JUSTICE 1 COMMITTEE

Wednesday 30 June 2004
(*Morning*)

Session 2

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JUSTICE 1 COMMITTEE
26th Meeting 2004, Session 2

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

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

COMMITTEE MEMBERS

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

*attended

COMMITTEE SUBSTITUTES

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

THE FOLLOWING ALSO ATTENDED:

Allan Wilson (Deputy Minister for Environment and Rural Development)

THE FOLLOWING GAVE EVIDENCE:

Susan Eley (University of Stirling)
Bill Munro (University of Stirling)
Graham Ross (Scottish Parliament Directorate of Access and Information)

CLERK TO THE COMMITTEE

Alison Walker

SENIOR ASSISTANT CLERK

Douglas Wands

ASSISTANT CLERK

Douglas Thornton

LOCATION

Committee Room 2

Scottish Parliament

Justice 1 Committee

Wednesday 30 June 2004

(*Morning*)

[THE CONVENER *opened the meeting at 09:45*]

Subordinate Legislation

Scottish Outdoor Access Code: Proposed Code (SE/2004/101)

The Convener (Pauline McNeill): Good morning and welcome to the 26th meeting in 2004 of the Justice 1 Committee. In fact, it is the last meeting before the summer recess and perhaps the last meeting that will be held in this room. It might even be the last meeting to be held in this building.

I remind members to turn off their mobile phones and pagers and I apologise for the late start. We had an unusually large number of late papers this morning and I wanted to ensure that members had all the papers they would need for the meeting. I have received apologies from Margaret Mitchell, who will not be joining us today, and from Michael Matheson, who is at another meeting but who hopes to join us soon.

Our first item of business is subordinate legislation. I welcome Allan Wilson, Deputy Minister for Environment and Rural Development, who will be taking part in our proceedings for the subordinate legislation process. I refer members to the note that has been prepared by the clerk on the proposed Scottish outdoor access code, and to a number of submissions that have been received. Members will be aware that we issued a call for evidence on the access code; we have received a number of helpful submissions.

Without further ado, I invite the minister to speak to and move motion S2M-1455.

The Deputy Minister for Environment and Rural Development (Allan Wilson): It is good to be back, convener. I felt all emotional when I heard your opening remarks. With me today are Ian Melville, who is from the Executive department that was responsible for the production of the code, and Richard Davison from Scottish Natural Heritage. I hope that they will be able to help out if there are issues on which I cannot answer members' questions.

It might be helpful if I give a brief résumé of how we arrived where we are with the code. Section 10 of the Land Reform (Scotland) Act 2003 placed a duty on SNH to draw up the Scottish outdoor access code. SNH set about that exercise in partnership with the access forum, so I take the opportunity that today's meeting affords me to acknowledge the hard work that has been put into preparation of the proposed code by both SNH and the access forum. A draft of the code was issued for public consultation last year, to which SNH received some 1,300 responses. SNH revised the draft in the light of those responses, again in discussion with the access forum, before submitting it to ministers.

As members know, the Land Reform (Scotland) Act 2003 allows ministers to approve the code as received from SNH, to amend it or to reject it. We clearly have no reason to reject it and we did not consider that it would have been appropriate to upset the balance of the code by unnecessarily altering wording, particularly where the wording is the result of long debate in the access forum. Our approach has therefore been to do no more than ensure that the code is consistent with the statutory policy and with the operational requirements of public bodies. For example, issues that are specific to the management of Ministry of Defence land had not been fully addressed, so we have agreed a number of amendments on that with SNH. We have also tried to clarify some perceived ambiguities in the code.

I assure members that we have sought to keep amendments to a minimum, and both we and SNH are satisfied that none of the changes will affect the principles that underlie the proposed code. We have made available to the committee and to the access forum a version of the code with our amendments highlighted. I hope that members have found that to be helpful. That substantiates my assurance that nothing that we seek to do will diminish or enhance the legislative intent of Parliament in relation to securing wider rights of responsible access.

The code is a central element of the new arrangements for access, so it is important that we take as many people as possible with us on the detail of the code. That is why it has taken some time to produce the code, but the inclusive approach that SNH has adopted on our behalf has resulted in a code that attracts wide support. I know that the committee has received submissions from interested parties and that some concerns exist—no doubt the committee will want to raise some of the issues this morning.

I was pleased to note that the Mountaineering Council of Scotland, which represents recreational interests, and the National Farmers Union Scotland, which represents land management interests, both welcomed the amendment that we introduced before bringing the code to Parliament.

I welcome the fact that there is such general agreement that the code be approved.

I am satisfied that the proposed code sets out clearly the responsibilities of those who exercise access rights and those who manage land, and that as such it sets out a sound basis for the new access arrangements that were established by Parliament in the Land Reform (Scotland) Act 2003.

I have much pleasure in moving motion S2M-1455. I will be happy to answer any questions.

I move,

That the Justice 1 Committee recommends that the Scottish Outdoor Access Code: Proposed Code (SE/2004/101) be approved.

The Convener: Thank you very much. We also put on record our thanks to SNH and to the access forum. We are aware of the hard work that has gone into preparing the code and we know that it has not been easy to balance the interests of access takers and land managers, so credit is due to them.

I will refer to the timetable for presenting our report to Parliament; the minister may wish to comment. We have been asked to report by 6 September. As the minister will know, we go into recess at the end of this week and the committee will not meet over the summer. We must determine whether we are in a position to report to Parliament tomorrow or whether we need longer to report before 6 September.

I can see that there might be two interests. One would favour putting the code before Parliament tomorrow but, although there is general agreement that we want to move as speedily as possible, there are—as the minister said—some points that people would like to put to the committee. The interest of having enough time to put a report together is set against the interest of getting the code approved as quickly as possible. Although some people would say that we are in the middle of summer, most would doubt it. Can the minister guide us on the timetable issue?

Allan Wilson: We discussed the matter informally but briefly. I have sympathy with the committee's predicament, but I do not set the parliamentary timetable. If the code is approved before the summer recess, we hope to be able to bring access rights into effect later in the year. If approval of the code is delayed until we come back to the new building in September, the legislation will not come into effect before the early part of 2005. There is an imperative, and members must decide how that fits in with the committee's timetable.

It is important that the general public and land management interests be aware of their new responsibilities before the new arrangements come into effect. Those are the wider considerations; however, I sympathise with the committee's predicament.

The Convener: Thank you. That is helpful.

Mr Stewart Maxwell (West of Scotland) (SNP): I will focus on an issue—access to railway lines and crossing of railway lines—that has been of concern to the Ramblers Association Scotland, the Mountaineering Council of Scotland and other outdoor organisations and recreation bodies. Do you believe, as I do and as those organisations do, that the term "contiguous" land within section 10(1)(d) of the Land Reform (Scotland) Act 2003 applies to Network Rail and that therefore ramblers, climbers and so on should have access—with appropriate direction and safety measures in place—to cross railway lines at appropriate and safe points?

Allan Wilson: That is a difficult and sensitive issue. On the one hand, I am sure that you are aware that members of the public have crossed railway lines safely and responsibly for years, but on the other hand, people are killed on railway lines every year and the railway operators have a duty in respect of public safety. Today, we are discussing the access code and it is clearly not the code's job to resolve that issue.

However, the code sets down certain principles that are relevant to the matter. Railway lines are excluded from access rights, but the code places a responsibility on all owners of excluded land to take account of the exercise of access rights over neighbouring land in the management and use of their land. Wherever possible, that means that management of excluded land should, among other considerations, respect any rights of way or customary access across land. That is, I think, the point that Stewart Maxwell makes. Other stipulations are attached to that provision.

In short, it is not for the code to seek to influence land managers to act contrary to their duties under health and safety legislation, but paragraph 4.24 of the code advises that, when managing land such as a railway, land managers should take account of contiguous land on which the public may exercise access rights. I think that that addresses the specific point that Mr Maxwell raised.

Mr Maxwell: For the sake of absolute clarity, do you therefore agree that Network Rail is not outwith the scope of the section of the act that I mentioned?

