Preliminary Consideration and the Committee was asked to form a view as to whether the objector had put forward a reasonable claim that the objector’s interests would be adversely affected by the Bill.

The Committee determined that the objector had not, but I, as the objector, was not given an opportunity of being heard at that meeting. Indeed I was not even present when the Committee decided that my claim had not been substantiated – I had not received notice that this matter would be determined at the meeting on that date.

I was not even present at the Committee meeting where it was determined that I had not substantiated my claim that my human rights were adversely affected by the Bill.

Under a public enquiry procedure, I would not only have had an opportunity of being present because I would have had notice of the hearing, but I would also have had an opportunity of being heard in connection with my objection.

Indeed, in the interests of showing fairness as between the objectors and the Promoter (whose memorandum and accompanying documents have not had to satisfy a test of “admissibility”), it seems that the objector should be given an opportunity of being heard and of appealing against the decision to find that an objection does not satisfy the criteria of admissibility and an opportunity of being heard if he or she wishes to challenge any part of the paper on consideration of preliminary objections (including the summaries of objections and assumptions made about arguments contained therein).

Public enquiry procedure contains clear provision for being heard which is not available under the Private Bill procedure where the only recourse of a party who is not happy with the decision of the Committee is the extremely expensive procedure of judicial review available only to the very rich or those in receipt of legal aid.

The decision of a Committee to reject objections on grounds of inadmissibility will effectively constitute a precedent and so it is very important that the basis of the decision be clear so that future promoters and objectors know where they stand.

Expensive and Unsatisfactory Appeal Procedure

Failure to provide a procedure for a fair hearing, as detailed in paragraph 1 above, could give rise to a challenge to the Bill at a later date. Individuals who have lodged objections and whose objections have been dealt with, may consider that notwithstanding the opportunity of making representations, the Act confers powers which represent a disproportionate interference with their
property rights under Article 1 of Protocol 1 of the ECHR. These parties may seek to challenge a
Private Bill when it becomes an Act on the ground that its provisions – e.g. procedure for hearings
in committee, the compulsory purchase provisions or the effect of the Works authorised by the Act
on enjoyment of Convention right to home and family life, breach the objector’s Convention rights.
Such a party could raise the challenge by way of judicial review.

A Judicial Review could be sought by such a party at any time. This is unsatisfactory for three
reasons:

• The Promoter cannot be certain that works will not be halted by a challenge at any time – this
could be during the Bill’s progress, after the Bill has received Royal Assent, after acquisition
procedures have been commenced or even after title to land has been acquired and works
commenced. This could be very expensive in terms of court time and also if contractors are
prevented from carrying out work in accordance with a project and the Promoter is responsible
for paying the contractors even though work has halted.

Need for reliance on advisors

The pressure on Committee time which the use of the Private Bill procedure involves means that
Committee members must rely on advice from external advisors. Whilst it is acceptable for this to
be given in areas where specialist advice or knowledge is required, undue reliance on external
advisors may result in objectors being denied a fair hearing.

The Paper on Preliminary consideration of objections sought to categorise objections under certain
headings. It might be thought that if the objection was not listed under a particular heading, then
that objection did not raise the point under consideration. However, the listing of the objection
under such a limited number of headings did not allow for full consideration of each objection in
turn. Although I was not present at the meeting, I understand that the Committee rejected all the
objections under a heading – it did not look at each objection in turn and see whether it was
admissible. This is inequitable for two reasons:

• The advisor who prepared the report may have made a mistake so that some objections may
have been rejected which should not have been – an example as mentioned above is with
regard to objection 185 which was omitted from the list with regard to ECHR. This objection
was not mentioned in connection with Bus Services, Traffic Congestion, Visual Impact either
and yet it contained objections based on these heads of claim.

• The objector has not had a fair hearing – the objector’s objection has not been individually
scrutinised to determine whether or not it satisfies the criteria of admissibility.

Grouping of Objections

• The procedures allow the Committee to “group” objections and call only someone representing
a group to be heard. The criteria for grouping are not made clear and it is only too easy to see
how such grouping would be inequitable. Why should one resident of a street be heard and
not another?

• In many cases, grouped objectors did not, in fact, share the same detailed interests albeit they
had some shared concerns. For example, some streets were grouped with other streets where
it was in the interests of one street to have, say, the tramline on a different side from the
cycleway. For some residents, the felling of vegetation was more of a problem than for others
and this meant that in grouping objectors some parties were not given an adequate opportunity
to have their concerns fully heard.

• I appreciate that the Private Bill Unit’s intention in grouping objectors may have been partly so
as to reduce the time taken for evidence (but from the objector’s point of view, that is not a
justification) and partly with a view to enabling those less articulate objectors to benefit from
being grouped with others so that they had an opportunity of having their concerns made clear.
However, I consider that the groups were too large to represent the interests of the various
parties. The grouping in some cases made the objector’s task even harder in that as well as preparing evidence, the objectors had to make time to hold meetings and discuss the approach to be taken. This had to be done in evenings and at weekends and it was often very difficult to co-ordinate a group objection.

Preliminary stage

I am not aware that any individual objector satisfied the criteria of admissibility of evidence in connection with the whole Bill. This was unfair since it meant that by the time objectors were able to give evidence with regard to, say, the Roseburn Corridor, the decision that a "loop" would be constructed had already been approved by the Committee. This meant that there was no opportunity to debate whether or not a loop was, in fact, the best solution to Edinburgh’s Transport needs and objectors had no opportunity of giving evidence with regard to whether or not a loop should be constructed.

The Committee accepted the Promoter’s evidence with regard to the need for a loop at the preliminary stage when no objector had an opportunity to rebut that evidence.

In the event, the Promoter has now made it clear that the Promoter will probably not construct the loop and so the whole process appears flawed because all evidence provided by the Promoter and by objectors was based on the assumption that a loop was to be constructed. If, in fact, a loop is not to be constructed then the need for the stretch of the route between Roseburn and Granton should have been considered separately rather than as an essential part of a loop. Whilst this evidence is not intended to discuss the merits of the scheme, the procedural defect is that there was no opportunity for objectors to give evidence with regard to the need for a loop, that the decision that a loop would be constructed was taken very early in the proceedings and that all evidence following from that was based on the assumption that a loop would be constructed.

Written evidence

- The method of submitting evidence was not convenient in that the Promoter and the objectors were asked to submit written evidence by the same date. This meant that much time was wasted in preparing evidence which was, in fact, not required because neither party knew what evidence was to be provided by the other.

- The Promoter appeared to be allowed too much leeway in responding to objections. The Promoter made no attempt to tailor responses to individual objectors so that many objectors were faced with many pages of evidence which were not relevant and which did not respond to the individual objector’s concerns.

It was clear that the Promoter “copied and pasted” sections of evidence from one response to an objector to another. I appreciate that there are pressures on time for the Promoter and that dealing with individual objectors, where many concerns are similar, did require repetitive evidence to be submitted. However, there should have been some attempt to check over evidence provided to any individual objector to make sure at the very least it did attempt to answer questions posed and did not provide unnecessary evidence which was not relevant to that objector.

- This approach to evidence made the procedure even more difficult for individual objectors since they had to deal with an enormous amount of paper and documentation within a limited time. This in itself made it difficult for objectors to respond.

- Method of taking evidence made obtaining legal representation too expensive

The hearing of evidence on a “topic basis” rather than “objector by objector” was prejudicial to objection interests for various reasons:-

- The giving of evidence on a “topic basis” rather than objector by objector meant that objectors were effectively denied the opportunity of obtaining legal representation. Each objector had to be prepared (or the group of which that objector formed part had to be prepared) to give
evidence at a large number of Committee Meetings with no definite time for providing evidence and in the knowledge that much of the time spent in the Committee would be spent in listening to evidence given by other groups. To obtain legal advice and assistance for providing evidence in these circumstances was effectively too expensive for all but the very wealthy or corporate bodies.

- The giving of evidence on a topic basis was in the interests of the Promoter in that it saved the Promoter the cost of witnesses being available to be cross-examined by each objector in turn. However, it seems to me that too great a sacrifice to the right to a fair hearing was made in the interests of the cost and convenience of the Promoter.

**Hearing of evidence**

Hearing evidence on a topic basis rather than objector by objector made it extremely difficult for objectors. Each objector was able to ask a Promoter’s witness in turn questions based on the evidence. Unfortunately, the Committee Convener was unwilling to allow one objector to ask a question which the Convener considered had already been asked by a previous objector. This meant that even if an objector had spent a lot of time perusing the Promoter’s evidence and preparing questions to build a case against the Promoter, that objector had to try and amend the questions asked as he or she went along if another objector had asked a similar question even if an identical question had not been asked and even if the answer had not really answered the objector’s concerns adequately.

- I personally found it extremely difficult and I have some experience (although I am not a litigator) of dealing with evidence and asking questions in a meeting situation. However, on various occasions I was told by the Committee Convener that I could not ask the question I had proposed because a similar question had been asked or because the Convener considered that the Committee had heard sufficient evidence on that topic. This meant that the giving of evidence was made exceedingly difficult for the objectors and that notwithstanding thorough preparation, the objectors had to try to reconstruct the cross-examination which they had prepared as they went along.

- Another case where this posed a problem was where the Wester Coates Terrace Action Group was asking questions of the Promoter’s witness on noise matters. The questions were to be asked after those of another group. Unfortunately, the precise and clear cross-examination which our Group’s questioner had prepared was hindered by the fact that another objector was able to ask questions first and the Convener was not prepared to allow Wester Coates Terrace Action Group’s representative to cover the same ground. It seems to me that that was most unfair and interfered with the objector’s right to a fair hearing.

- Another aspect of the evidence taking which caused problems with the objectors was that objectors were advised that they could not ask questions about any matter which was not mentioned in the written evidence. This did not seem equitable since in some cases the objector’s awareness of the need to ask the question only arose after seeing the Promoter’s evidence. Since the Promoter’s evidence and the objector’s evidence “crossed”, a question on the Promoter’s evidence could not have been mentioned in the objector’s evidence because the objector did not know that that particular piece of evidence would be submitted by the Promoter.

- The Committee made it clear to the objectors that where any evidence was not rebutted, there was no need to refer to that evidence again at the cross-examination stage. Indeed, the objectors were not allowed to refer to evidence which had not been rebutted. In my own case, much evidence given by me in connection with the selection of route was not rebutted by the Promoter but because I was not allowed to refer to it in the Committee there was no opportunity of stressing that evidence and ensuring that all the Committee really heard it nor did it enter the written record of proceedings.
Where evidence was not rebutted, it would have seemed equitable for that to be given weight in the Report by the Committee to the Parliament but no mention was made of that evidence whatsoever in the Report.

The fact that the Promoter did not rebut this evidence at any time meant that there was no opportunity before the Committee of stressing the evidence and stressing the fact that at no stage had the Promoter rebutted it. Our Group also provided evidence by an expert witness on environmental issues which was never rebutted by the Promoter either in writing or in Committee. Again, there was no mention of that in the Report.

**Timing and availability**

- The method by which evidence was taken over a large number of days as well as making it extremely difficult for any objectors to employ legal representation, also meant that it was extremely difficult for any objector to attend all the hearings and hear all the evidence. Even where there was a group, it was difficult to arrange for an attendee at all the different sessions of evidence of objectors acting together.

- There was no possibility of building up a case which would have been possible had one representative been able to speak for the objector or the objector himself or herself been able to give evidence. Most objectors had to rely upon different people attending different sessions. These people did not have the information available from previous sessions nor were they aware of what had happened on previous occasions.

- It was not always possible to obtain the written report of a previous Committee Hearing prior to attending as a witness since the Report was not always available and it was not always possible to watch sessions on the webview link since sometimes the webview link was not working properly.

This meant that the objectors were prejudiced whereas the Promoter’s team were able to ensure that it had a coherent and cohesive approach and had heard all the evidence by each objector so as to build a coherent case.

- On various occasions, the Group found that attending a Committee Meeting was extremely difficult. Almost all members of the Group worked and therefore had to take time off work to attend Committee Meetings. Witnesses or questioners were put down for a slot in a day and had to take a whole day off work even where they, they were not required until later in the day. Because they could not risk missing the “slot” when they were to be heard. Although the Clerks tried to assist by indicating that evidence could likely be heard earlier or later in the day, no guarantee was given and on at least one occasion I had to rush to the Parliament by taxi having looked at the webview link and discovered that the evidence was several hours ahead of what had been anticipated by the Clerks.

- From the Promoter’s point of view, the Promoter had representatives at the Parliament each day of evidence and could ensure that relevant witnesses were called at the time they were needed. Objectors, on the other hand, had sometimes to sit for many hours before their evidence was taken or questions could be asked.

- In some cases, changes of the dates of hearings and over-run of evidence meant that members of the Group were not able to give evidence since they had work or other commitments which could not be broken.

For example, on one occasion one of our witnesses was to lead evidence from an expert witness on behalf of the Group, was due in Court that day and not due to finish until 4 o’clock. Although this was made clear to the Committee Clerk and a request was made that that witness’s evidence be delayed until the Group’s representative was able to reach the Parliament, the witness was called and his evidence was taken before the Group’s representative had arrived even though he arrived not long after 4 o’clock.
Summing up

- The objectors were given a total of ten minutes to sum up all the evidence which had been submitted in writing and heard in over a year. This made it very difficult for the objectors since it was extremely difficult to pull together all the evidence on all the topics given over such a long period in so short a time.

- It also meant that one person had to sum up the evidence on behalf of each Group. Where one individual in that Group may have had a particular concern, there was no possibility of that individual repeating that individual’s particular concern since in such a short time, it was possible only to mention the most important points from the point of view of the Group.

- In some instances it may have been that the person giving the summing up would have unfairly stressed the concerns of that particular individual rather than those of other members of the Group.

- Having to sum up for the Group, it meant that there was a need for meetings and additional preparation done by the objectors in trying to agree what should be put in the summing up and a lot of time was required for this.

- In the event the summing up which was carefully prepared by our Group, slightly over-ran the time and our representative was not allowed to finish her summing up.

Report of the Committee

- The Parliament’s role in assessing the Private Bill is a quasi-judicial one and the Parliament was under an obligation to weigh the conflicting interests of Promoter and objectors. In these circumstances, being considered by the Committee, evidence of their having weighed up each piece of evidence and an explanation of the Committee’s opinion, I would have anticipated that the Report of the Committee to the Parliament would have assessed all the evidence in a systematic way and shown the arguments, the persuasiveness or otherwise of the evidence before the Committee as well as a clear explanation as to how the Committee reached its decision. Whilst I appreciate that preparation of a Report in this way would have been time consuming, this is the type of decision which would have been provided by a Judge and since the Committee’s role is quasi-judicial in considering a Private Bill, I should have anticipated the Report would have been in this format.

In the event the Report did not appear to contain any explanation as to the Committee’s approach to the weighing of evidence nor any indication as to whether or not the Committee considered evidence to be persuasive or not. Nor did it seem to give any explanation as to why objector’s evidence was given a lesser weight than that of the Promoter.

- As mentioned above, our Group gave some evidence which was not rebutted (on environmental issues, route selection and human rights issues). None of that evidence was rebutted in any meaningful way by the Promoter and yet that evidence was not referred to in the Report.

- Moreover, in cross-examining the Promoter’s expert on noise, the representative acting on behalf of WCTAG showed that the Promoter’s noise expert had contradicted himself and also showed that there had been inconsistencies in the use of standards of noise measurement which had been used in assessing the future impact of noise on residencies along the Roseburn Corridor. No mention of this was made in the Report.

- If, indeed, the Committee looked at the evidence of the objectors and decided that it was not persuasive, the Report should have stated that and stated the reasons and arguments which led to that decision. Where no reference at all was made to evidence which was not rebutted or evidence which was given and showed flaws in the Promoter’s case, there remains a concern in the eyes of the objector that this evidence was not given adequate consideration and that the decision recommends the Bill to the Parliament was a political one. Since the
Parliament’s role in considering a Private Bill is quasi judicial and not political, this would, of course, be unacceptable. If the decision of the Committee was made after thorough weighing of the evidence, then there should be a clear statement of that in the Report so that not only is justice done, but justice is also seen to be done.

Report

The Report of proceedings heard in Committee is not a “shorthand writer’s account” but rather seeks to reflect the intentions of those giving evidence. In my view, this is not satisfactory in that it allows the party preparing the Report to take a subjective view of the evidence. In my view, the written report should be an exact record of the proceedings and should not allow any scope for subjective amendments since that might amend the evidence given. Although the intention of allowing this subjective approach appears to be that it allows for stresses to be added where parties giving evidence have, for example, used hand signals, or indicated an intention by use of tone, there is no reason why the party making up the report should not add that the witness on this occasion made a hand signal etc.

Since there was no opportunity for objectors to give evidence at the preliminary stage, the Committee Convenor gave various members of different groups an opportunity of giving evidence. This was, however, solely at the discretion of the Committee Convener and she was under no obligation to allow this evidence.

Summary

I appreciate that this letter may seem unduly critical and accept that it is not objective although I have tried to approach this matter in as objective a way as possible. I have tried to consider the procedure rather than the merits of the Bill to which I am objecting. Overall, I have to say that as an objector I found the procedure most unsatisfactory and felt that it did not afford a fair hearing to objectors. I appreciate that there are time constraints on the Committee and that there are time and money constraints on the Promoter of a Private Bill but nevertheless I consider that the scales are weighed too heavily in favour of the Promoter.

Transport & Works (Scotland) Bill

I have not looked at the proposed Transport & Works (Scotland) Bill in any great detail due to pressure of time. However, I do not consider that from an objector’s point of view, there is anything in the Bill which confirms to the objector that there will be an opportunity for a fair hearing. In particular, I have the following comments:-

- Section 8 provides for the Scottish Ministers making rules in relation to objections but until the rules have been made, it is not possible to comment.

- Section 8, sub-sections (2) and (4) provide that the Scottish Ministers must take any objections into consideration before deciding whether to not to make an Order but there is no obligation on the Scottish Ministers to hold an inquiry or hearing and therefore from the point of view of an objector, he or she may have his or her objection disregarded without any particular process or hearing being undergone.

- There is no obligation on the Scottish Ministers to hold a inquiry or hearing and “taking into consideration the grounds of any objection” does not impose any obligations on the Scottish Ministers to do any more than consider an objection.

- Sub-section (3) appears to suggest that the Scottish Ministers can only disregard the objection if it is frivolous or trivial or relates to compensation but does not seem to impose any obligation on the Scottish Ministers to hold a hearing if it considers an objection is not frivolous or trivial or relates to compensation.

- Section 9 provides that the Scottish Ministers “may” cause a public local inquiry to be heard and does not appear to impose any obligation on the Scottish Ministers.
Sub-section 2 provides that the Scottish Ministers “may” give a person an opportunity of appearing and being heard unless the objector is a Local Authority, National Park Authority or a person entitled to notice under the 1947 Act. Under the 1947 Act, a party adjacent to a proposed scheme would not be entitled to notice so this appears to mean that “affected proprietors” ie those whose property is adjacent to a proposed scheme or affected by noise or for some other reason affected by a proposal would not be enable to insist upon being heard at an inquiry.

However, it seems to me that if I were to be an objector to a scheme promoted under this Bill, in a similar circumstance to the Tram (Line One) Bill where I owned a house adjacent to the proposed scheme but no land which was to be acquired, I would have no right to be heard. This seems inequitable since although a person in similar circumstances may not have land taken, such a person may be materially adversely affected. In some cases, a party who is affected because of living adjacent to a scheme is more prejudiced than a party from whom land has been taken. In a case where no land is to be taken, the objector often has no remedy at all except very limited availability of compensation under the 1973 Act. Whereas a person from whom land is to be taken has the full benefit of the compensation available under the 1963 and 1973 Acts, may be able to serve a counter-notice and have a larger area of land taken than is proposed, may be able to benefit from an advance purchase scheme; or may live some distance away, receive full compensation for the land taken and so suffer very little real prejudice.

It seems to me therefore inequitable that an “affected” party is not entitled to be heard at a public enquiry.

I welcome the suggestion that an inquiry be held by an assessor or other person who is experienced in the taking and weighing of evidence since I think this is likely to appear fairer than the present procedure where evidence is taken by a Committee of MSPs who even if they aim to be objective may be swayed by political considerations. It is also likely that an assessor will be able to arrange sessions of evidence which are less constrained by other commitments. For example, it may be possible for an assessor to arrange evidence over a couple of weeks rather than one day a week over many months. This would be better from the objector’s and the Promoter’s point of view since the evidence would be fresh in the mind of all parties and there would be less preparation and paperwork required to review evidence taken over several months.

Please do not hesitate to contact me if you have any queries.

I must stress that this is my personal opinion of my own personal experience in connection with the Tram (Line One) Bill and my own personal comments with regard to the Transport & Works (Scotland) Bill and that the views contained in this letter do not reflect those of Brodies LLP.

SUBMISSION FROM ALISON BOURNE

Difficulties experienced in objecting to Tram Line 1 Bill

I believe the £20.00 lodging dues to be excessive and socially exclusive.

In order to object to a Private Bill in principle, it was explained that an objector must show how they would be directly “adversely affected” by the proposed scheme. Many objectors to the Tram Line 1 Bill, with which I was involved, claimed that they wished to object in principle to the Bill on the basis that they were both national and local taxpayers who would be contributing to a scheme which, even at the time of lodging their objections, faced a massive funding shortfall. However, this ground was not accepted by the Committee until a much later date. The problems were, therefore, (a) finding an acceptable ground to object in principle to a Private Bill; and (b) if such a ground is deemed inadmissible, that there is no opportunity to find another ground and no guidance can be tendered to objectors as to what may constitute an acceptable ground.
Whilst I appreciate that, at the time that the Tram Bills were lodged (December 2004), there was much confusion about the how the Private Bills Procedure actually worked, in hindsight, I do not believe that (a) the importance of including absolutely all possible reasons for one’s objection in one’s original letter of objection; and (b) that objectors would not be permitted to raise additional concerns at a later date, was made sufficiently clear to objectors.

**Did the Procedure for objecting allow me to present my views in a meaningful way?**

Whilst, in theory, it seemed relatively straightforward to demonstrate a clear adverse effect on an objectors’ interests as a private householder living adjacent to the proposed tram line, in practice, the presentation of evidence to substantiate the reasons for those concerns was confusing, challenging, extremely time-consuming and costly, particularly for those objectors who chose to engage expert witnesses.

At Consideration Stage, the Committee chose to split the objectors into groups. This was due to the large number of objectors and the Committee’s desire not to “waste time” in considering similar evidence from large numbers of objectors individually. Each group was required to nominate a specified number of “lead objectors”, who would be responsible for dealing with deadlines in submission of evidence/attending Committee meetings and conducting examinations of witnesses. Whilst I appreciate that, to have received evidence from each objector would have been time-consuming, I nevertheless believe that each objector has a right to be heard and to have their concerns addressed directly by the Promoter, particularly having paid a £20.00 lodging fee.

**Experience of giving evidence to MSPs**

At the commencement of the Preliminary Stage, the Committee commissioned two peer reviews: one regarding finance and the other regarding the adequacy of the Environmental Statement. However, the Committee seemed to pay little heed to the findings of the financial review which raised serious concerns regarding both the robustness of the Preliminary Financial Case, anticipated patronage, etc, and the level of contingency which had been stated by the promoter. I believe that, having gone to the trouble and expense of obtaining independent reviews, that the Committee should have been considerably more robust in their examination of the Promoter on the areas of concern raised by those reviews.

The objectors (many of whom had had 18 months to get to grips with the issues surrounding major transport proposals) were disappointed from the outset by the standard of questioning on the part of the Committee. It became clear that MSPs who sit on such committees may well not have the level of previous experience or technical expertise to fully understand the very complex issues which a major transport proposal may present or, indeed, the time/inclination to scrutinise issues to the level which may be desired by objectors and/or taxpayers. From the outset, issues, such as funding, did not receive the level of scrutiny which objectors felt was appropriate, given the large sums of public money involved and it was increasingly felt that it would be desirable that those scrutinising the proposal be professionally qualified/experienced to do so.

At the Preliminary Stage, the Committee chose to call witnesses to give evidence on specific subjects which the Committee had selected. Evidence was taken by means of a “question and answer” approach and there were, therefore, occasions when it was difficult to introduce a pertinent piece of information during evidence as, to some extent, one was relying on Committee members to ask the right question, which frequently did not happen. Likewise, the Promoter’s witnesses were asked questions by the Committee (the objectors had no opportunity at this stage to ask questions) and, therefore, were not obliged to provide any more information than that which had been specifically requested by the Committee. I have followed, with interest, the meetings of the EARL Committee who often ask witnesses, at the end of their evidence, whether they have anything further to add. This is a neat way of ensuring that the Committee is presented with evidence which is as complete as possible and one which I strongly support.

The Tram Line 1 Committee identified different subject areas on which they wished to receive evidence. This was done (a) without consultation with objectors (not sure if the Promoter was consulted); and (b) without explanation being provided as to why the Committee had chosen those subjects. In short, decisions were arrived at in a manner which was not transparent to objectors. 
and some objectors felt that they had been offered no opportunity to be heard on areas which were of concern to themselves.