Allan Wilson: The code says that we can advise land managers on the exercise of their responsibilities in relation to access. We have discussed the issue with colleagues in the Enterprise, Transport and Lifelong Learning Department and with representatives from

Network Rail and Her Majesty's railway inspectorate. Network Rail has real concerns about the public safety implications of unauthorised use of some private crossings, and the inspectorate has made it clear that Network Rail is expected to act on those concerns. We have explored with it and SNH the wording of the code on the management of railway infrastructure that is excluded from access rights by the act. We do not consider it to be appropriate to go beyond what is included in paragraph 4.24 of the code, which requires those who manage land that is excluded from access rights to take account of how their management might affect the exercise of access rights over neighbouring land. That is a clear reference to Network Rail in the context in which Mr Maxwell raised it.

Mr Maxwell: I understand what you are saying and I appreciate Network Rail's difficulties and responsibilities in relation to safety, particularly with respect to people crossing railway lines. However, recreation bodies have said that we are talking about some extremely rural and remote areas that railway lines cross where there has been a traditional right of access to cross such lines for generations. We could be talking about there being 20 trains a day while there is clearly a right of access for people to cross roads that tens of thousands of cars go up and down. I am sure that you understand the frustration of recreation bodies. People can cross roads that are much more dangerous than railway lines, but there seems to be a problem with Network Rail accepting that viewpoint.

Do you agree that part of the problem is that Network Rail, which is a United Kingdom-wide body, does not understand the different arrangements in Scotland—particularly its separate laws and Government guidance—and that a separate rail infrastructure in Scotland would probably get round the problem?

10:00

Allan Wilson: No. You are right to press an issue of concern to recreational users of land—I do not have a problem with that—but a system of co-management operates, and we have not had the experience with Network Rail that you describe. As I have said, the issue is not straightforward. Railway lines can pose a real physical barrier to the enjoyment of some areas of Scotland—I understand that and I know that Stewart Maxwell does not mean to suggest otherwise—but we cannot ignore issues of public safety. Therefore, I welcome the recent initiative by the chairman of the access forum, who is encouraging Network Rail to work in partnership with recreation bodies, local authorities and Government agencies to address the issue. I hope that progress can be made by those different interests working together within the general guidance that we have set out in the Scottish outdoor access code.

I understand that risk assessments are being carried out for all railway crossings. That seems to be a sensible approach to the question about the amount of use of the lines in question. The level of risk that is associated with a particular crossing will depend on a number of factors, including amount of use, frequency of trains and visibility along the track. It is not for me to generalise. It is sensible to have individual risk assessments in areas in which there is conflict and that is an approach that I encourage.

Mr Maxwell: I do not disagree with that statement. If those risk assessments can be made relatively speedily, perhaps all interests can be addressed. I suspect that the relative risk of crossing some lines is very low.

Allan Wilson: I assure you that, through our agencies and officials, we will continue to press Network Rail to address such issues.

Bill Butler (Glasgow Anniesland) (Lab): I will ask about updating the Scottish outdoor access code. Can you offer the committee clarification on the timescales for reviewing the code and on whether Scottish Natural Heritage or the Scottish Executive will be able to produce interim guidance notes when changes are made to relevant legislation? That second issue has been highlighted by the Scottish Countryside Rangers Association.

Allan Wilson: As required by the 2003 act, SNH will keep the code under review. That will be a constant process because review will happen as issues arise. The access forum will play an important role in the process. Any proposed amendments that come out of a review will have to be consulted on then approved by ministers and Parliament. I cannot give a specific timescale; the code will be updated as appropriate.

Bill Butler: So you are saying that the code will be kept constantly under review.

Allan Wilson: Yes.

Bill Butler: The Mountaineering Council of Scotland raises a number of questions about the procedure for updating the code. What role will the access forum play in updating the code and will there be consultation on any suggested rewording of it? You have answered that question, but could you state for the record that that would be the case?

Allan Wilson: Yes. As I have just said, the process would be that SNH would review the code in consultation with the access forum and that any

amendments would go to ministers and then to Parliament.

Bill Butler: Would that ever change? Would it be a constant process?

Allan Wilson: Yes, it would be a continuing process. It has not been determined whether there will be an absolute review at some point in the future.

The Convener: I will ask about access to land on which crops are growing. You might recall that we had a lengthy discussion on that during the passage of the bill, and that that discussion resulted in a satisfactory conclusion.

Several organisations have asked whether the right of access would apply to tram lines or tracks. I note that the code uses the word "tracks" but not the words "tram lines". When we questioned you at stage 2 of the bill, you said that it was possible to use tram lines as a way of passing through a field without damaging crops. Should we have used the words "tram lines" in the code, or does "tracks" mean tram lines?

Allan Wilson: I re-emphasise what I said earlier. Nothing in the code

"will diminish or enhance legislative intent"

in relation to exercise of responsible access. The access forum considered in detail whether the code should refer to tram lines, but concluded that they are covered by the general wording of "unsown ground", which reflects the wording in the legislation that we pored over at stage 2. The code sets out the ways in which people can exercise access rights responsibly over land on which crops are grown and emphasises the need to avoid damage to crops.

It would be inconsistent to attempt to exclude tram lines from access rights through the code when the legislation allows for responsible exercise of access rights over unsown ground, including tram lines. I hope that that is clear enough. The code reflects the legislation, which provides that access rights can be exercised responsibly over land on which crops have not been sown. The code also provides advice on how to avoid damaging crops when exercising access rights. I hope that that gives you the assurance that you seek.

The Convener: So, someone can exercise their right to responsible access over tram lines.

Allan Wilson: Yes—I am sorry if I did not make that clear.

The Convener: I just needed to be sure because there are cases for and against that. Some evidence has said that people should be expressly forbidden from crossing tram lines. However, I am clear that the matter is about responsible access and about taking that access without damaging crops. The code is one way we can ensure that people hold to that principle.

Margaret Smith (Edinburgh West) (LD): I would like to go back to basics. I confess that I am quite new to scrutiny of this subject, but I was lucky enough to have lunch with some farmers at the Royal Highland Show on Friday, and access to working farms was of interest to them. There seem to be some inconsistencies in the code—which have been picked up on by the NFUS and others—especially in relation to access to farmyards and fields that have animals in them. For the record, what do you think the code says on such areas? The NFUS, among others, believes that the code is inconsistent on both those issues and there is some confusion among farmers.

Allan Wilson: I always get concerned when members talk about going back to basics.

Margaret Smith: It is a Liberal interpretation of going back to basics. Do not worry.

Allan Wilson: I am pleased to hear that. You highlight something that we discussed at great length and in considerable detail at various stages of the passage of the bill. The proposed code reflects the statement in the legislation that land that forms the curtilage of a building is excluded from access rights unless either there is a right of way or the landowner has given prior consent. That was a matter of some contention; it remains a matter for—I hope—proper consultation and agreement in areas where people have customarily enjoyed access through farmyards without let or hindrance. We expect that to continue. The use of the phrase "customary access" in this context refers to the public having had access through many farmyards in the past. There is no reason why that should not continue.

That said, the discussions between SNH and the Health and Safety Executive centred on concerns about safety in working farmyards. SNH redrafted a paragraph to make it clear that although access rights do not extend to farmyards, if the land manager has allowed access in the past, it may be possible to continue to use the route on the same basis. SNH has retained the term "customary access", to which I referred. That was requested by recreational interests to reflect situations in which access has historically been enjoyed. As I say, there is no intent to diminish such access in any way.

I am also aware of the concerns that biosecurity may be threatened and that liability may be increased. Again, I reassure members that nothing in the code would lead to that conclusion. The legislative intent on liability is laid out in the Land Reform (Scotland) Act 2003. The access code can work in concert with existing codes on good

agricultural practice, particularly in relation to biosecurity. There is no conflict between the two and nothing in the code will increase liability on farmers, landowners or land managers.

Margaret Smith: In effect, there will be no increase in landowners' or land managers' liability compared to the common-law situation before the bill was passed.

Allan Wilson: That is precisely correct.

Margaret Smith: The Environment and Rural Development Committee asked us to clarify that point on the record because it had residual concerns about the matter.

Obviously, the publicity about the access code and about what people can and cannot do will be crucial. You gave the example of somebody going across a farmyard and you talked about customary access. That may be fine for members of the Ramblers Association who are walking with maps in an area that they have traversed before, but for a family on holiday in the Highlands for the first time in an area that they do not know, a rule about what is customary is not good enough—we need something clear for such people. I wonder about signage: will there be guidance to landowners about what is acceptable signage? Given that you are trying to encourage people to use the right to roam and to get out into the countryside, how will you publicise the code to the population at large?

Allan Wilson: Those are good questions, if you do not mind me saying so.

Margaret Smith: You can say that if you like.

Allan Wilson: To go back to basics, I am satisfied that section 5(2) of the 2003 act achieves the aim that liability on landowners should not increase because of the legislation. The proposed code states clearly that the outdoors is a working environment and that it is therefore, by definition, not risk free. It further advises that those who exercise access rights should take responsibility for their actions.

The 2003 act imposes a duty on SNH and on local authorities to publicise the code to access takers. That must be associated with a wider education programme—I see that my colleague from SNH is nodding in agreement. There is an additional duty on SNH to promote understanding of the code, which is the point that Margaret Smith asked about. Once the code is approved, a summary version will be prepared and circulated widely. A major campaign is planned to alert the public and land managers to their responsibilities. The point that Margaret Smith raised will be addressed through widespread circulation of a summary of the code and through an educational publicity campaign to make more people aware of the code, whether they are access takers, recreational users, land managers or landowners.

Margaret Smith: I also asked about signage.

Allan Wilson: I am sorry—I forgot about that. SNH will engage in discussions in order to produce guidance on appropriate signage. The Environment and Rural Development Committee mentioned that to us and we are happy to work on the matter because the point was well made.

The Convener: That is also a point that the Environment and Rural Development Committee made to us. We will use that committee's report when we draw up our report.

Bill Butler: Access for disabled people is one issue that has caused concern. The Fieldfare Trust points out that the code makes no substantive mention of the needs of disabled people, despite a specific mention in the 2003 act. The trust's submission states:

> "The Code itself could become a deterrent to disabled people venturing into the countryside if it gives the impression that the measure of the reasonable behaviour … is set by people without disabilities".

Is the trust right to be concerned? Is there a danger of that happening?

10:15

Allan Wilson: Disabled people are included within access rights, but I agree that it is important that land managers recognise their needs. The code refers to the need to consider all users, which obviously includes the disabled. Where land managers provide facilities for access, they may need to ensure that the arrangements meet the requirements of the Disability Discrimination Act 1995. However, that is a matter for law rather than for the code.

Under the Land Reform (Scotland) Act 2003, the main responsibility for access provisions falls on local authorities, which are aware of their duties under the DDA. We intend to reinforce that through guidance so that there can be no dubiety about how the provisions apply to access for the disabled. I hope that those actions, not least the guidance that we will issue to local authorities, will satisfy the concerns of the Fieldfare Trust and others.

Bill Butler: That takes care of the concern that has been raised about the role of local authorities.

You said that the code mentions the need to consider all users. However, the Fieldfare Trust suggests that the code should include specific examples that refer to, and cover the needs of, disabled people. Would it not be better if the code was refined in that way?

Allan Wilson: Examples would not apply to all users. Perhaps the code could say more on the issue, but it refers to the need to consider all users, which obviously includes the disabled. That should address those concerns. The concerns should be addressed further in the guidance that we will issue to local authorities, which will have responsibility for things such as the core path network.

The Convener: Returning to the issue of field margins for just a minute, I welcome the fact that the code encourages land managers to leave uncultivated margins around fields to assist access. Field margins also help to encourage habitats for new wildlife. At stage 2 of the Land Reform (Scotland) Bill, we debated whether a requirement for uncultivated field margins could be included given that a condition of common agricultural policy support is that land be in good agricultural and environmental condition. Do you intend to raise that matter in the CAP reform discussions?

Allan Wilson: As members are probably aware, I have advised the Environment and Rural Development Committee that we are consulting on what should constitute good agricultural and environmental condition and the format of land maintenance that should be required for farmers to secure entitlement to the single farm payment that is being introduced as a consequence of CAP reform. Within that broader context of consultation, in the immediate future and further along the line we will consider issues such as field margins.

In discussions, Scottish Environment LINK has made a useful contribution to that debate by suggesting how the agricultural and environmental condition could be beneficial both to recreational interests and to the preservation of wildlife and the better maintenance of biodiversity. Field margins have an important contribution to make to that.

Margaret Smith: My question, which is more precise, relates to recreational activities, with specific regard to golf courses. I should probably declare an interest as I am a member of Ravelston golf club. Last night, I was at a meeting in Carricknowe golf club in my constituency. There is an on-going problem about people walking across the golf course; club members are concerned about that in relation to safety.

On the question of customary access, there seems to be inconsistency of approach. The Scottish Golf Union considers that references in the code to customary access to golf courses for sledging, for example, should be removed because the Land Reform (Scotland) Act 2003 excludes such activities. In contrast, the Ramblers Association would like clarification that people can take part in certain activities on golf courses. Could you clarify that situation?

The code says that people can exercise access rights to cross a golf course but that, wherever possible, land managers should

"provide paths around or across the course and/or advise people on the safest ways through the course … to minimise safety risks."

On a more general point, will councils, other land managers and so on have access to any funding to assist them to provide paths? As you can imagine, a path around a golf course would be rather a large undertaking. Even putting up fencing to minimise safety problems would be a significant task. Can organisations access any funding to assist them?

Allan Wilson: Yes. Some additional resource has been allocated to SNH for furthering responsible access. Likewise, local authorities have been given funding for the creation of the core path network and facilitating wider responsible access.

The golf course example that you gave is an example of a situation in which I would hope that common sense would prevail and proper local management would ensure that responsible access takers are not put at risk of being struck in the head by a flying golf ball and are instead assisted in the exercise of their access rights when they want to cross a golf course. Equally, however, it should be possible to maintain the fabric of the golf course and continue the game of golf without interruption. Further, where there has been access to the golf course for the purposes of sledging, that would be maintained.

The general point prevails that nothing in the code diminishes or enhances the legislative intention of Parliament in relation to the exercising of the right of responsible access.

The Convener: I support that view; common sense should prevail and it is not possible to include absolutely everything in a code or an act. I have always been keen to ensure that the creation of statutory rights of access does not negate any pre-existing common-law rights. There is always a balance to be struck. One of the issues that was raised with the committee at an early stage was that it was perfectly legitimate for some golf clubs to make a big issue out of sledging, but that for others—for example, those that have flat courses—sledging was not an issue. I think that the code has got the balance right.

The issue is responsible access taking. If people exercise their access rights irresponsibly, they are clearly not adhering to the provisions of the act or the code.

Allan Wilson: I could not have put it better myself.

The Convener: I am sure that you could.

Mr Maxwell: I did not realise that sledging across golf courses was such a big issue. It takes me back to the times when I sledged down the King's Park nine-hole municipal course when I was a bit younger.

I want to ask a question about railways. Groups such as the Activity Scotland Association have suggested that the code should include guidance on how to cross railway lines safely, the responsibilities of the access taker in such situations and the responsibility of railway managers to take account of the land reform legislation. Is that not a reasonable point to make?

Allan Wilson: The code provides advice and guidance for areas in which access rights apply; by definition, those areas do not include railways. However, there is general guidance on responsible access and an individual's responsibility for their well-being. The code includes health and safety advice that applies more generally and can be used in discussions between the access forum, Network Rail and whoever else is concerned in a particular locality to ensure that proper advice and guidance are given. That will be possible in any location where securing access across a railway line is an issue. Both Stewart Maxwell and I would want people to secure such access responsibly.

Mr Maxwell: Does that cover the point that was raised with us?

Allan Wilson: Yes.

Mr Maxwell: My next question relates to liability. The University of Aberdeen law school submitted evidence in which it welcomed the relatively full treatment of liability in the proposed code, but expressed concern that there was no specific statement on a legal principle that, unfortunately for me, has a Latin name. I refer to the principle of volenti non fit iniuria—that is as close as I will get to pronouncing it correctly. Under that principle,

"it is a defence to an action by a person who has suffered injury or damage to show that the person willingly accepted the risk of injury or damage knowing the risks involved but nonetheless accepting them."

The law school suggested that, without such a statement,

"the picture of liability given by the code could be regarded as incomplete."

Should a statement on the principle of volenti non fit iniuria be included in the code?

Allan Wilson: This comes under the heading of people taking responsibility for their actions, to which I referred in response to an earlier question. Paragraph 3.11 on page 16 of the code contains a marked amendment that states:

"There is a longstanding legal principle called 'volenti non fit injuria'"—

that takes me back to my Latin O-level days—

"which means that a person taking access will generally be held to have accepted any obvious risks or risks which are inherent in the activities they are undertaking."