No allowance was made in the timetable to deal with the implications of emerging information. For example, the Tram Line 1 Committee heard evidence during the Preliminary Stage from Lothian Buses about the impact on bus services anticipated as a result of the tram scheme. The Committee had also received a Preliminary Financial Case from the Promoter, at the time of lodging the Bill (which was based on information contained in the STAG2 report), to the effect that over 80% of tram patronage would arise from former bus passengers, whose bus services were to be withdrawn or altered post tram operation. However, it was not until well into Consideration Stage that Lothian Buses announced, through the press, that they (and, by then, Transport Edinburgh Ltd) would not withdraw services in the areas from Haymarket – Granton – Leith, ie, throughout some two-thirds of the route. This would have clear and serious implications for the business case; the likely impact on congestion; and on environmental issues (eg, air quality figures), and yet the Committee did not seek to hear further evidence from either Lothian Buses, TEL, the Promoter or the objectors on this matter. Similarly, when evidence emerged that the anticipated cost of the project had increased to from £450m to £714m, the Committee took further evidence on finance from both the Promoter and the Minister for Transport, Mr Tavish Scott. However, no opportunity was extended to objectors to provide further evidence on this matter at that stage. One can only conclude, therefore, that the Committee did not wish to hear countering evidence from objectors, particularly those who had advised the Committee at the Preliminary Stage that the scheme would cost over £700m (and who had been proven right).

Several of the lead objectors were also responsible for preparing written evidence themselves. Therefore, the time required of objectors and, particularly, lead objectors, many of whom were in paid employment and who required to take leave in order to satisfactorily fulfil their objector obligations, was excessive.

The Promoter did not require to adhere to the same “rules” laid down by the Committee which the objectors did. For example:-

(a) the Promoter’s solicitor was present at a meeting between the PBU and the objectors, when, to my knowledge, no objector was ever invited to attend any meeting between the PBU and Promoter’s staff;

(b) the Promoter’s witnesses were repeatedly allowed to submit written evidence late and this was accepted, although objectors were very seldom extended the same latitude;

(c) the Promoter’s witnesses repeatedly introduced new evidence in their rebuttal statements/oral evidence, often following an invitation from the Promoter’s QC to provide an “update” of the position. This offered no opportunity for objectors to consider and/or deal with the evidence then produced. However, on no occasion was an objector witness permitted the same latitude by the Committee; and

(d) on receipt of witness statements, the Committee then stated that certain evidence contained therein was “inadmissible” (no explanation was provided for this determination). For example, I had referred to existing tram projects and, indeed, the other two proposed Edinburgh tram lines in my written statement but the Committee had deemed this inadmissible. Despite this, the Promoter’s witnesses were repeatedly permitted to provide lengthy evidence relating to other UK and European tram schemes and, when objectors sought to counter this evidence or refer to other tram projects (including Edinburgh’s Tram Line 3), they were advised that this was not relevant and were not permitted to do so.

In my case, the Tram Line 1 Committee had identified that the issue of a lack of a direct tram stop for the Western General Hospital was an important area which they wished to explore. Up until then, I, along with many other objectors, had raised this as a concern and a failing of the scheme and it would be fair to say that I had carried out more inquiries on the subject than any other objector. However, when the Committee identified this as an area they particularly wished to explore and, given the importance of the matter for the 7,000 people who require to travel to the Western General every day, and for NHS Lothian (who had lost their opportunity to object), and the
large number of objectors who simply could not, at that stage, “catch up” sufficiently with the evidence thus far engathered, I felt obliged to present as strong a case for the hospital as possible. This resulted in my collating huge quantities of documentation from various sources (one crateful!), reading same, attending other meetings with relevant parties and ultimately submitting a 64-page witness statement and some 90 supporting documents. This took my entire summer holiday and every spare moment for weeks. It is too onerous a responsibility for objectors to present evidence on major issues, such as access to hospitals and, indeed, there was a very real concern that the Committee members, who already seemed fed up by the amount of time required of them, did not appreciate being presented with such a large amount of further documentation to read. I believe that, where issues of particular consequence to the wider taxpaying public are concerned, the Committee should employ their own independent experts to engather, assess and report on that issue. It is not desirable that the responsibility for presenting such evidence falls on one or two ordinary members of the public who may well not have sufficient procedural/technical knowledge to present the case adequately.

No guidance was given prior to preparation of written evidence as to what the Committee would deem as “inadmissible” evidence. In my case, this led to large swathes of evidence which I had carefully assimilated, considered and presented being deemed inadmissible after my written statement had been submitted.

Several of the Promoter’s witnesses submitted similar evidence on a particular topic. Objectors were, consequently, obliged to expend time rebutting each statement individually. I believe that only one Promoter’s witness should be permitted to present evidence on any particular topic.

However, when oral evidence was being given by the Promoter’s witnesses, the Committee would permit examination of only one Promoter’s witness on that subject. On occasions, the opportunity to question the appropriate Promoter’s witness had passed and there was no opportunity to “revisit” that witness. Objectors had already prepared questions for each witness on the basis of each of the statements/rebuttal statements and this resulted in considerable confusion for objectors, during the course of meetings, as to which questions could be put to which witnesses. This caused considerable embarrassment to objectors who had carefully prepared their questions but, without prior warning, were not permitted to ask them and, indeed, were unsure whom to ask.

At the Consideration Stage, the Committee chose to hear evidence by way of the objectors questioning their own witnesses; the Promoter then questioning those witnesses; and the objectors then questioning their witnesses again, and vice versa for dealing with Promoter’s witnesses. The Promoter employed a QC and solicitor to deal entirely with the questioning of witnesses, whilst objectors simply could not afford to do likewise.

Following the conclusion of all oral evidence meetings, the Committee then retired to consider the evidence they had heard in private. Whilst I appreciate the thinking behind this, it does not appear to be a particularly “transparent” means of demonstrating how MSPs arrive at their decisions. I believe it may have been helpful for the Committee to go back “on camera” at a later stage to advise of their conclusions and the thinking behind them, particularly when they do not intend to explain the reasons for their conclusions in their Consideration Stage report. Again, this becomes particularly important where issues which are of interest to the wider general public are concerned, eg, funding issues. The Committee heard evidence at Stage 1 on financial issues relating to Tram Line 1. Even at that stage, it was absolutely clear that the shortfall in funding was likely to be significantly higher than the Promoter had publicly stated. However, the Committee chose to recommend that the Bill proceed to Consideration Stage, having secured no proper response as to how the funding issue was to be addressed and did not provide reasons for their recommendation. This allowed the Bill to proceed for the construction of Line 1 in its entirety when it was already clear to objectors that it was highly unlikely that there would be sufficient funds available to complete the route. Furthermore, much of the evidence submitted was based upon the construction of the whole route (eg, patronage/environmental impact, etc) when it was already clear that only a part of the route could be built initially. This rendered much of the evidence which was subsequently submitted either irrelevant or superseded.

A major concern of objectors, which increased as the Bill progressed, was that it may be inappropriate that politicians be involved in a scheme where such large sums of money/political
interests were involved. I realise that this may sound blunt but do not know how else to put it! In the case of the tram scheme, the First Minister had already publicly indicated his support for the scheme and the Minister for Transport had previously promised funding towards the scheme. It, therefore, seemed somewhat optimistic (even unrealistic) to believe that five ordinary MSPs would ever be likely to go against the publicly-expressed wishes of senior ministers.

It was felt that, in addition to professionally qualified experts, one or more “ordinary members of the public” should also be involved in the consideration of evidence as they were less likely to be motivated by political reasons. In order to substantiate this point, I would draw your attention to a Department for Transport Guidance Document, entitled “Procedures for Dealing with Optimism Bias in Transport Planning”, by Professor Bent Flyvbjerg, June 2004. I strongly agree with the UK Department for Transport that this report should be mandatory reading for all parties involved in the consideration of major transport projects. Amongst many other interesting conclusions, the report states (page 44): “Allocation of resources from the national Government to a region will most likely be appreciated by the population; hence local politicians see a clear political interest in pushing for such projects.” The report also states that “Local transport authorities “play the game”. They have had a clear perception that it would pay off to keep the budget low and not focus too much on the likelihood of unforeseen costs and to emphasise the benefits. Project promoters ignore, hide or otherwise leave out important costs in order to make total costs appear low.” This is a UK DfT Guidance Report and I would suggest that its findings be borne in mind by anyone considering publicly-funded projects.

I would also draw your attention to further reports by the same author, who is an eminent social scientist, government/UN advisor, entitled “Cost Underestimation in Public Works Projects: Error or Lie?”.

General

My main concern regarding the Private Bills Procedure is that it does not ensure accountability. As an example, since its commencement, the tram scheme has been seriously underfunded and huge sums of public money have already been expended on its development. Despite members of the public advising all 58 Edinburgh Councillors about both the actual likely cost and the level of shortfall in 2003, the Councillors chose instead to “rely on advice from their officials”. Then, when the Bills proceeded through Parliament, the Committees, for whatever reason, failed to ascertain on behalf of the public either the cost or the shortfall until the Bills had progressed too far (as stated on page 53 of the DfT report referred to above: “The Government’s announcement to improve the transport system and to build approximately 25 light rail transport schemes created huge expectations locally and the announcement was, therefore, a sort of political prestige invested. Withdrawing from the promised projects would, therefore, not be easy from a political point of view, even though they suffered from cost overrun.”)

Despite this, MSPs followed the recommendation of the Committee and chose to approve the Bills, thereby handing the schemes back to the Scottish Executive/City of Edinburgh Council, whose officials had provided them with incorrect “advice” in the first place. I find it wholly unacceptable that the Executive, the Council and the Parliament failed to make it clear to the public at an early stage what the likely cost of the project would be and, to this date, no-one appears to be accountable for ascertaining such costs. This has allowed millions of pounds of taxpayers’ money to be expended on a project which, due to spiralling costs, may never be delivered and for which it appears nobody will be accountable. The reader may also be interested to learn that, since approval has been granted to the Tram Bills, requests for information relating to financial issues under the Freedom of Information (Scotland) Act have been refused and there is now no effective mechanism (complaints to the Scottish Information Commissioner currently appear to take up to 4 months to process) open to members of the public to oblige the Promoter to disclose information. Therefore, there has been a subsequent lack of transparency and accountability since approval of the Bills.

I believe it would have been both helpful and informative if MSPs, whose constituencies are affected by the project under consideration, were able to express their views and concerns at Committee meetings and/or submit written evidence. It is likely that those MSPs will be involved in
dealing with the implications of the project for some considerable time after the Bill receives approval and, therefore, it would be both prudent and fair that local MSPs be allowed to make representations to the Committee on issues which relate directly to their constituencies.

Conclusion

In view of the above, I wholly support the intention to alter the method by which major projects are scrutinised in future.

Comments on Transport & Works (Scotland) Bill

Paragraph 50

In my view, it is imperative that confirmation be sought before any Bill proceeds at all that there is sufficient funding identified to complete the project. In the case of the Tram Bills, this was not done, with the result that a vast quantity of written/oral evidence was submitted pertaining to whole sections of the tram scheme which would not, in all probability, ever be built. Furthermore, because only the whole tram alignment could be approved (and not just whichever sections were affordable), affected residents/businesses now face uncertainty for some 15 years about whether the scheme, as it affects their interests, will ever be completed.

I would suggest that, in addition, to providing “an estimate of expense and a funding statement detailing the cost of the proposals and the likely sources of funding”, an appropriately qualified independent expert be engaged to review such information and to ascertain exactly how likely it is that sufficient funds will be available to complete the entirety of the project for which consent is sought. I would further suggest that an appropriate hearing take place at this stage at which the appropriate expert may examine the promoter’s witnesses directly on the veracity and robustness of the estimate of expense, funding statement and level of funding available.

Provision should also be made whereby, if it becomes apparent that, for whatever reason, the entire scheme is unlikely ever to be completed, approval should only be sought/granted for the section(s) which are realistically achievable.

Paragraph 51

I would suggest that some provision be made which would oblige both objectors and promoters to produce information requested by the other side immediately. My experience is that promoters are experts in the art of procrastination and, with only six weeks to formulate an objection, it would be imperative that objectors be permitted prompt access to any and all information which they require from the promoter.

I support the proposal not to levy an objection fee.

Paragraph 54

It is to be hoped that neither promoter nor objectors would be allowed to breach the rule about disclosing their entire case in advance. I have previously outlined problems where the Promoter of the Tram Line 1 Bill consistently introduced new evidence/inadmissible evidence, etc, without censure.

Paragraph 59

I refer the reader to my paragraph no. 14 and would suggest that, where issues affecting the interests of the general public rather than a particular objector’s are concerned, the reporter (or an expert commissioned on behalf of the reporter) undertake a view of the evidence relating to that issue.

Paragraph 118

The consultations on both the Waverley Line and Tram Projects received much criticism, mostly on the grounds of the Promoters’ failure to notify and/or subsequently engage with affected parties. I would suggest that the Promoter be required to demonstrate thoroughly to the scrutinising authority that notification has been properly carried out.
The reader may be interested to learn that, as recently as July 2006, at a meeting between the tram promoter and affected residents, five directly affected residents attended who stated that, to this day, they had received no communication whatsoever from the promoter and that all the information they had gleaned regarding the project had come from the local press. Needless to say, they were not impressed and left the meeting armed with questionnaires to pass on to the other (approx 24) neighbours who, likewise, had received absolutely no communication from the promoter to date. Clearly, these people have been deprived of their right to make representations and now have lost their opportunity to do so, purely as a result of the Promoter’s negligence.