Mr Maxwell: I now see the amendment and apologise for failing to notice it previously.

My other question relates to the Nature Conservation (Scotland) Act 2004. RSPB Scotland pointed out that the code refers specifically to the Wildlife and Countryside Act 1981 and wondered whether it would be updated to take account of the 2004 act.

Allan Wilson: I saw that that issue had been raised. The convener made the point that those who exercise access rights must comply with the law. In that context, the law includes the requirements of the 2004 act, which has not changed what constitutes responsible exercise of access rights in respect of wildlife. It is not the role of the code to interpret what is meant by reckless disturbance of wildlife, for example, which is an offence that we included in the new legislation. Ultimately, it will be for the courts to determine that. The 2004 act does not provide powers to landowners to prevent access, as has been argued, and those who exercise access rights must comply with the law, which includes the new provisions of the 2004 act.

Mr Maxwell: I thank you for that clarification. The Ramblers Association and the Scottish Countryside Activities Council were concerned about the reckless disturbance point that you just made. They also suggested that careful guidance should be included to avoid any confusion or contradiction and to prevent land managers from having the ability to misuse those provisions. Will you comment on that?

10:30

Allan Wilson: I have no particular comment beyond what I have said. The Nature Conservation (Scotland) Act 2004 does not provide landowners with powers to deny access, although I know that some have argued that. Equally, those who exercise their right of responsible access must do so in such a way that they do not fall foul of the provision on the reckless disturbance of wildlife. I am sure that 99.9 per cent of people will not fall foul of that provision. However, when that provision is breached, it will be a matter for the courts rather than the code.

The Convener: The Environment and Rural Development Committee also made that point about the operation of the 2004 act.

The next issue has been well rehearsed, but for the sake of completeness and to cover all the points that the Environment and Rural

Development Committee made in its letter, I will ask about that committee's concern about paragraph 2.9 of the proposed code, which sets out guidance on access for those who undertake commercial activities. The Environment and Rural Development Committee is not entirely clear about how that guidance will apply to, for example, companies that offer group walking holidays. The committee understands that commercial activities that involve groups are not excluded from access rights, but clarification on that point would be helpful.

Allan Wilson: Page 9 of the proposed code says:

"a mountain guide who is taking a customer out hill-walking is carrying on a commercial activity but this falls within access rights because the activity involved – hill-walking – could be done by anyone else exercising access rights. The same would apply to a canoe instructor from a commercial outdoor pursuits centre with a party of canoeists. Other examples would be a commercial writer or photographer writing about or taking photographs of the natural or cultural heritage."

The point of contention is referred to, and proper guidance and advice are laid out in the code. However, what is being relied on is the Land Reform (Scotland) Act 2003, which, as members know, was written to secure such access rights.

The Convener: I am aware that the arguments have been well rehearsed, by us in particular, and that several amendments were made during the passage of the bill to deal with concerns about commercial activity. However, I wanted to put the matter on the record because the Environment and Rural Development Committee raised it with us.

The RSPB has raised several issues, one of which is a point for clarification. When SNH commissions the RSPB to undertake surveys in relation to SNH's work, will the RSPB be covered adequately, as it is a non-commercial, voluntary organisation?

Allan Wilson: As discussed, and as you have said, interpretation of what falls within access rights is ultimately a matter for the courts. However, the non-governmental organisation activities to which you refer, such as survey work, would be likely to fall within one of the categories that are stipulated in the 2003 act, which I will repeat for the record. The categories are:

"recreational purposes … the purposes of carrying on a relevant educational activity; or … the purposes of carrying on, commercially or for profit, an activity which the person exercising the right could carry on otherwise than commercially or for profit."

Whether charitable NGOs operate for profit may be arguable; many might claim to operate commercially. However, that would ultimately be a matter for the courts to determine, as members know.

The Convener: Does that mean that it might be in doubt whether an NGO such as the RSPB could exercise its access right to survey land? Is it clear that such work involves a commercial transaction?

Allan Wilson: In my view, survey work by such an organisation would constitute

"carrying on a relevant educational activity".

The Convener: Would the organisation be adequately covered?

Allan Wilson: Yes.

The Convener: We want to ensure that that scenario would be covered—I can think of others, too.

Allan Wilson: We must understand that we will have the 2003 act, the outdoor access code and, ultimately, the judicial interpretation.

The Convener: A number of submissions, particularly those that expressed land managers' concerns, raised an issue about what would happen if, in their view, a person was not exercising their access rights responsibly. During the passage of the Land Reform (Scotland) Bill, we discussed what the right course of action would be in such circumstances. In the past, land managers have called the police and I am keen that one of the outcomes of the 2003 act and the code would be the acknowledgement that such problems are better resolved locally and that the police should be called only when a criminal offence has been committed. Does the code address the issue, or would the local access forum deal with it?

Allan Wilson: The code contains a section entitled, "What to do if you encounter irresponsible behaviour". Paragraph 6.14, which reflects the point that you made, says:

"If a person's behaviour is criminal, you should contact the Police."

I imagine that in 99.9 per cent of cases of agreed access, rights will be exercised responsibly with the consent of managers and owners. If anyone acts in a criminal manner, they should be reported to the police.

The Convener: The Environment and Rural Development Committee asked about dissemination of the code. I am sure that that has been addressed, but for the record what plans do you have to disseminate the information in the code?

Allan Wilson: A duty is imposed on SNH in that regard, as I said in response to Margaret Smith. The code will be publicised widely and we will circulate a summary of the code and engage in wider educational activity via SNH to ensure that recreational users are aware of the code's

provisions and that land managers and others are aware of their responsibilities under the 2003 act and via the code. I hope that that activity will be as extensive as it can be to ensure that the issues are publicised widely.

The Convener: Are there plans to produce a short summary of the code?

Allan Wilson: Yes. SNH will produce a summary of the code, which will be circulated widely.

The Convener: I take this for granted but again, for the record, will the shorter version of the code reflect absolutely the intention of the code itself?

Allan Wilson: Yes.

The Convener: May we have a copy of the summary when it is available?

Allan Wilson: It would be a mistake to go to all the trouble of producing a precisely worded code, only to produce a summary that departed from that. We will take great care to ensure that the summary reflects the code directly and the access forum will approve the summary before it is circulated.

The Convener: It would be helpful if the committee could have sight of the summary when it is available. You also referred to guidance about acceptable signage in response to Margaret Smith's question; the committee would be grateful for the opportunity to see that, too.

Allan Wilson: I am happy to give an assurance in relation to both documents, which should be available circa late September.

The Convener: Bill Butler asked about people with disabilities. When will you issue guidance to local authorities?

Allan Wilson: The consultation has just been completed, so shortly after the summer recess we will lay a negative instrument before Parliament.

The Convener: We are grateful for the guidance that you gave us on our timetable. We will consider whether we have enough information to proceed with our report. We note the positive submissions that we received, some of which acknowledged that Scotland may have the best access legislation in Europe. That is a positive message, notwithstanding the fact that there are issues to be clarified and finalised.

The committee is grateful to you, minister, and your officials for the work that you have done. We look forward to receiving the guidance from you to complete the process. The Land Reform (Scotland) Act 2003 was one of the biggest—if not the biggest—pieces of legislation that the Parliament has dealt with, and we welcome the code.

Is there anything that you want to say before I put the question on the motion?

Allan Wilson: No. You pointed out the historic nature of the bill that we passed. We are discussing part 1 today, but parts 1, 2 and 3 taken together are probably the most significant legislation that the Parliament approved in its first five years. If the committee finds it possible to approve the code today, we will be able to bring it forward earlier than might otherwise have been the case. However, I wholly understand the difficulty that the committee might have in doing so.

The Convener: The question is, that motion S2M-1455 be agreed to.

Motion agreed to.

That the Justice 1 Committee recommends that the Scottish Outdoor Access Code: Proposed Code (SE/2004/101) be approved.

The Convener: It is up to the committee to make a decision on the timetable. Members heard what the minister said and we know what the deadlines are. I will take comments on whether members think that we can produce the report for tomorrow.

Bill Butler: If the clerks can summarise the salient points in time for tomorrow, we should proceed, because that will avoid the delay until 2005 that could occur if, as the minister said, we wait until September. If that delay can be avoided, the historic access rights would be conferred. We should go for it.

The Convener: Unless anyone is otherwise minded, I will take that suggestion as agreed. We planned for this eventuality, and our clerks have kindly agreed to start writing the report now, based on what members have said, the minister's answers, the written evidence and the report from the Environment and Rural Development Committee. I thank the clerks for agreeing to do that. As Bill Butler said—I am sure the committee agrees—it is important that we do this in the interests of passing the code for the summer.

Victim Statements (Prescribed Offences) (Scotland) Amendment Order 2004 (SSI 2004/287)

The Convener: Agenda item 2 is the Victim Statements (Prescribed Offences) (Scotland) Amendment Order 2004, which is a negative instrument. I refer members to the note that has been prepared by the clerk, which sets out the background, and invite them to comment. Once again, the efficient Subordinate Legislation Committee noted an error in a previous instrument, and recommended revoking the old instrument and replacing it with the one that is

before us. There is nothing controversial in that. Are members happy to note the instrument?

Members *indicated agreement.*

Alternatives to Custody

10:45

The Convener: I refer members to the note that the clerks have prepared, which sets out the background to a research report that was prepared for the committee on alternatives to custody in other jurisdictions. Members will recall that we decided that we would continue the work of the former Justice 1 Committee, following its report on alternatives to custody, by focusing on alternatives to custody in other jurisdictions. I welcome Susan Eley and Bill Munro, from the University of Stirling, who have carried out the research. I also thank Graham Ross, from the Scottish Parliament information centre, who supported them in their work.

I thank the witnesses very much for the work that they have done, for which the committee is very grateful. We might have some questions to put to you to focus our minds on the work that we need to continue. Is there anything that you would like to say before we start our lines of questioning?

Susan Eley (University of Stirling): No. We will leave it open to the committee.

The Convener: I invite members to consider the interim report. It is recommended that we consider the jurisdictions of Finland, Sweden and Western Australia. Why were those three jurisdictions chosen? We originally considered six, but it was suggested that we narrow our focus to three.

Susan Eley: The interim report that is before the committee is the product of our review to date, which began at the end of March. We looked at several jurisdictions across Europe, North America and Australasia, and the interim report is indicative of some of the jurisdictions that we looked at. In the first phase of the research report, we were mindful of concentrating on jurisdictions that either had succeeded in reducing their prison populations or had maintained their prison populations at a relatively low level compared with that in Scotland.

Following that review, we proposed three jurisdictions for distinct reasons. First, Finland is proposed because it has been used previously as a model for establishing good practice in other jurisdictions. For example, New Zealand used the jurisdiction of Finland as a model. There are several reasons why Finland has been particularly successful in reducing its prison population. Among the factors that have contributed are changes in penal theory related to criminal policy; political consensus that prison overcrowding was a problem that needed to be addressed; and changes in penal legislation.

We are interested in focusing on Finland primarily because it has been used as a model before and is seen as a site of good practice. We are interested not so much in replicating the evidence that is already out there, but in interrogating much more closely why Finland has seen such a significant reduction in its prison population—although, over the past three years, it has witnessed an increase in that population. We want to see whether there are any lessons to be learned.

The second proposed jurisdiction is that of Sweden. Sweden is of interest to Scotland because of two specific policy measures. Sweden's prison population has been more or less stable for the past 20 years. In the mid to late 1990s, there were notable changes in three-year periods. Between 1995 and 1998, there was a significant decrease in the prison population, which was followed by an increase in that population between 1998 and 2001. Subsequently, there has been a significant decrease in the prison population, which is attributable primarily to the policy measure of addressing the number of receptions to prison by providing, as an alternative to prison sentences of up to three months, intensive supervision orders that place people under house arrest and use electronic monitoring. The measure has been operating in Sweden for three years and that is why we felt that it would be a valuable jurisdiction to scrutinise in more detail.

The third proposed jurisdiction is that of Western Australia. Western Australia had an above-average prison population compared with the prison populations in the rest of Australia. It has instigated a package of reforms, the most notable of which is the abolition of prison sentences of six months or less. We feel that, as that policy measure is relatively recent yet established, it would be fruitful to concentrate on that jurisdiction and to consider that specific policy measure.

Michael Matheson (Central Scotland) (SNP): When you examine the other jurisdictions, will you consider the structures in those areas? For example, I believe that in Scandinavia a single-agency approach is taken to help to marry together alternatives to custody, the court system and so on. Will you consider structural reform and its impact on the implementation of policy? It seems that most of your work has been on policy and what is in place rather than on the structural aspects.

Susan Eley: Finland is different from the other jurisdictions that we propose to study because the approach to penal reform there is culturally different. We have been considering that closely. We will be careful to examine not only technological changes such as tagging measures, but the economic and environmental factors, which include structural factors. We will be critical in our evaluation of what measures have been taken in the jurisdictions to see how transferable they are to the current Scottish situation.

Margaret Smith: Have you done or would you consider doing any work on the views of the public in the three jurisdictions? You have touched on the different culture in Finland. We have been told that in the jurisdictions there was political consensus that prison overcrowding was a problem that needed to be addressed. However, that is only part of the picture, because if we let people out of prison or do not put them in prison in the first place, a political consensus is also needed on the fact that we must do other things with them and ensure that they do not offend when they are not in prison—some people would say that one of the benefits of prison is that persistent offenders cannot offend when they are in prison. What has been the general public's reaction to the changes that have been made in the three jurisdictions?

Susan Eley: That was not one of our main focuses in phase 1, but one of the major aims in phase 2 is to consider the changing trends in public attitudes—in the three jurisdictions and more widely—as a result of policy measures on imprisonment.

Margaret Smith: My second question is wrapped up in the first one. The reduction of the prison population is only part of the equation, because we must also consider what to do with offenders who are not in prison. You mentioned that the greater use of tagging in Sweden is married with intensive supervision orders. What effect has that policy had? Was more investment needed in local authority social work departments? What would be the consequences of such a measure in Scotland?

In the three jurisdictions, how effective have the measures been in tackling reoffending, which is one of the other major problems? Reducing the number of people in prisons will not be effective if we do not address reoffending.

Susan Eley: A focus of phase 2 of the research will be to examine the resources that the new measures have required in the jurisdictions and to compare the resources that have been given to prison estates with those for community sanctions. We will scrutinise those matters closely. You are right that intensive supervision orders bring with them a burden of resourcing, which we will consider closely.

The third major aim of the second part of the research is to scrutinise the local evidence on effectiveness and to place it in the wider context of the global evidence on the efficacy of various community-based sanctions.

The Convener: I know that you have just completed phase 1 of the research and that much of what we want to talk about will probably be dealt with in the next phase. I will lay out some issues and I would like you to tell us whether you will consider them. Do you know how many prisons there are in each of the three jurisdictions and what their capacity is?

Susan Eley: I am not able to give you the exact figures at the moment.

The Convener: In Scotland, one of the issues is the conditions in which we hold prisoners, which can be affected by overcrowding, slopping out and so on. That is perhaps a driving force for not locking up so many prisoners. Do we have any information about the conditions in which prisoners are held in the proposed jurisdictions?

Susan Eley: It is fair to say that slopping out has not been particularly evident in the literature that we have studied so far, but overcrowding appears to be a concern.

The Convener: So overcrowding is still a problem in those three jurisdictions.

Susan Eley: It is a problem in those three jurisdictions and more widely throughout the jurisdictions that we considered.

The Convener: I asked that because the conditions in which prisoners are held must be part of the backdrop to our work. That is a big issue for us in Scotland.

In most cases, the trends in serious crime in Scotland are rising. Do we know anything about the backdrop to that in the three suggested jurisdictions? Are serious crime levels falling or rising there?

Bill Munro (University of Stirling): The general trends in all the jurisdictions were similar—there tended to be a drop in crime trends overall but, within that, there tended to be a rise in the incidence of serious and violent crime and, in most European countries and in other jurisdictions, levels of less serious crime tended to be falling.

An issue that we covered as part of the research was the complexity of reading trends. In different jurisdictions, there are different ways of counting crime and different ages at which people are responsible for crime. We used victim surveys and prison numbers, but the prison numbers were not always that clear, because they tended to be just the average number of prisoners on a particular day. We found that it was very difficult to get entry figures. In the interim report, it was difficult to get a clear idea of trends on prison numbers. When we focus on the three jurisdictions, the picture will be much clearer, because we will have more time to get access to such figures.