Paragraph 128
I would agree with the principle of considering providing financial aid to objectors who are unfamiliar with the legal and procedural issues relating to an inquiry. This is on the basis that, as schemes are generally proposed “for the common good”, it is unfair that an objector should have to bear any financial burden in order to protect their individual position. Objectors are unlikely to have asked for the scheme and should not require to incur expense in order to preserve/protect their interests.

General
I refer to the Paragraphs 22 and 23 above and to the Department for Transport Guidance document previously referred to and, whilst I fully appreciate that it may be outwith the current scope of the Transport and Works (Scotland) Act, I feel strongly that provision should be made which will ensure that someone is clearly accountable for ensuring that sufficient evidence is received on issues, such as finance, and for subsequent recommendations. This would offer the public some assurance that recommendations made are based on sound, technical evidence and that the scope for “politics” to take precedence is decreased. This would also be in line with the recommendations of Lord Fraser’s Inquiry into the Holyrood project.

FURTHER SUBMISSION FROM ALISON BOURNE

I have just watched the video footage of the Committee meeting of 5 September 2006 at which Mesdames Jackie Baillie and Tricia Marwick, MSPs, and Mr John Halliday of the SPT gave evidence on which I would like to raise some additional points. I realise that what follows in this letter is outwith the scope of the evidence which I was invited to submit to the Committee but hope that Members will feel that it may be helpful to their considerations.

During the 5 September Committee Meeting, there was much discussion on the subjects of how best to deal with any alternative projects (eg, rail v tram) and alternative alignments which may be suggested by objectors/third parties. Evidence was given to the Committee to the effect that the STAG process offered a level of scrutiny such that, by the time a Bill is lodged, it should be safe to assume that both the type of project being promoted and also the alignment proposed are the best, in terms of STAG. Mr Halliday mentioned that other solutions are assessed during the STAG process and that five national criteria are applied during the route sifting process in order to ensure that the alignment eventually arrived at is the one most likely to deliver the range of benefits demanded by the STAG criteria (“safety”, “environment”, “economy”, “integration” and “accessibility”).

However, this assumes that the STAG criteria and procedure has, indeed, been properly followed by the scheme promoter, without any bias, and that the project objectives are in line with the STAG objectives. Mr Ewing remarked that the whole process is rather like the Promoter marking the exam paper itself. Mr Ewing is absolutely correct and there is a significant problem here which I am concerned is not being sufficiently addressed under the terms of the proposed new legislation.

In the case of Tram Line 1, the original objective was to provide a fast link between the Waterfront Development and the city centre, preferably as cheaply as possible. The Promoter briefly compared the solutions of trams, guided buses, conventional buses and a “do nothing” scenario and concluded that trams were the preferred solution. The guided bus, conventional bus and “do nothing” scenario were not assessed any further. However, between the time of this assessment (2000/2001) and the present, modern bus technology has made enormous advances with many
cities now looking at Bus Rapid Transit (BRT) as the solution they wish to follow, as opposed to trams. I would suggest that consideration of other options should be carried forward to a fairly advanced stage, before being allowed to fall.

Also, in the case of Tram Line 1, the initial route sifting procedure did not, in my opinion, comply with STAG. Instead of applying the five STAG criteria to all potential route links, sifting out the “least good” links to eventually arrive at a preferred route, the Promoter applied the criteria: “safety”, “environment”, “economy” and “technical difficulty” (Work Package 1 Report, December 2002) - and this despite the fact that technical difficulty (apart from obvious engineering “showstoppers”) should not be a considered during the initial sifting process. Moreover, and again contrary to the recommendation of STAG, the Promoter then applied weightings, giving “technical difficulty” the highest weighting, ie, easiest and cheapest was given weighting over the other three criteria. Somewhat bizarrely, having identified a “preferred route”, the Promoter then applied the five STAG criteria to that route alone and claimed that this route best met the STAG objectives!

In dropping “integration”, no consideration could be given as to how the tram would integrate with other modes of transport, eg, buses. This, of course, was identified, by the NAO, as one of the reasons why some existing UK tram schemes have failed to attract sufficient patronage.

In dropping “accessibility” (“social inclusion” and “catchment”), there was no mechanism by which to identify the key passenger generators (eg, hospitals, colleges, major employers, etc) or the areas where there was a high demand for public transport (ie, socially deprived areas). Instead, the Promoter identified a “preferred route” which, for much of its length, runs beside the sea and then along a disused railway corridor, virtually cut off from the general road network (making integration difficult), both of which sections of line have low population density/high car ownership, whilst failing to provide direct stops at several key generators, whose patronage the scheme requires in order to ensure that it “stacks up” financially.

What is even more perplexing is that, in undertaking the sifting process for Tram Lines 2 and 3, the proper STAG procedure was followed correctly, ie, the five national criteria were applied throughout the whole procedure and there was no trace of “technical difficulty” being a consideration in identifying the best route, or of weightings being applied.

The impact of the differing criteria can best be seen by considering the many key generators served by Tram Line 3: city’s busiest bus corridor; University; Cameron Toll shopping centre; New Royal Infirmary Teaching Hospital; new Bio-medical Park; Craigmillar Regeneration Area; Fort Kinnaird Retail Park; and Newcraighall park and ride (with potential to extend into East Lothian). Regrettably, the public was not invited to state which of the three tram lines it preferred but I have little doubt that Tram Line 3 would have received the greatest support, addressing as it does many socio centres where access is already a problem.

In my view, the unsatisfactory initial sifting process for Tram Line 1, undertaken over a year before the Bill was formally lodged (and two and a half years before objectors became aware of the unusual sifting method applied) was where many of the problems with the project arose as the public could not understand the logic of a tram scheme (whose main advantage is that it can carry high numbers of passengers) which would not adequately serve the places where large numbers of passengers are, eg, the Western General Hospital/Edinburgh’s New Telford College.

I have raised, in my previous submission, the fact that sceptics of the tram scheme were aware from, TIE’s own background papers, that there was a massive funding shortfall well over a year before that became general public knowledge.

The point I wish to make is that, whilst I absolutely support the proposal that an independent Reporter(s) be appointed to undertake the consideration of the detail of future transport Bills, it may well be the case that, by that stage, the damage has already been done. My suggestion is that publicly-funded projects should be scrutinised by an independent expert(s) from a much earlier stage, preferably as near to inception of the scheme as possible. Had there been an independent expert(s) involved at the time when the sifting process was undertaken or when the Preliminary Financial Statement and supporting papers were produced, the technical and financial problems
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would have been identified at a point which would have allowed time to find answers to these problems before the Bill was lodged.

Because such scrutiny was not in place, Royal Assent has been given to a tram scheme that is likely to bear little resemblance to the original scheme. Only certain sections of the route are likely to be built for which there are still no estimated patronage figures; no benefit/cost ratio; no business case; no environmental impact information (eg, air quality/reduction in general vehicular congestion); no details of the impact on bus services, etc. It is not even sure that an acceptable solution has been found to the very many technical difficulties which running a tram through the city centre will involve. How can a project be allowed to incur £63m of taxpayers’ money, be “over 10 years in the planning”, go through years of Council and Parliamentary procedure with issues such as these still unresolved?

Only this week, the Edinburgh Airport Rail Link Committee has published their Stage 1 Report in which they express dubiety over various aspects of that project. Why were these fairly obvious technical and financial issues not resolved BEFORE that Bill was ever lodged?

By repeatedly failing to address obvious major problems at an early stage, millions of pounds of public money are wasted every year on projects which may never actually materialise and the general public becomes increasingly exasperated over the perceived “incompetence” of its officials and its politicians.

I would suggest that, whilst the new Transport and Works (Scotland) Act is to be welcomed and should result in a great improvement over the Private Bills Procedure, serious consideration needs to be given as to how major schemes are approached from their very inception. There needs to be far more meaningful consultation with the public on what it considers to be priorities; far more rigorous attention paid by consultants to potential “showstoppers” at an early stage; and far more scrutiny given by independent parties throughout all stages of a project to ensure that major issues are addressed.

If this were to happen, I feel confident that, by the time a Bill is lodged with Parliament, the level of objections would be much lower, less serious and far less time consuming (therefore, cost effective), and there would be a greater assurance to the public that the scheme is (a) robust; (b) technically and financially feasible; and (c) will actually be delivered.

SUBMISSION FROM BLACKHALL COMMUNITY ASSOCIATION

Having looked at the Transport and Works (Scotland) Bill, plus its Notes and Memorandum, I do not feel that many of the points I made during the consultation have been addressed. Key to these is the issue of “public interest” and a requirement that I feel should be placed upon Promoters of Bills to provide evidence of their project being in the public interest. This should also be in the context of the business case – public value should be paramount, both in terms of funds and in the outcome of the project.

There should be additional independent third party scrutiny where the Promoter of a scheme is either the Scottish Executive, Transport Scotland or a local authority in order to ensure that projects actually meet public need and are financially viable, rather than represent a politically-driven agenda. Appointing a Reporter may not achieve this; where full planning public inquiries are conducted, experts presenting opposing cases are able to challenge the “expert” views of promoters of schemes before a Reporter. This at least enables a full public airing of arguments and counter arguments. However, ordinary members of the public do not have access to experts readily. I am aware that proposed planning legislation is also going down the same route as the proposed Transport Bill – that is, opposing views are shared before public hearings, with a view to the Reporter/local authority basically resolving dispute over detail, not principle. Again, my concern is that too tight a remit will prevent key evidence from emerging from close public scrutiny of different view-points.
Financial viability should be tested in the public domain and should be scrutinised independently at the same time. And as part of, the examination of a project. Economic viability should be an inherent and early criteria which should not be reserved for the Scottish Executive or Transport Scotland until after the Parliamentary process is complete. The public fails to understand why all that effort should go into a Bill, if it may not be affordable (it’s cart before horse), or only part may be affordable.

The brief for the independent reporter should include the option of scrapping a scheme. The "examination in public" which occurred for Edinburgh's congestion charging scheme was to examine the detail only - the Reporters were not able to propose scrapping it, or replacing it with better schemes. Also, who will employ the Reporters? If the Scottish Exec or Transport Scotland appoints them, and a transport project is being promoted by the Scottish Exec or Transport Scotland, there is no guarantee of independence and transparency. Paragraph 56 of the Memorandum says exactly the opposite to this – if I were to read this Paragraph as I considered participating in a Bill, I can assure you I simply wouldn't bother. If a Reporter is truly independent, (and as a guarantee of independence), surely s/he should be able to examine whatever they wish and take whatever view and action they want to, on the strength of the arguments submitted? If a project is very good, and a Promoter has done their preparatory work well, there should be nothing to fear from rigorous examination of the principle and the detail of a scheme.

There needs to be clearly marked exit strategies and exit points at all stages of the procedure, so politicians and experts have the proper opportunity to make major changes to routes etc. There should be mechanisms to ensure that legitimate concerns are properly and factually addressed, or the system will be very vulnerable to "spin", hype and PR, rather than evidence.

Objections and concerns from members of the public need to be answered specifically. It is no good, if you wish to engage the public and bring public support for projects, if consultations and objections are ignored or selectively summarised. There should be an obligation on the Promoter to engage with, satisfy or factually answer concerns and objections and to provide evidence that this has occurred.

There should be clear, understandable and precise definitions of what "in the public interest" means. A project that delivers political policy is not the same as "in the public interest". This is a subject term which needs to have proper criteria and clarity about its definition, in order that the public may understand or challenge what is being done in its "interest". This should specifically include reference to the use of public funds both for construction and for operation of projects. "In the public interest" must surely mean economically viable.

Whilst I do not wish to rehearse the detail of our experience, I have given some illustrations of our specific experience of the Edinburgh Tram (Line One) Bill:

- There was absolutely no change in the position of the Promoter throughout the consultation period, the objection period and the Parliamentary period with regard to local community objections. Just because the broad idea of a tram loop had received funding from the Executive should surely not have meant that the scheme was a done deal? In the event, the Promoter does not intend to build a loop, despite lodging evidence about how essential a loop was to the viability of the scheme. Our proposed alternative routes (to better serve a major hospital) were not examined, except in the most cursory way.

- We had to lodge responses, in a rigid time and style-framework over the summer holiday period, on three separate occasions, but actually had nothing to add to our first formal objections. In other words, our points of concern remained unchanged, were unanswered (and are still unanswered).

- We had late (and little) guidance on what was within the control of the Parliamentary committee (eg speed limits, enforcement of mitigations etc) and what was not in their remit (and within whose control enforcements etc did lie, and what our role in this was to be, if any).
In summary, we were never sure what the Committee actually could do to help us, even assuming we were able to put a winning case.

As the Promoter was clearly biased (promoting their case), they just kept putting their argument, rather than answering our concerns. The Parliamentary process therefore felt like promotion, and spin, not a fact-based examination.