The Convener: If we were to abolish short-term sentences, we would be virtually opening the prisons and letting people out. That would reduce the prison population, and I suppose that the situation is that simple. Is there any way of monitoring the impact of such a decision? For example, in Western Australia, has there been an impact on the recidivism rate?

Susan Eley: Given that the measure in question was taken relatively recently, it would be quite early to include such an assessment in the report. However, I believe that there are other jurisdictions to which we can look where similar measures have been taken to provide alternatives to short-term sentences other than direct release.

The Convener: There is obviously an alternative, but I presume that, rather than an alternative being provided, people are just being let out of prison. For me, the question is what the impact of doing that in Scotland would be. Would we simply switch one sentence for another, or would the impact be positive? I know that you cannot answer that, but I wonder whether you will be able to find that out from your research on the other jurisdictions.

Susan Eley: In the review, we will be able to unpick some of the complexity to do with the types of offenders who might be in that pool of early-release prisoners and the offences involved. We will be able to find out from the other jurisdictions what offences and what offenders early release would apply to. That links in to the question of the acceptability of those measures to the public and to victims.

Mr Maxwell: I will start with a straightforward question. You have outlined why you chose Finland, Sweden and Western Australia as the three jurisdictions that you wish to examine. Will you say why you rejected the other three jurisdictions?

Susan Eley: Spain was one of the other jurisdictions that we originally proposed. We felt that there were difficulties in getting access to the official documents and that the language difficulties would have implications for the timeframe. That was a purely pragmatic decision.

We were also interested in the Netherlands, but we believed that the body of evidence there could also offer something to the comparative review, by offering a contrast to the jurisdictions that were under study.

The other jurisdiction was Victoria, Australia, which provides a direct contrast to Western Australia. However, on our second and closer scrutiny, we felt that the cultural and historical differences linked to the judiciary in Victoria meant that it excluded itself from being directly transferable to Scotland.

11:00

Mr Maxwell: I am quite surprised by that final answer and that there would be such a diversity of cultures between two parts of Australia, and between Australia and ourselves. Will you expand on your reasoning?

Susan Eley: I would not argue that there are huge cultural differences between Australia and Scotland. Professor McIvor, who carried out that part of the review, felt that Victoria in Australia had unique cultural legacies in its judicial system that meant that it would not be as appropriate as Western Australia for considering policy measures.

Mr Maxwell: I am just pressing the point out of curiosity. What were the unique cultural legacies in the judicial system of Victoria?

Susan Eley: I am unable to answer that directly as I did not conduct that part of the review.

Mr Maxwell: Okay, I will move on.

I assume that you will have to take into account the different cultural backgrounds of the three jurisdictions and Scotland. Will you also examine the different rates of criminality? In particular, will you be considering the definitions of what constitutes a crime in different societies? Some societies have a very large number of crimes on the statute book and others have a much more restricted view of what defines a crime.

I am particularly interested in the attitudes to crime in different countries. I was really interested in the Netherlands because it obviously has a different attitude to two areas of crime: pornography and drugs. Given that those are not seen to be crimes in the Netherlands but they are seen as crimes here, how are they taken into account in your study? Scandinavian countries have a similar outlook on those areas and they also take a different view of things such as euthanasia. How do you deal with the cultural differences and different attitudes that affect prison numbers?

Bill Munro: The cultural differences have come out very clearly in the interim report. What you said about the different definitions of crime and criminality in different jurisdictions is very important. In some ways, it is especially true of the Netherlands. Because of the timescale, we took a very broad view of the various jurisdictions. In some cases, there were small indications that interesting things were happening, but it was difficult to follow that up to see the fuller picture. Part of the problem was the language issue and getting material in English.

There was a tendency to view the Netherlands as having a very liberal and less punitive criminal justice system. However, when we looked beneath that perceived culture, it did not appear to be that way. The reason why the Netherlands had low prison figures in the 1970s and 1980s was that the country made a decision that there should be one prisoner to one cell. Those who received custodial sentences went on fairly long waiting lists. Therefore, the prison figures showed that the Netherlands had a low number of people in prison, but there was no indication of how long the waiting lists were. There were also quite a lot of short sentences. The idea that the Netherlands is less punitive was challenged quite strongly when we looked into the background.

In Europe as a whole, we decided to dismiss some of the countries that we considered, such as Spain, not purely because of cultural reasons, but because they were so completely different. For example, in Spain and Italy, the courts have a flexible role and a lot of responsibility is placed on judges to make decisions about alternatives to custody. Such alternatives tend to be seen as a privilege to the prisoner instead of a direct alternative. Therefore, although Spain and Italy are attractive examples, because in both countries the prison rates are going down, ironically they are also countries in which the use of alternatives to custody depends on the historical role of judges and there tend not to be many alternatives to custody. We felt that the contrast to Scotland was so sharp that we did not pursue those examples in more detail.

Mr Maxwell: I do not know whether this question is answerable, but is it possible to overcome those cultural differences? Is it possible to make a straightforward comparison between the situation in Scotland and that in the three examples that you include in your report? When it comes to the treatment of criminality, it seems that every country is unique. Can any valid comparisons be made?

Bill Munro: It is important to emphasise the difficulties in making comparisons, especially when one thinks of western and eastern Europe. There are so many cultural differences and disparities that it is difficult to know where to start.

Once we looked further into the subject, however, we could see the key trends that were common to the way in which the various jurisdictions were heading. Comparisons can be made in certain areas, but there are others in which it is more difficult. The situation in Finland was unique. The decision to reduce the use of custody was taken because there was the political will to do so. The Government also had the massive support of the country. There is political will in Scotland to make the changes, and the mechanisms are also similar. The question is whether public opinion on what the Executive is doing might differ from public opinion in Finland.

Bill Butler: In response to my colleague Stewart Maxwell's question, you spoke about the difficulty in making valid comparisons when cultural differences are taken into account. You have also highlighted two other areas that showed the limited nature of trend comparisons in different jurisdictions. The first was how populations are classified and counted and the other was how similar rates of imprisonment can conceal radically different or divergent practices. How will you attempt to circumvent those limitations in the second phase of your research project?

Bill Munro: There is probably less of a problem in the jurisdictions that we have chosen to look into in more detail. We have tended to base most of our work on eastern and western European countries in which, in some cases, the difficulties seemed to be insurmountable.

Bill Butler: So, relatively speaking, it will be easier in the jurisdictions that you have chosen to make valid comparisons in relation to practices in Scotland.

Bill Munro: Yes, although there will be differences. As we indicate in the interim report, it was important to highlight the difficulties and differences at the same time as making the comparisons. Especially at this stage, when we are looking at trends, it would be easy to draw incorrect conclusions from them if one were not aware of the differences. That was particularly true in the case of waiting lists in the Netherlands and Poland. The political changes in the 1980s produced difficulties in many eastern European countries because the notions and definitions of crime and criminality changed quite profoundly, and it meant that it is not possible to compare charges or offences, as they were not similar.

Bill Butler: Is there enough similarity among the three jurisdictions that you chose to look at in the second phase of the review to overcome those difficulties?

Bill Munro: Yes.

Susan Eley: There is similarity, but there is also transparency in the classifications. Where there are differences, we have confidence in being able to identify them. In some other jurisdictions, it was difficult to ascertain what the classifications were. We are confident that we will be able to be as robust as possible.

The Convener: You said that the second phase of the review will involve more detailed analysis of relevant published material and the collection of additional information. I am keen that we supplement that information with any connections that we can make with those jurisdictions. I do not know much about them, but I presume that there are relevant committee systems or people with whom we could begin to make contact.

I feel that what we have at the moment is valuable in so far as it tells us what the published material is, and we can analyse that. However, if someone were to examine Scotland's prison system, they could look at lots of publications but they would not get added value unless they spoke to us and to the ministers who run the prison system about what the real issues are. Can we discuss with you at phase 2 of the review how we might try to make those connections happen?

Susan Eley: Absolutely. We would welcome the support of the committee. We use the term "materials" in its broadest sense to include people and their knowledge as resources. We intend to take a Delphi approach to contacting experts who might have their own unpublished materials and experiences of the process as well of particular policy measures.

The Convener: Can anyone advise me whether there is a protocol for making contact with other jurisdictions?

Graham Ross (Scottish Parliament Directorate of Access and Information): I do not know of any existing protocol, but I think that there is scope for visits—perhaps not to all the jurisdictions, but to one or two. Relevant contact could be made with those people. I can certainly find out whether there is a protocol.