The Committee concerned itself with the legalities of the procedure, rather than the merits of any case (largely because it couldn’t actually do very much procedurally to accommodate our case ie change the principle of the Bill or the detail of it in several areas which were important to us).

There really were no exit points in the procedure, because of the Parliamentary “window” in which the process was operating. The Committee and the Promoter were both in a big hurry to get the Bill through, to make way for other bills that were scheduled and were politically important to them.

There was no meaningful opportunity to look at the principle of the tram scheme (only the “adequacy” of the supporting documents was looked at, briefly and by invitation only), and yet the Promoter did not (and still does not) have the detail available, as the project was waiting for the Parliamentary process to be complete before commissioning detailed design. Local people are most concerned about detail, as it affects them, and if this cannot be examined, and the principle cannot be examined, it is all rather pointless.

The issues for the Transport Bill as I see it are:

Who will be publicly accountable for projects? We need a clear chain of responsibility – if politicians wish to make Reporters accountable (and do the bulk of the work), then they have to give them more and wider decision-making powers. They also need to make decisions which politicians don’t like sometimes, or their integrity is undermined!

The public needs to be told exactly what it can expect from the process, and someone (not the Promoter) needs to take ownership of the pre-submission stages, and needs to take independent evidence of consultation, to avoid it being merely a box to be ticked by the Promoter (eg we need a check list of public concerns, with positive outcomes, to ensure that the Promoter really listens).

How will the Committee be sure that it is properly informed of all the arguments without hearing all the evidence and without being able to put questions?

How will the political decision to undertake a big transport project be separated out from the merits (and detail) of a proposal in both accountability and procedural terms? It is legitimate to make political decisions in principle, but if a scheme becomes, in the course of its development and as detail emerges, unworkable or environmentally unacceptable, who is going to do something about that? It’s about safe-guarding an idea by ensuring sound delivery in practice. It may be that the idea simply does not translate into reality – there should be an exit strategy for this eventuality.

There needs to be an assumption and a mechanism that recognises that the public may indeed know better than the Promoter and/or experts about the detail of an area, and that the public may make a suggestion which would improve a scheme. There is an inherent resistance in “experts” in accepting this notion (eg prior to a Bill being lodged), and the Transport Bill needs to protect the public in this respect.
We have considered to what extent the Bill addresses problems experienced by clients involved in the private bill process. Briefly, these can be summarised as:-

- **Consultation** – we have represented clients whose first knowledge of the impact of a private bill on their interests is the formal notification. Consultation exercises can have more in common with public relations exercises and have not resulted in meaningful engagement with those persons/companies who could/will be adversely affected by the provisions of a private bill. As a result of poor consultation in previous bills, the route of the public transport infrastructure required to be changed. Lack of detailed consultation on the impacts of the original route has led to amendments being brought forward at consideration stage. This has resulted in duplicate legal costs associated with having to continue to defend the “fiction” of the original route plus responding anew to the new route (the “bill within a bill procedure”). In some instances, promoters have attempted to be pro-active and consult before or just after the formal notification. This approach has not always been successful in preventing subsequent objections being lodged because the information from the promoter necessary for the individual/company to assess the impact of the bill on their interests has not been forthcoming.

- **Notification** – some clients for whom we have acted have not received notification of all of their interests affected under private bills. It can be time consuming but necessary to verify that correct notification has been carried out e.g. to determine whether any servitudes or other interests over land owned by others are affected. This could be better addressed with improved consultation prior to notifications being sent out and better information being sent out enabling easier identification of land interests affected.

- **Incentive to negotiate** – in our experience the promoter only begins to seriously negotiate (i.e. responding to specific concerns) when a date for a committee hearing is set, whereupon activity reaches frenetic levels. This attitude is not conducive to problem-solving and has meant that complex issues, capable of being dealt with between parties prior to the consideration stage, have been left for the bill committees to assess. Legal costs for our clients are higher as a direct result of this because witness statements and rebuttals require to be drafted. It is relatively easy for the promoter to go through the motions as regards negotiation e.g. some correspondence may be received from the promoters and meetings can take place, however the information provided by the promoter is generic. Meaningful negotiations do not take place prior to the date of hearing drawing closer.

- **Quality of information** – in general there is not a problem with the volume of information being generated. There is however a lack of specific information which would enable objectors to accurately predict how a bill will impact on them. For example, promoters produce draft codes of construction practice. These are generic documents which do not contain objectively framed commitments. They remain in draft format well into the parliamentary process. Yet they are often used by promoters to counter particular concerns raised by objectors, even at the stage of responding to witness statements. They do not enable planning to be undertaken e.g. to ensure continuity of services or access. Nor are they specific enough to enable reliance to be placed on them e.g. in lieu of submitting objections.

It is against these experiences which we have considered the Bill. Firstly, we agree with the aims of the Bill, particularly those which seek to:

- Encourage promoters to undertake meaningful engagement with specified persons under general public in order to inform the design and development of projects;
- Require pre-application scrutiny of promoter’s proposals so as to ensure that the subsequent process operates swiftly and efficiently;
- Provide promoters/prospective applicants access to land for various reasons; and
- Ensure that more information is available to the general public.
This response seeks to provide a view on how well the Bill meets its objectives and addresses the concerns regarding the private bill process.

Section 4(2) provides that the Scottish Ministers may (amongst other things) make rules as to

(a) the form of an application under this section,

(b) the documents and information to be submitted with the application,

(c) the giving of notice of the application (including the publication of any such notice

(d) consultation to be undertaken before the application is made, and any other steps to be taken before the application is made, or in connection with the making of the application, and

(e) any other steps to be taken –

- (i) before the application is made, or
- (ii) in connection with the making of the application

It is clear from the explanatory note that these provisions are intended to create meaningful consultation. However, as currently drafted all of the detail is left to be set out in orders to be made by the Scottish Ministers. As a result, it is difficult to assess whether the Bill will achieve its aims and whether it addresses the negative aspects of the current private bill procedure. The Policy Memorandum states that the detail of application information required will be consulted on separately. Comments here are therefore brief. We would however question whether the use of secondary legislation to fill in the entirety of the detail is transparent.

- **Consultation** – Given the importance of meaningful consultation, it is surprising that the Bill leaves the entirety of the detail for the secondary legislation. An objective “minimum bar” requires to be set out. It needs to be clear that prospective applicants would have to reach this standard of meaningful consultation, before an application can be lodged. It might be thought more appropriate to require an objective qualitative standard to be attained. It is accepted that the variety and range of transport projects means that it would not be practicable to introduce absolute rules (e.g. fixed time periods for consultation). If a qualitative standard is set down then secondary legislation could be used to set out what evidence would be required to establish that the standard had been met. The provisions would need to be drafted in such a way that “PR exercises” do not constitute meaningful consultation.

- **Notification** – The information provided to those affected by the application should enable them to assess the impact of the project on their interests. The inclusion of code of construction practices (not in draft) and meaningful information on mitigation measures and how access will be maintained would assist recipients in deciding on whether to raise objections. As currently drafted, all of the detail is left for secondary legislation.

- **Quality of information** – The documents submitted with the application should be specific. There is a link between meaningful consultation and quality of information generated. For example meaningful consultation could generate access impact studies using data provided by potentially affected individuals/businesses. In addition, the power to enter land for the purpose of informing an application (section 18 of the Bill) could be used where appropriate in order to enable prospective applicants to conduct access surveys etc. which would enable more specific documentation to be prepared e.g. to inform the code of construction practice or local construction/access codes.

- **Incentive to negotiate** – If a meaningful consultation is conducted, with adequate information provided to those potentially affected by a project then in our view, the number of objections received will be fewer and better focused. However there also requires to be a mechanism to incentivise applicants to negotiate out objections prior to the examination stage.
We support those aspects of the Bill and supporting documentation which are geared towards –

- ensuring that substantive amendments post consultation do not occur; or
- if amendments do occur (e.g. to alleviate or remove objections), other parties, who may be affected by those changes, have the opportunity to have their concerns heard.

We note that the Scottish Ministers will be able to act as a promoter/applicant. It will be important that the rules apply to them as they apply to any other applicant so that the same amount of scrutiny will take place.

In conclusion, we are broadly supportive of the Bill, particularly those aims stated above which appear to be geared towards addressing problems experienced by clients engaged with the current system. However the use of secondary legislation to supplement crucial details means that we are unable to provide a view on whether the aims are met. We note that further consultation is planned but have expressed concern that it may not be appropriate to leave so much of the detail to secondary legislation e.g. without introducing the idea that minimum/qualitative standards require to be met.

We thank you for this opportunity to provide our views.

SUBMISSION FROM NETWORK RAIL

Thank you for inviting Network Rail to comment on the Transport and Works (Scotland) Bill. Further to our earlier comments on the associated consultation on proposals for a new approach to delivering public transport infrastructure developments on Scotland we do not have much more to add.

Network Rail is fully supportive of the objectives of the Bill to provide a modern efficient process to authorise transport related developments. As a promoter of major railway infrastructure schemes (e.g. the Airdrie Bathgate Bill currently before the Scottish Parliament) and as a party who regularly has an interface with other transport projects, we support any proposal which will introduce a more efficient and streamlined system.

We note that any railway project which is wholly within Scotland or goes cross-border will be dealt with under the new procedure for the Scottish element of the works. Further, we note that it is the intention for the Promoter of the scheme to obtain an Order to provide all the authority required to build and operate a transport system.

One substantive point we do however wish to make relates to Section 26 of the Bill which amends the Transport (Scotland) Act 2001. The stated intention of the section is to enable Scottish Ministers to provide funding for voluntary purchase schemes (VPS) for properties affected by a transport development not eligible for purchase under the compulsory purchase process. The section is retrospective. In May 2006 Transport Scotland published a paper setting out arrangements for funding for VPS. The provisions of Section 26 themselves are understood and do not give rise to any concerns, particularly as the provisions are discretionary. However, we are concerned by any suggestion that there should be a link between a VPS approach, funding of such a VPS and schemes to be authorised under the new procedure generally. Any suggestion that a VPS is a pre-requisite of a scheme authorised by the new Bill procedure is unacceptable so far as Network Rail is concerned, as we believe that the principle of VPS is very complex, and requires a case by case evaluation for each project.

So far as the Airdrie-Bathgate Bill is concerned, we are in discussions with Transport Scotland regarding purchase schemes generally and we have made known our views on VPS to them.

Although, we welcome the proposed introduction of a mechanism that facilitates faster consideration for transport infrastructure works, any change must ensure that there are processes in place to protect the operational interests of potentially effected parties. These should include a
sufficient consultation process, preserved right of objection to protect operational interests and, if appropriate, consideration by an independent party.
The Convener: I welcome to the committee the Minister for Transport, Tavish Scott, who is supported this afternoon by Frazer Henderson, who is the head of the bill team, Andrew Brown and Catherine Wilson, who are solicitors in the Scottish Executive, and Damian Sharp, who is the head of major projects for Transport Scotland.

Minister, I invite you to set out the case for the Transport and Works (Scotland) Bill.

The Minister for Transport (Tavish Scott): It is important to recognise that there has been a positive response to the bill. We all recognise the benefits of removing transport projects from the private bills process, particularly those of us who have sat on private bill committees.

One of the key considerations behind the bill is that the new process should not take place in a vacuum. It will sit within the existing processes of our parliamentary democracy. If the bill is enacted, transport proposals will continue to be subject to scrutiny, from the strategy documents, beginning with the strategic projects review, through to the infrastructure investment plan and culminating, for nationally significant projects, in the national planning framework. The input of the Scottish transport appraisal guidance, which I understand you have been discussing, will be vital in evaluating projects that involve the investment of public money. As you may recall, I previously announced a review of STAG. That review is now under way and it is due to finish in June 2007. MSPs will, of course, have an opportunity to influence the final proposals.

We expect the bill to build on the existing processes to ensure that a full and thorough appraisal process takes place involving the local community, local MSPs and, where appropriate, the Parliament. The onus will be on promoters to ensure that engagement takes place with the right people at the right time, and they will be held to account for that. Although anyone will be able to promote a project under the bill, the parties that are most likely to do so are Transport Scotland, Network Rail and the regional transport partnerships.

To pick up a point that David McLetchie made in a previous meeting of the committee, that front-loading process might involve additional investment and effort at the start but, in return, we expect that the legislation will enable us to provide an efficient and structured authorisation process once an application has been submitted.
As you are aware, the bill distinguishes between local and nationally significant projects. I understand that there has been some confusion about the distinction between those terms. However, the definition of nationally significant projects will become clear during stage 2 of the Planning etc (Scotland) Bill and as a result of the consideration of the national planning framework. It might be helpful if I say that transport projects that are currently being taken through the capital programme, such as the M80 project and the Edinburgh airport rail link, would be examples of nationally significant projects.