The Convener: If we are discussing going to any of the jurisdictions, we should be able to make contact with the relevant democratic structures to say what we are doing and to welcome dialogue with them. In future, we might even be able to get some correspondence going. Could you investigate that?

Graham Ross: Yes, of course.

The Convener: As there are no other questions, I ask members to agree the recommendation that we look at the three jurisdictions under discussion. Are members happy to proceed in that fashion, with the proviso that we want to add weight to the academic research by making some contact with those jurisdictions?

Members *indicated agreement*.

The Convener: On behalf of the committee I thank Susan Eley and Bill Munro for what they have done so far and for appearing before us this morning. Would either of them like to say anything in conclusion?

Susan Eley: Thank you for your support on agreeing to look at those three jurisdictions.

The Convener: I also thank Graham Ross.

Work Programme

11:13

The Convener: Item 4 is on the committee's work programme. I refer members to the note that sets out the forthcoming work programme, and remind them that the majority of the work programme has been agreed previously. However, this is an opportunity to review it prior to the summer recess and to remind ourselves of the work that we have agreed to undertake.

Three decisions require to be taken. The first is to consider the change in the list of witnesses that we will call to give oral evidence in relation to our inquiry into rehabilitation programmes in Scottish prisons. The second decision relates to whether we will take evidence from Her Majesty's prisons inspectorate for Scotland. The third decision is to agree a timetable for oral evidence. The clerk's note suggests that there should be four evidence-taking sessions for this inquiry, which would take place in the first four meetings after the recess.

We have previously discussed the fact that our inquiry cuts across some of the Executive's consultation on reducing reoffending. After the four evidence-taking sessions, we might simply decide to leave the matter there for the time being and submit a report to the Executive. On the other hand, something might emerge from the sessions that might focus members' minds.

I invite members' comments.

Mr Maxwell: I am happy with the suggested change to the witnesses who will give oral evidence. Indeed, the change is entirely reasonable, given the timescale and the fact that we will have other opportunities to speak to certain individuals and groups.

I think that it would be valuable to speak to HM chief inspector of prisons. However, we should timetable that discussion to coincide with the publication of his annual report and not bring him to the committee before that report is ready.

11:15

The Convener: So our evidence-taking session with the chief inspector of prisons would have a dual purpose. We would question the chief inspector about his report and also take evidence from him for our inquiry.

Mr Maxwell: Yes.

Margaret Smith: Can I have a copy of the work programme that has the second page? I must have lost the other page; I have so many papers.

Michael Matheson: Given the Justice 2 Committee's recent experience, I suggest that, when we invite witnesses from the Scottish Prison Service, we make it quite clear that we want people who have the relevant expertise and experience to comment on the issues that the committee is examining.

The Convener: I presume that we want the SPS's expert on the programmes that are available in prisons to educate us on what the SPS is trying to achieve, how it has arrived at the programmes that it is running and so on. You are quite right to point out that, given the short time that we have available, we must ensure that we get the right person from the SPS. We will come back to members with the name of the person or persons from whom we will hear.

Margaret Smith: Given my constituency interest, I am a bit concerned by the suggestion of taking north Edinburgh drug advice centre out of the list of individuals and organisations that will give oral evidence. Last week, I was in Saughton prison in Edinburgh—as you can see, they let me back out again—to see its Fairbridge project. However, when I spoke to the prisoners, the issue of the effect of drugs on their lives and their offending came up time and time again. I appreciate that time is limited, but that aspect is obviously central to the issues that we have to consider. The staff to whom I spoke said that one of the key reasons why people reoffend quite quickly after release is that drug services are not set up to deal with them speedily. They might have to wait a month before someone is available to discuss their problems, drug rehabilitation and so on. However, without a job or any means of support, people reoffend within that time to get money for drugs. As I have said, I think that the issue is absolutely central to our inquiry.

The Convener: The clerk's note contains an annex that lists the individuals and organisations that, given the time available, we would call to give oral evidence. The Edinburgh throughcare centre is on the list of organisations to be included in our fact-finding visits and external meetings. As a result, the committee would still meet people at the centre and make a report. That information would still be available to the committee, so those places will not be excluded from the process—far from it. The organisations that we have chosen to visit have all been chosen for practical reasons, such as the time available to us and the convenience of getting to them, with the possible exception of HMP Peterhead, which we could visit as time permits.

Margaret Smith: I still suggest that it is important to take oral evidence on the effect of drugs. I do not have a problem with the fact that some of us might want to visit the north Edinburgh drug advice centre outwith a committee meeting, and I think that such informal meetings are quite

useful, but the issue of drugs is central to what is happening in a lot of people's lives and to why they cannot get out of the cycle of reoffending. It is important to be able to question people on the record about that. Other witnesses may touch on that when they give evidence, but it is a central issue and I feel that we would benefit from hearing from people who deal with drugs issues all the time.

Michael Matheson: It might be helpful to get a better idea of how we intend to frame the inquiry. I am looking at the list of suggested witnesses for oral evidence during what could be described as phase 1 of our inquiry. I suspect that, as a result of the evidence that we receive from those witnesses, some issues will be flagged up and we may wish to probe into the evidence in closer detail. That may bring us on to looking at the work that has been done by specific projects. For example, I am sure that the Scottish Prison Service will go on at some length about the drug rehabilitation service that Cranstoun Drug Services provides. It may then be appropriate for us to hold discussions with Cranstoun to look at what is happening on the ground, and the same may be true of the north Edinburgh drug advice centre. If there will be scope to probe more deeply into specific issues, it would be helpful to have clarification about that. Representatives of some of the projects could then be brought forward to give evidence at that stage.

Mr Maxwell: Michael Matheson makes a good point. This is not the end of the inquiry process, but merely the start. As he says, we may want to revisit certain projects and to hear evidence in future from representatives of projects other than the north Edinburgh drug advice centre.

Given the timescale for the inquiry, if we were to add back in the set of witnesses that Margaret Smith mentioned, we would probably have to remove somebody else. Can you suggest someone who should be removed from the list, Margaret? I am not trying to put you on the spot, but that is a difficulty. Michael Matheson's suggestion that we could look at such things in more detail during the phase that follows oral evidence was a good one.

Margaret Smith: You ask a reasonable question, but I do not have a breakdown of how members envisage dealing with the witnesses or of which witnesses would come to which session, so it is quite difficult for me to answer. I just feel that the issue of drugs is absolutely central to our inquiry. I am not wedded to the idea that we have to hear evidence from the north Edinburgh drug advice centre, but I think that we have to take oral evidence from somebody who is able to answer our questions about the importance of drugs and of proper drug rehabilitation services in tackling reoffending behaviour. As I said, I am not wedded to the idea that that oral evidence must come from the north Edinburgh drug advice centre, although it would be useful to visit that centre.

The Convener: I do not think that anyone disagrees with the point that you are making.

Margaret Smith: I am quite happy with Michael Matheson's point that there could be a second phase that would take us into more informal meetings. I just want to ensure that on what I consider to be a central point—the importance of the drugs issue—we are able to question somebody who is among the first set of witnesses for oral evidence. That would allow us to get to the bottom of the matter and find out what services are being made available to people and whether that is one of the reasons why there is a revolving-door issue for a number of people with such problems.

The Convener: I agree with the point that you are making, but I have to remind the committee that our inquiry is about rehabilitation in prisons. We must be absolutely certain about who we think are the experts in determining the impact of drug misuse on the rehabilitation of drug users in the custody of the Scottish Prison Service. For example, the time-out centre, which is in my constituency, could make those arguments, and I would prefer it to give evidence on the record. The committee might also benefit from visiting the centre, which deals with a lot of drug users and offers an alternative to custody.

Margaret Smith is right to say that we must consider the impact of drug misuse on rehabilitation, but I am not sure who would be the best witnesses to call. We should certainly hear from the Scottish Prison Service on how it views and deals with the problem, and I would like to know what is happening to the £12 million or so of Executive money that the SPS is meant to be spending on post-release drug programmes. As Michael Matheson said, there are first principles but that does not preclude our inviting the Edinburgh prison throughcare centre to give oral evidence. However, I am not clear in my own mind about who would be the best person to address the question.