I have already given evidence to the Procedures Committee in which I focused on the role of the minister and the attached accountability. I do not intend to repeat those arguments, but I will make a final point in that regard. All of the transport-related private bills have concerned partnership agreement commitments, which means they have taken forward Executive policy. I concur with Fergus Ewing’s point that a Government has a right to promote its own policies as it has a mandate from the Scottish people to do so. Of course, the detail of the projects must be scrutinised, and the bill will ensure that independent scrutiny takes place.

As you are aware, the bill gives local authorities, national park authorities and those who are affected by compulsory purchase a right for their objections to be heard at an inquiry. I have followed the discussions of this committee and the evidence of witnesses and I am pleased to advise that I shall lodge an amendment at stage 2 to extend that right to be heard at an inquiry to navigation authorities, Network Rail and regional transport partnerships. I hope that that will address some of the concerns that have been expressed.

I hope that members recognise that the bill balances the priorities of efficiency and natural justice. I hope that we achieve a better process for the delivery of important transport projects on behalf of the people we serve.

I am happy to answer questions.

**Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP):** There is a measure of consensus about the bill, and I am pleased that, following the submission of evidence to us, Network Rail, the regional transport partnerships and the navigation authorities are to be statutory consultees. The evidence that we heard from Shetland Islands Council was probably instrumental in ensuring that the navigation authorities gained that status.

The minister is quite correct: Governments should be able to promote their own policies. You will appreciate that, in advocating that, I am thinking beyond next May.

The fundamental point about the bill is the timing of projects, which I am sure concerns everybody. We must have consultation, and it should be front-loaded. We must involve the public as well as those who are directly involved in the process. Projects take an awful long time. Personally, I feel that they take too long. How will the bill affect how long major national projects take to deliver? Will the bill do enough to deliver such projects within a reasonable time, given their strategic importance to Scotland?

**Tavish Scott:** We might reflect on the other evening’s members’ business debate, which was secured by Bill Butler, on the Glasgow crossrail project. I said that I was from the school of decision making that Charlie Gordon illustrated in his speech. It might be strange for Charlie Gordon, Fergus Ewing and I all to agree, but we share a concern about the length of time that projects take to get through the process and come to fruition. I imagine that it is fair to say that all members agree. I would not be promoting the bill if I did not believe that we could achieve a better process for future Governments—of whatever persuasion. It is crucial that the bill does that.

I am clear about the importance of front-loading the process, which David McLetchie and other members were right to raise earlier. The nuts and bolts of sorting out projects must happen at the beginning. It is in the Government’s interests—whichever is in Government—to ensure that the process is as robust as it can be, taking into account the natural concerns of communities and individuals’ rights to object to projects that they do not like, while dealing with as many issues as possible up front. There will be a bit of work to do on how best to manage the first project to go through the new procedure, but that is the essential core of making a more efficient process that delivers the time savings that we are seeking and provides a better process for the promoter and the Government in seeking to meet their transport objectives.

**Fergus Ewing:** If the bill is enacted, a major change—perhaps the major change—will be the replacement of the work of ad hoc committees of MSPs with the involvement of the Scottish Executive inquiry reporters unit, or SEIRU. That will mean that the delays that result from MSPs being restricted to meeting on a weekly cycle, broadly speaking, with various gaps for recesses will be avoided, as SEIRU will presumably be able to deal with an inquiry in a continuous period of one to three weeks. Is that your understanding of the main way in which we will make time savings in the national projects that come under the bill?

**Tavish Scott:** That is a reasonable and fair assessment of how time efficiency can be brought into the process. It is important to reflect on the
fact that in carrying out its work, the inquiry reporters unit must ensure—and this is the Government's job—that the resources are available, in particular the skilled men and women who are able to conduct assessments.

At the moment, we put an inordinate amount of pressure on colleagues of all parties who are members of private bill committees. We need to strike the right balance between preserving Parliament's absolutely appropriate right to scrutinise the Government's transport project intentions and providing a much more effective mechanism for dealing with them.

The other side of that—which I am sure is behind the line of questioning—is that, with roads projects, Government decides to build a road and, subject to the appropriate statutory processes, simply gets on with it, no matter how large the project might be. It is important to achieve some consistency in our handling of transport projects.

14:15

**Fergus Ewing:** Indeed. The consensus continues apace, minister.

Is SEIRU adequately resourced to cope with the task it will face?

**Tavish Scott:** Yes, it will be. It is Government's job to ensure that that happens. By the time the bill is an act of the Parliament—which will be, of course, subject to parliamentary approval—SEIRU will be in a position to take forward the work that it needs to take forward.

**Fergus Ewing:** Finally, I want to focus on the nuts and bolts of SEIRU's approach to rail projects. How will it acquire expertise in a field in which I assume it has not been involved previously? Will it establish a unit of specialist advisers who are familiar with the delivery of rail projects? If that is not part of the plan, is there a plan to equip it with the expertise that will enable it to come to a reasoned and fair judgment in each case?

**Tavish Scott:** Yes. The plan is to bring in appropriate expertise. That has been built into SEIRU's operating business plan. The situation is equivalent to the way in which we developed expertise in Transport Scotland, for example, by bringing in highly able men and women to scale up the organisation to cope with the commercial pressures for which the organisation has responsibility and to deliver an extensive programme of transport improvements. Mr Ewing can take it that we plan to ensure that the necessary expertise is in place to allow SEIRU to do its job properly.

**Fergus Ewing:** I might come back to you later with a question about heritage railways, but I will leave the matter there for the moment.

**Mike Rumbles (West Aberdeenshire and Kincardine) (LD):** A number of heritage railways, including the Deeside light railway in my constituency, have contacted us about the bill. I am quite used to dealing with legislation in which ministers try to gather powers to themselves. However, with section 21 we are being asked to agree that powers—in this case, the power to make light railway orders—be taken away from the Scottish ministers. That is unique in my experience of considering legislation. The irony is that the light railway companies that have contacted the committee are concerned about ministers losing that power. As I understand it, the costs under the current system are quite low, whereas the companies will incur major costs under the system prescribed in the bill. What is the purpose of section 21? Why are you taking away that power? Moreover, will you give us more information about costs?

**Tavish Scott:** The straight answer to Mike Rumbles's first question is that we seek to treat all transport developments in the same way. The situation is similar to our management of road versus rail in the few brief years since 1999. Our focus is on ensuring that, as far as possible, we put in place the same procedures to deal with all transport developments. As with any other railway development, heritage railway projects can raise issues of noise, vibration and disturbance.

It is fair to say that not all the heritage railway proposals that I have seen are for rural areas. Some of them would impact on suburban and urban areas, so noise and vibration issues might be more important in particular localities. That is another good argument for dealing with heritage railways in the same way as we deal with other railway developments.

I appreciate Mr Rumbles's point about cost. The fees will not be set until next year, but I assure the committee that they will not be greater than they are currently. It is important that we reflect that as we continue our consideration of these matters, which we will do during the course of the next year.

**Mike Rumbles:** I am delighted to hear, minister, that there will not be any increase in costs for companies in relation to the Light Railways Act 1896. That addresses the fundamental point, and it is an excellent outcome.

Several witnesses have suggested that there is a problem with independent scrutiny when ministers can choose to go against the advice of a reporter, for example when an independent reporter considers a scheme and reports back to
the minister, either approving or rejecting it, and the minister overturns or does not recognise that advice. There is therefore an accountability issue. Several witnesses have suggested that, in such cases—and SEIRU reported that it happens in 5 per cent of cases, which is quite a lot—the decision should be referred to some sort of parliamentary committee. Do you agree?

Tavish Scott: No, I do not. Five per cent of cases is very low. It does not constitute a lot of transport projects in any one period. However, I understand Mike Rumbles’s point and I assure him that the issue was debated extensively at the Procedures Committee.

My answer is similar to the one I gave to Mr Ewing earlier. We propose to put in place a process that will be front-loaded with the detail and core of the project, which will be gone into in advance. Subject to the definition of “national significance”, a project such as the Edinburgh airport rail link, for example, would go through several levels of parliamentary scrutiny at a strategic level in addition to detailed assessment at local level, involving local communities, MSPs and statutory bodies.

The Government’s transport proposals will therefore go through a number of different stages of one form or another, including direct parliamentary scrutiny and the local assessment of projects, all of which means that a considerable amount of detailed scrutiny will be done. Given the front-loading exercise and the significant top-line parliamentary scrutiny in the context of the national transport strategy, the strategic projects review and the planning framework, for example, as well as the run-of-the-mill members’ business debates, parliamentary questions, and general debates, it will simply not be necessary to have yet another process. I know that it might be a forlorn hope, but I hope that the 5 per cent figure will come down because of the amount of work that will be done at the start of each project. We—or future ministers—might be able to reduce the number of cases in which ministers overturn the recommendations of a local inquiry. It is clear that there should be a right to a local inquiry, which will be an important part of the process.

Mike Rumbles: I understand that entirely in the context of projects that are of national significance, because such projects would come back to the Parliament for scrutiny, so there would be public accountability. However, if the development was not of national significance, the minister would appoint a reporter who would simply report to the minister. The minister could say yea or nay to the development without the matter coming back to the Parliament. Accountability is the nub of the issue. For projects that are not of national significance, should not someone else consider the 5 per cent of cases in which there is a dispute between the reporter’s findings and the minister’s decision?

Tavish Scott: As I said, such an approach would put in place another hurdle for projects to overcome. We should distinguish between projects that are nationally significant and projects that are locally significant—

Mike Rumbles: I am not talking about nationally significant projects.

Tavish Scott: A locally significant project would undoubtedly be included in the local transport strategy that the local authority and the regional transport partnership take forward. If a local authority promoted a proposal for a road, it would have to overcome a considerable number of hurdles in relation to the local inquiry. In addition, the minister with responsibility for transport would have to satisfy himself or herself that the correct procedures had been followed locally. If the reporter found against the local authority and the case was referred to the minister for a decision on whether to ratify or overturn the reporter’s findings, the minister would be accountable to the Parliament for their decision. As Mr Rumbles knows from his experience in the Parliament, members rightly hold ministers to account, through all the mechanisms that we know and love.

The Convener: If the inquiry reporters unit was considering the detail of a project to which the Executive was committed, could the reporter’s remit make absolutely clear to the public that the Executive supported the project, so the reporter would consider not whether the project should go ahead but whether details of the project should be amended before it could go ahead?

Tavish Scott: From constituency work, we are familiar with cases in which the inquiry reporters unit has dealt with planning applications. It is clear that it is a quasi-judicial process. While you and I, convener, as members of the Scottish Parliament can write to the reporter to say, “Our constituent has written to us on this matter and we would be grateful if their comments were taken into account,” reporters can airily chuck our letters into the bucket if they so choose. The process is independent, as it should be.

Reporters will properly assess the detail of projects. If the Parliament endorses strategic documents or a planning framework that includes proposals for a significant new railway in Scotland, the reporter will be bound to take that into account—as they currently do. For example, if the Government intends to build a road, the reporter who considers the project takes account of that intention. The reporter considers details such as whether the Government followed the correct procedure and whether environmental assessment
was properly undertaken, as well as aspects of the project that independent objectors or statutory consultees have questioned. That is a fair assessment of the manner in which engagement will take place in the proposed new system.

14:30

Ms Maureen Watt (North East Scotland) (SNP): We have asked most witnesses what they see as a project of national significance. What do you understand by the term “national significance”? What is your definition of it? In what circumstances will ministers use their discretionary powers?

Tavish Scott: I appreciate that this is not the answer that is looked for but, as I said, that matter will be considered in Parliament as the Planning etc (Scotland) Bill is scrutinised, particularly at stage 2. Transport projects such as the M80 and the Edinburgh airport rail link—to name but two that are in our capital transport programme—are nationally significant. I cannot add to that today, because the precise definition is ultimately a matter for the Planning etc (Scotland) Bill. As I am sure Maureen Watt fully appreciates, the definition affects not only transport but infrastructure spending throughout the Executive.

Ms Watt: What steps have officials taken to ensure that the Planning etc (Scotland) Bill and the Transport and Works (Scotland) Bill are complementary rather than contradictory?

Tavish Scott: That is a fair question. Officials have engaged at an appropriate level to ensure that transport is thought about carefully in relation to how the definition works. That will continue as we consider the Planning etc (Scotland) Bill at stage 2.

Ms Watt: It has been said that the Transport and Works (Scotland) Bill is the English act with bells and whistles. Apart from section 21, the bill will give ministers more powers than the English act does. Why was it thought necessary to do that?

Tavish Scott: What I will say might be slightly unpopular south of the border, but I think that we have produced a better model. We have learned from how the system has worked at Westminster and we have taken advice on it. The bill team has contacted colleagues in the south to learn from how the system has worked at Westminster and we have taken advice on it. The bill team has produced a better model. We have learned from how the system has worked at Westminster and we have taken advice on it. The bill team has produced a better model. We have learned from how the system has worked at Westminster and we have taken advice on it.

Ms Watt: Are you willing to share examples of the English legislation not being strong enough?

Tavish Scott: I cannot be drawn on that today, but I would be happy to reflect on that in correspondence, if that would help.

Michael McMahon (Hamilton North and Bellshill) (Lab): I will ask about triggering of public inquiries. I cannot—given our experience and the reason why the bill was introduced—conceive of a nationally significant transport measure that would attract no objections. The idea that we could dig a sod of ground anywhere and Friends of the Earth would not object is beyond the realms of possibility. However, should no objection be made, the bill will give the minister discretion to call in a proposal. If a transport proposal were nationally significant, would it be better for the minister automatically to require a public inquiry?

Tavish Scott: That is a judgment call—ministers of the day would have to make an assessment based on the circumstances. We have achieved the right balance in leaving the potential for a minister simply to move a project forward in the circumstances that Michael McMahon described. That is probably the right judgment call in those circumstances.

I share Michael McMahon’s view. It is difficult to imagine a major project—particularly, dare I say it, a road project—to which no objection would be raised. Last week, there were objections from curious quarters to a rail project. However, I think that we have achieved the right balance. We have left some flexibility in the system. We must also remember that we all want projects to progress more quickly. I suppose that a minister might come under slightly curious attack for putting in place an unnecessary process, but we have made a judgment call and have suggested that approach to Parliament.

Michael McMahon: I am not greatly concerned by the matter, but I want to press it further because clarification will be worth while. Why would an objection by a national park authority, local authority or landowner who is directly affected by proposals automatically trigger an inquiry, whereas a discretionary approach would be taken to an objection by the Scottish Environment Protection Agency or Scottish Natural Heritage?

Tavish Scott: The process would be triggered in compulsory purchase cases in which the promoter was seen in law to be removing a right.
Paul Martin (Glasgow Springburn) (Lab): I want to ask about the evidence that we heard from objectors last week on their experiences of processes. Do you accept that parity between objectors and promoters does not exist because much more significant resources are available to promoters than to objectors? Is there a way by which we can ensure that there is parity, or movement towards it, that will allow objectors to engage meaningfully in the process?

Tavish Scott: That is a genuinely difficult question. Paul Martin is right—obviously, if the Government is promoting a major rail or road project through Network Rail, Transport Scotland or a regional transport partnership, it can spend a lot to promote the relevant bill.

There are two important issues. First, front-loading the exercise to try to sort out issues is important—I am sorry to labour that point. Secondly, the potential for an inquiry independent of Government is important. No matter how much money Transport Scotland, for example, might have invested in a project, an inquiry must fully consider how properly the organisation had conducted itself in assessing a business case or part of a project. We can certainly give the committee more details about the process. It is important that the reporter be adequately resourced to do their job properly. Questions have been asked about that.

Paul Martin: You mentioned front-loading the process. Objectors have expressed to us concern about the independence of processes. They are concerned that the outcomes of work will be contaminated because the promoter will be fiercely in favour of the project in question and will seek the outcome that it has proposed.

Tavish Scott: As the mechanism comes into being—subject, of course, to Parliament’s approving it this year—the Government will look closely at the first stages of its introduction. We have been clear about that. If a transport project is being promoted by Network Rail, an RTP or Transport Scotland, the Government will closely check the adequacy of the process. If Paul Martin MSP was deeply unhappy on behalf of his constituents about something that was being done in that process I am sure that he would not be slow to raise it in Parliament. The minister of the day would receive direct representations and be under direct pressure.

Paul Martin: During the preparation processes, if an organisation expressed concern, you would see yourself as the adjudicator and say that you had received information that the environmental study had not been carried out properly and so wanted to adjudicate. Would that happen before or after the reporter came in?

Tavish Scott: That would be part of the normal democratic process. Ministers are rightly accountable to Parliament, certainly in relation to transport projects that the Government is promoting. If the front-loaded process was seen as being deficient, it would be for the minister to ensure, and to demonstrate, that that was not the case. We need to strike a balance between what I might loosely call ministerial meddling and driving hard to streamline the process to make it more efficient, so that the Government of the day delivers the transport projects that it wants to deliver and has a mandate to do so. If an individual or group felt aggrieved that the process at the beginning of the project design was not adequate, the mechanisms that I have described would be available to them and, undoubtedly, a minister would be accountable.

David McLetchie (Edinburgh Pentlands) (Con): I was interested in the minister’s remarks in response to Paul Martin’s question, given our experience last week when we heard from objectors to the tramline projects. You said that, under the new system of inquiries for major projects that you envisage, the reporter would have to examine the business case for a particular proposition. We do not have a final business case for the tramline projects—we were supposed to get one in December, but I believe that it will not be unveiled until April next year, which is more than a year after the bill completed the parliamentary process. When would the reporter examine the business case?

The viability or otherwise of business cases depends, in a sense, on how much free, or public—we know that it is not free—money is going into a project. If you are going to give only £500 million to Edinburgh trams and the promoter has to raise another £200 million, that will materially affect whether the business case is viable. How can a reporter assess a business case without knowing the project’s funding commitment? It strikes me that, if he did not know that, he would not be able to do his job properly.

Tavish Scott: I am sorry; I should not mislead the committee. It is not the reporter’s job to do what I expect Transport Scotland to do on the capital transport programme, which it will do whoever is minister for transport. It is Transport Scotland’s job to ensure that the business case on every capital transport project is correct, robust and does what it says on the tin.

I am sure that, during the course of any capital transport programme, transport ministers will continue to make announcements such as the one that I made on 16 March on our numbers and timescale for every capital transport project.

Damian Sharp could give Mr McLetchie full details of how the process works. I have given a
flavour of it in numerous discussions in this committee and in private bill committees.

I did not mean to mislead the committee, but by the time a project arrives at the door of an inquiry, the ministers of the day would have signed off the formal business case, which would be the subject of a parliamentary record. As I have, I hope, said all along, if a material change was to put the business case in doubt I would expect, as happens now, Transport Scotland, through Damian Sharp's team, to bring me information, which I would lay before this committee and the Finance Committee. Thankfully, that is not the case with any of our capital transport projects. There is a big difference between the business case process that Transport Scotland carries out and what a reporter would do in assessing an element of the business case, perhaps because an objector had raised an objection about an aspect of the business case, such as traffic numbers. I am sure that a reporter would consider that matter.

14:45

David McLetchie: Following that helpful clarification, my next question is on the extent to which the business case will be a legitimate subject at an inquiry. To go back to the convener's question about remits, should it simply be said at the outset that the business case has been laid out by Transport Scotland, approved by the minister, endorsed by Parliament and that is that? Is it correct that inquiries will not involve arguments about whether proposals make economic sense or will represent value for money, although we may have discussions about that in the wider political theatre?

Tavish Scott: That is absolutely correct and is a fair understanding of what should happen. I simply add that, in certain circumstances, individual objectors may raise issues about, or may object formally to, statements in the business case. For example, an objector may ask about predicted passenger numbers for a particular mode and therefore call into question the modelling that has been used to justify the underlying principles in the business case. That is the sort of issue that I envisage might be raised. Whether the reporter chooses to take account of that will be a matter for them.

David McLetchie: The issue takes us back to one of the fundamental points that arose in last week's evidence, which is the confusion between the principle and the detail—I used the business case as an illustration of that. Last week's evidence from objectors was clear that they and many other people who go to inquiries, such as the inquiry on the M74, or who come to private bill committees in Parliament think that we are here to debate the principle or that reporters are supposed to provide an independent Solomon-like judgment and that will be the end of the matter. However, the point that various committee members have tried to get across is that we have a process to take the decision in principle and then a process of inquiry. It would be helpful to the public to clarify that, because people confuse the two processes. The matter is not well understood.

Tavish Scott: That is a fair comment. Work needs to be done on that, perhaps as the bill goes through its formal proceedings. We might depend on our good friends in the press to get that line across clearly. Ultimately, if the Government says that it will do capital transport projects X, Y and Z, and if Parliament, through the mechanisms that we have described, endorses those projects, we are then into discussions about the detail of how the project will be delivered. David McLetchie makes an important distinction on which I agree.

David McLetchie: I suggest that in any inquiry, that distinction must be reinforced at the outset. If the reporter starts to entertain wide-ranging debates about the principles or certain aspects of policy, that will serve only to increase confusion. If people are not ruled out of order, they will assume that what they are saying is in order.

Tavish Scott: Those are helpful remarks.

David McLetchie: Convener, may I ask another helpful question?

The Convener: Okay.

David McLetchie: I do not understand wholly the need for legislation on voluntary purchase schemes, which is another issue that arose in last week's evidence session. Why do we need to legislate for such schemes?

Tavish Scott: During the passage of the Waverley Railway (Scotland) Bill, it was discovered that funds that Government provides to promoters for transport developments cannot be used to operate a voluntary purchase scheme. The bill will rectify that anomaly. We simply do not have the power, so we propose to create it.

David McLetchie: What does a voluntary purchase scheme mean in this context? If I am promoting a scheme and I want to buy a bit of land, why cannot I just buy it? Why do I need a scheme? Why cannot I just tell the landowner that I will give them a certain amount of money for the 5 acres and then draw up a contract?

Tavish Scott: I am pleased that, voluntarily, Damian Sharp has come along to answer that question.

Damian Sharp (Transport Scotland): I would draw a distinction. With an advance purchase, the promoters identify what land they need to deliver a
scheme. They can either simply negotiate an agreement or secure compulsory purchase powers. There is no doubt about the ability of promoters to do that, nor about the ability of Transport Scotland to fund that.

Voluntary purchases, on the other hand, are purchases of properties that are not strictly required for the construction of the project, but in respect of which construction of the scheme will have such an adverse impact on residents that it will become very difficult or unpleasant for them to live in the properties concerned, given that they did not know that there was going to be a railway or tramway in close proximity. I stress that there is a very limited number of such properties in Scotland. The intention is to deal with that situation, which first came up in relation to the Borders railway.

David Mcletchie: Are not the owners of properties that would be adversely affected able to gain compensation under land compensation legislation, which has been on the statute book for years?

Damian Sharp: They are able to gain compensation under that legislation in most cases, if the impact is to do with noise. However, that legislation is fairly restricted—in particular, it restricts claims for compensation to one year after the opening of the scheme in question. For example, a woman who had a disabled son needed to move because construction of a railway would have exacerbated his medical condition during that time, but the land compensation procedures do not cover that. There is no statutory means of dealing with such situations, so voluntary purchase is the only option. In that case, Scottish Borders Council had the powers to buy the property, but we had no means of funding the purchase under a voluntary purchase arrangement. That illustrates the anomaly that the provisions in the Transport and Works (Scotland) Bill seek to remedy.

David Mcletchie: In comparison with the other methods of land compensation, acquisition and so on, will the proposed mechanism, which we are being asked to approve as a provision of the bill, be confined to limited circumstances such as the exceptional circumstances that you have just outlined?

Damian Sharp: Transport Scotland has published a policy in relation to the circumstances that we would expect to apply to schemes that it funded. We have made it clear that there is an initial presumption against use of a voluntary purchase scheme, and that there needs to be proof of the need for one. The policy gives examples of the types of situation in which it would be appropriate for such a scheme to be used.

It is worth remembering that, of the seven private bills that have come before Parliament, at least three of the projects—an argument is being made for a fourth—do not require any voluntary purchase provisions, and the others have required them only for very limited circumstances that relate to a very small number of properties in comparison with the total number of properties that border the schemes. Voluntary purchase schemes are intended to deal with such exceptional circumstances where existing statutory provisions do not cover what we think Parliament’s intent is in ensuring that individuals do not lose out.

The Convener: I have a question about access to land in advance of preparations being made for a project. You have helpfully supplied us with some draft Scottish statutory instruments, one of which concerns access to land. Network Rail has expressed concerns about access to land near operational railways. A person gaining access to that land would need to be accompanied by someone who had experience of operational railways, and would need permission to be on the railway. Would the access arrangements take account of such issues and the limitations on when access could be gained, given that the railway’s operation should not be disrupted?

Tavish Scott: Yes. The convener has set out the types of circumstances in which we would envisage that the arrangements would take into account, for example, health and safety considerations and timing of access, given the timing of railway maintenance. The promoter might have to deal with Her Majesty’s railway inspectorate.

Fergus Ewing: The chairman of the Heritage Railway Association, Mr Ovenstone, expressed concern in a submission dated 22 August that if the procedure for making an order under the Light Railways Act 1896 is abolished, the cost of authorising Scottish heritage railways will increase. The minister was good enough to assure Mr Rumbles that, under the new regime, “fees will not be greater than they are currently.”

I welcome that assurance, not least because the Strathspey railway scheme in my constituency is likely to go ahead soon and the Strathspey Railway Company Limited has written to me to say that it is anxious not to have to pay more than the current fee, which I understand is set at a basic rate of £1,250. Will the minister confirm that the company will pay no more than £1,250 under the new regime?

Tavish Scott: I cannot add to what I said to Mr Rumbles, which is on the record. I meant what I said.
**Fergus Ewing:** I appreciate that you seemed to give a copper-bottomed assurance, which I welcome. I push the matter only because James McCulloch, from the Scottish Executive inquiry reporters unit, told the committee at last week’s meeting that fees would be based on the cost of the work that the reporters unit will be required to do. The minister’s assurance appears to be at odds with Mr McCulloch’s evidence, because it will be impossible to set a fixed fee if the fee is to be based on the amount of time that reporters spend on an inquiry. I hope that the fee will continue to be £1,250. Can the minister confirm that the Strathspey Railway Company, for example, would pay £1,250 under the new arrangements?

**Tavish Scott:** Advisers advise and ministers decide. I said what I said on the record and will say no more or less than that.

**Fergus Ewing:** Your assurance does not appear to be as categorical as it first seemed to be, although I hope that I am wrong about that. Rule 17 of the draft Transport and Works (Scotland) Act 2007 (Applications and Objections Procedure) Rules 2007 says, under the heading, “fees for applications”:

“DN: Yet to be determined await consultation exercise”.

I do not know what “DN” means, but perhaps someone can tell me. I presume that the consultation will be based on the intention that the Strathspey Railway Company will pay no more than £1,250 for its application.

**Tavish Scott:** I am staggered that Mr Ewing is trying to pluck defeat from the jaws of victory. I will not change what I said on the record. I said it—full stop.

**Fergus Ewing:** I hope that that means what it seems to mean, although the minister will not be explicit—

**Tavish Scott:** Oh, come on—

**Fergus Ewing:** If the minister says that the fee will be £1,250, which is what the Strathspey Railway Company wants to know, we will both have snatched victory from the jaws of defeat.

**The Convener:** The minister has given his answer—

**Fergus Ewing:** He could answer if he wanted to.

**The Convener:** You have had about three tries at the minister. He has given the answer that he intended to give. I want to bring in Maureen Watt.

**Mike Rumbles:** May I ask a brief question on the point that we have been discussing?

**The Convener:** If it is to try to pursue the minister for an answer that he has already given, then you cannot. If it is a slightly different point, I will allow it.

**Mike Rumbles:** I would not like the railway heritage people, who I presume are listening to this debate, to go away with the wrong impression.

15:00

**The Convener:** They will be able to read the Official Report and see what the minister’s answer is.

**Ms Watt:** I want to follow on from what Michael McMahon and Paul Martin said about the role of ordinary members of the public in the planning process for projects of national significance. The minister said that if the front-loading process was regarded as deficient because people’s expectations were not met, we would have to revisit it. However, we are at a stage now where we can build provisions into the bill.

It would not be misrepresentation to say that the evidence from the Edinburgh tram objectors last week was that they were disappointed with the process. Such people are deeply worried about the bill’s front-loading aspects with regard to devolved Government and involving communities. What reassurances can you give to somebody who is not involved through the national parks or who is not a landowner? Every project of national significance will affect people, so how can you persuade them that the bill will not leave them feeling as disappointed with the proposed process as they are with the current one?

**Tavish Scott:** It is important to recognise that people who do not get what they want are never happy. If I may say so, we all talk glibly at times about consultation. We in Government are criticised day in and day out, as are local government and community councils, for issuing endless reams of consultation. However, if there is consultation on a subject and a decision is then made that someone is against, they are, by definition, not happy about that. That is the nature of parliamentary democracy, local council democracy and all levels of representative democracy of which I am aware. Ultimately, we do not satisfy everyone—that is the nature of the process.

What I am clear about—I am sure that the committee is also clear about this—is that by improving the process and ensuring that we set up a structure that achieves much more meaningful consultation and proper engagement at an earlier stage, people will feel that they have at least had their day in making their case. Ultimately, if their case is heard but not agreed with and the Government decides to proceed with, for example, a railway, tram scheme or road, I rather suspect that those people will remain unhappy.
Unfortunately, that is often the nature of such things. We all have experience of that in our own areas and nationally.

**Ms Watt:** People are happy to be consulted, but the major reason why people end up so dissatisfied is that they are never told why what they have proposed is not possible—feedback on consultation is missing from many projects, national or local. We cannot just rubbish people and say that they will never be satisfied. There are situations in which all the consultees give their evidence but get no feedback, which results in much of the misunderstanding and the feeling that they have not been properly listened to.

**Tavish Scott:** I do not accept that people are never given answers. I suspect that people just do not like the answers that they are given. Those are two different issues. Whether we are ministers, MSPs or whatever, we all experience situations in which we make an argument and do not think that we have been given an answer, although the person, body, statutory consultee or whoever gives the answer clearly feels that they have answered fully and properly. That is how such processes are.

In designing a process—for example, for national transport projects—that seeks to deal with the kind of points that Maureen Watt and other members have made, all we can do is ensure that we invest sufficient time and resources in the first stage, and think about how it will work. As a backstop to that, we then have to ensure that the inquiry process is adequately resourced, so that if people do not feel that their point or solution has been properly investigated at the first stage, there is another opportunity during the independent inquiry. We could die of paralysis by analysis: how many stages do we want? We agree that we need to make the system as efficient as possible to achieve the objectives of a democratically elected Government of whatever persuasion. The other side is to address the issues that people raise, as Maureen Watt rightly said. However—not to dismiss their views in any way—we have to accept that some people will not be satisfied because they believe that their view has not been listened to.

**The Convener:** That brings us to the end of questions. I thank the minister for his evidence, and I thank his team of supporting officials.
Pilotage Act 1987

**Current regime**
Under the current regime Scottish Ministers may make an order to extend the pilotage area of a harbour authority either on the application of the harbour authority or without any application being made to them. Before making that order the Scottish Ministers are obliged to:

- inform those persons they consider *may* be affected; and
- set a reasonable, but unspecified, time period for the receipt of objections.

If any person objects to the proposed order and does not withdraw their objection then the order will be subject to Special Parliamentary procedure (SPP).

**Bill’s proposals**
In future if Scottish Ministers propose to make an order to extend the pilotage function of a harbour authority, or the harbour authority itself applies for such an order before making the order Scottish Ministers or the harbour authority, as the case may be, will be obliged to:

- publish a notice in a newspaper, the Edinburgh Gazette and any other publication Scottish Ministers consider appropriate;
- send a copy of the notice to those persons they consider may be affected by the order; and
- within the notice advise that objections can be made to the Scottish Ministers by a date not less than 42 days after the notice.

If there is an objection by a harbour authority affected by the proposal then an inquiry or hearing must be held. Any other objections (if not frivolous or trivial) from other parties will be considered at an inquiry, a hearing or by written correspondence. The Scottish Ministers may make the order after receipt of the report of an inquiry or hearing, if held, and that order will be made as a local order without any parliamentary involvement.

**Review and conclusion**
The new process seeks to ensure that all relevant parties are informed of the proposal to change pilotage arrangements. The new process widens the coverage and places the onus on the harbour authority, where it is making application for the order, to identify relevant persons. This is appropriate since the harbour authority is better placed than the Scottish Ministers to identify interested parties. If there is a valid objection an inquiry or hearing will be conducted or written representations considered, and that process will provide an appropriate means for exposure of issues without the need to invoke SPP.

The policy intention is to improve notification and information, and as part of the general modernisation of procedures ensure that decisions can be made without having to invoke SPP, which is subject to the Parliamentary timetable. There is recognition of a harbour authority’s interest by providing a statutory right to an inquiry.
Special Parliamentary Procedure: Harbour Revision and Harbour Empowerment Orders

The Scottish Ministers either on application by a harbour authority or of their own motion may make a Harbour Revision order to improve the efficiency and operation of a harbour. The Scottish Ministers may also make on application a Harbour Empowerment order conferring powers to improve, construct or maintain a harbour.

Current regime
Under the current regime a notice of the proposals has to be published by the promoter of the application in the Edinburgh Gazette, by local advertisement and such other means as the Scottish Ministers think fit. A notice must also be served on:

- owners and occupiers of land which is to be compulsorily purchased;
- on the local authority where a public right of way over a footpath or bridleway is to be extinguished;
- the harbour authority if it is not the applicant; and
- any other persons specified by the Scottish Ministers.

If there are objections an inquiry or hearing is mandatory where there is an outstanding objection from the local authority or an owner or occupier of land which is to be compulsorily purchased.

The Scottish Ministers must consider any outstanding objections and the report of any inquiry before deciding whether or not to make the order. However, where an order authorises the compulsory purchase of land forming part of a common or open space or land held inalienably by the National Trust for Scotland (NTS), it must be subject to SPP.

Bill's proposals
The Bill proposes to remove the requirement for SPP in respect of orders authorising the compulsory purchase of common or open space or NTS land. The NTS along with all other persons with an interest in land which is to be compulsorily acquired, will as now have a right to a mandatory inquiry or hearing.

The order will be made as a local order without any parliamentary involvement unless the proposed development is designated within the National Planning Framework as a development of national significance in which case the order will be subject to an affirmative Parliamentary process.

Review and conclusion
The intention, as part of a general modernisation of procedures, is to ensure that decisions can be made without having to invoke SPP, which is subject to the Parliamentary timetable.

Ministers have identified, however, that a harbour authority does not have a right for its objections to a Harbour Revision order instigated by the Scottish Ministers to be heard at an inquiry or hearing and are currently considering whether an amendment should be made to the Bill so as to ensure that a harbour authority has a statutory right to be heard.

Special Parliamentary Procedure: Harbour Reorganisation Schemes

The Scottish Ministers either on application by a harbour authority or of their own motion can authorise a reorganisation scheme the purpose of which is to reorganise the grouping of harbours.

Current regime
Under the current regime, where a reorganisation scheme is submitted to Scottish Ministers and they decide that it should proceed, they must publish a notice of the proposals to reorganise in the Edinburgh Gazette, by local advertisement and such other means as they think fit. A notice must also be served on:

- owners of interests in land which are to be transferred; and
- any harbour authority which is responsible for a harbour comprised in the group but is not a party to the submission of the scheme.
If there are any outstanding objections (other than those that are considered frivolous or trivial) the Scottish Ministers must hold an inquiry. Before deciding to make or not make an order the Scottish Ministers must consider any objections and the report of the inquiry. If there remains an outstanding objection then the scheme is subject to SPP.

**Bill’s proposals**

The Bill proposes that any unresolved objections will be considered at an inquiry or hearing or by way of written representation before the Scottish Ministers are able to decide to make or confirm the scheme. The requirement for special parliamentary procedure will be removed. Harbour reorganisation schemes made or confirmed by Scottish Ministers are not statutory instruments and therefore there will be no parliamentary procedure.

**Review and Conclusions**

The intention, as part of a general modernisation of procedures, is to ensure that decisions can be made without having to invoke SPP, which is subject to the Parliamentary timetable. Any unresolved objections, including those by an affected harbour authority, will be considered at an inquiry or hearing or through written representations.

**Special Parliamentary Procedure: road developments affecting the interests of a Harbour Authority**

**Current regime**

A roads authority seeks an order to create a bridge or tunnel over navigable waters. The harbour authority as the navigation authority objects on the grounds that the bridge or tunnel is likely to impede its functions or interfere with navigational requirements. If the objection remains unresolved then the order is subject to SPP.

**Bill’s proposals**

A roads authority seeks an order to create a bridge or tunnel over navigable waters. The harbour authority as the navigation authority objects on the grounds that the bridge or tunnel is likely to impede its functions or interfere with navigational requirements. If the objection remains unresolved then the Scottish Ministers must hold an inquiry and may make an order after receiving the report of the inquiry. The order will be made as a local order without any parliamentary involvement unless the proposed road development is designated within the NPF as a development of national significance in which case the order will be subject to an affirmative Parliamentary process.

**Review and Conclusions**

The harbour authority will have a statutory right to be heard at the inquiry. The new process ensures that a decision can be made without having to invoke SPP which is subject to the Parliamentary timetable.
Copies of the written evidence received by the Committee can be found on the Scottish Parliament website (www.scottish.parliament.uk) or can be provided, on request, from the Clerk to the Committee.

Blackhall Community Association
British Ports Association
Bus Rapid Transit UK
CBI Scotland
City of Edinburgh Council
Confederation of Passenger Transport UK
Heritage Railway Association
Lerwick Port Authority
Light Rapid Transit Forum
McGrigors
Mrs Alison J Bourne (Lead Objector - Edinburgh Tram (Line One) Bill)
Scottish Environment Protection Agency
Scottish Natural Heritage
SESTRAN
Shetlands Island Council
South Lanarkshire Council
The Royal Society for the Protection of Birds Scotland
TRANSform Scotland

SUPPLEMENTARY LIST OF OTHER WRITTEN EVIDENCE

Deeside Railway Co Ltd
Deeside Railway Co Ltd Further Evidence
Network Rail
Odell C Milne (Objector - Edinburgh Tram (Line One) Bill)
Strathspey Railway Co Ltd
TIE Limited
Mrs Alison J Bourne (Lead Objector - Edinburgh Tram (Line One) Bill)
Members who would like a printed copy of this *Numbered Report* to be forwarded to them should give notice at the Document Supply Centre.