Bill Butler: Paragraph 7 of the clerk's paper notes that the committee will hold an evidence session in Glasgow. Margaret Smith said that she is not wedded to taking oral evidence from a particular organisation—the north Edinburgh drug advice centre, in this case—so perhaps, if appropriate, we could hear from the time-out centre at that meeting. That would fit into the timeframe that the clerks say is appropriate, so it might be a way forward.

Margaret Smith: For clarification, would the meeting in Glasgow be one of the four evidence sessions, or would it be additional to those meetings?

The Convener: Annex C of the paper on the work programme shows the timetable for the inquiry. The first evidence session will take place on Wednesday 15 September and the last will take place on Wednesday 6 October in Glasgow, at which meeting the clerk's paper schedules in evidence from local authority criminal justice and social work services, a panel of academics or independent criminologists and the Minister for Justice, who is usually invited to give evidence at the end of the process.

Michael Matheson: It is difficult at this stage to identify an agency or organisation that could address the issues that Margaret Smith raised, which include drug abuse and rehabilitation. As is always the case with inquiries, when we start to take evidence it will become apparent that it would be helpful to call certain organisations to give evidence. The list of proposed witnesses in annex C is comprehensive for the purposes of an initial sweep across the issue. We can consider later whether it would be relevant to hear evidence on specific matters from other organisations. There is a range of drug rehabilitation organisations that we could invite, but it might become apparent in the course of evidence taking that we should focus on a couple of those organisations.

The Convener: We will take evidence from the Scottish Prison Service on 15 September. I note Michael Matheson's point about the need to hear from the right people at that meeting, and it might be useful to invite the service to give us its views on drug rehabilitation. We normally give witnesses two or three weeks' notice, so it would be possible to revise our witness list on the basis of what we hear at that meeting. We could then invite the Edinburgh prison throughcare centre or any other relevant organisation to give evidence on the rehabilitation of drug users.

11:30

Margaret Smith: From the breakdown, it appears that the most obvious meeting at which to slot someone else into a panel is that on Wednesday 29 September. I hope that any organisation worth its salt would be happy to take on the challenge at a couple of weeks' notice. I want to ensure that we cover the issue of drug rehabilitation for prisoners on release. From talking to prisoners, prison officers, Fairbridge staff and people from Edinburgh prison throughcare centre and other organisations, I have a sense that that is a big contributory factor in reoffending. Much good work is being done in prison to get people ready for release and to get them to think about what they will do when they are released. However, when they are released, one of the first issues with which they have to deal is the fact that they have a drug habit.

The important point is that we should hear from people who can tell us what is being done to tackle the problem. I am relaxed at the prospect of leaving things as they are for the moment and re-evaluating them after 15 September, with a view to slotting in a representative of Fairbridge or another organisation on 29 September. We will take advice on which organisation would be the best for us to hear from. The issue is not geography, but who is providing the service and has the information that we need to access.

The Convener: To which specific issue of drug rehabilitation should organisations speak?

Margaret Smith: The issue that we are considering is the effectiveness of rehabilitation programmes in prisons and the work that is being done in prisons with people who have a drug problem. One difficulty seems to arise at the point of release—what kind of throughcare is put in place for people in relation to their drug habit? I understand that there is a gap. It may be a gap of only a week, but we have been told that it is extraordinary for it to be that short and that there is more likely to be a gap of something like a month between people receiving rehabilitation in prison and their getting it in the community. There does not seem to be a smooth transition from what is being done to tackle drug misuse in the prison context to what is being done in the community. We probably want to hear from organisations that work both in prisons and in the community.

The Convener: You are suggesting that we deal with this matter under the heading of throughcare. We must start by examining rehabilitation in prisons, because that is what the inquiry is about. However, we will inevitably have to consider the issue of what the Scottish Prison Service does for prisoners on release. It has some responsibility for the matter, and the rest is picked up by others. That is as far as we can go. We need to be careful not to stray further than throughcare. We must stop short of dealing with the community aspect of the issue.

Margaret Smith: I am talking about situations in which work is being done with someone in prison, but there is absolutely nothing there for them when they walk out the door. One of the first things that seems to happen is that such people offend to feed their habit and end up back in prison straight away. The people who have worked with them in prison are left feeling frustrated. The issue is immediate throughcare, rather than how people are dealt with three or six months down the line.

The Convener: You are talking about throughcare on release.

Margaret Smith: Yes.

The Convener: I wanted to be clear about that. If we agree to evaluate the issue, we must decide which other organisations we need to call to give oral evidence under the heading of drug rehabilitation for prisoners on release. If Margaret Smith is happy with that, we will review the matter after we have heard from the SPS on 15 September.

Margaret Smith: I am happy with that approach, as long as the issue is dealt with.

The Convener: I raise one further issue for consideration. I know that we have already carried out some post-legislative scrutiny of the Protection from Abuse (Scotland) Act 2001, but it might be worth considering the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 next, in the light of press reports about its operation. When that act came into force, it had the effect of introducing a preliminary hearing—like the Bonomy hearings—in advance of trials, to consider any evidence about the victim's sexual character or history. There is anecdotal evidence of complaints from solicitors and advocates about how the act operates and recent press reports have said that there will be a challenge to the act under the European convention on human rights because the act might be seen to be unfair to the accused, as the reaction of the victim to the questions being put before the judge cannot be tested. I do not understand all the issues, but it might be wise for the committee to consider picking that up in future, if issues arise from it.

Mr Maxwell: I do not disagree with any of that. My only concern is work load. Consideration of that act would be a big issue, and we have just had a lengthy debate about trying to squeeze in one additional panel to give evidence on one additional day. I wonder how it will affect the overall timetable if we open up a serious and large issue; it might throw out nearly everything. I am not against the idea, but how, in practical terms, would that fit into the timetable?

The Convener: We would consider the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 only once we had concluded our work on the Protection from Abuse (Scotland) Act 2001—it would simply sit there until we had time to consider it. I merely suggest it at this stage as a kind of postbox heading. We could keep in touch with any developments in relation to the act and thereafter pick up anything that we considered to be vital.

Mr Maxwell: Under the heading "Legislation", the paper says that it is expected that the committee will be designated lead committee on the forthcoming family law bill. It has not yet been confirmed by the Executive when that bill will be introduced. Is there more information on that, because it will also affect the timetable? On a personal note, I am rather disappointed that the committee did not get the Fire (Scotland) Bill, which was published on 28 June.

The Convener: We do not have a timescale for the family law bill at the moment, but I am happy to write to the Executive to ask it to clarify when we can expect it.

There are no further issues on the work programme. We have agreed who we are going to take evidence from, including the inspector of prisons, and we have agreed a timetable for oral evidence, which is in annex C.

Civil Partnership Bill

11:38

The Convener: I refer members to the paper that has been prepared by the clerk and which outlines a recent amendment to the Civil Partnership Bill in the House of Lords. The committee has received correspondence from the Deputy Minister for Justice, who states that the amendment fundamentally changes the bill. He assures the committee that if the amendment is not overturned in the House of Commons the Executive will return to the matter in the Scottish Parliament. The Executive is not proposing to reopen the debate on the provisions of the bill, but is commenting on an issue that I am sure the committee will be concerned about. We said specifically to the minister that any significant amendment should come back to the committee. We have a response from the minister, so I thought that the committee would want to address the matter.

Margaret Smith: I was keen to get the matter on the record before the recess because the amendment that has been agreed to in the House of Lords fundamentally changes the bill and fundamentally goes against what we agreed in the Sewel motion on 3 June, which specifically endorsed the principle of giving same-sex couples the opportunity to form civil partnerships. The amendment effectively endorses the principle of allowing family members over the age of 30 who have lived together for more than 12 years the opportunity to enter into a civil partnership. It goes well beyond what we agreed in the Sewel motion, which is why it is important that it be dealt with.

As the convener mentioned, the minister assured us that the Sewel motion would come back to Parliament if there were major changes to the bill. That is why I thought it important that we get a commitment on record from the minister before the summer recess to the effect that that is exactly what the Executive will do.

On timing, I understand that the bill will—after receiving its third reading in the House of Lords tomorrow—have its second reading in the House of Commons around 21 July. It is likely that the Government will try to overturn the amendment in the House of Commons, so the bill will probably reach committee stage in the House of Commons about when we return from our summer recess. At that point, we should have greater clarity about where we are, so we can consider then whether the Sewel motion needs to come back to us.

It is useful to get the matter on record now because the amendment fundamentally changes the bill and takes it into areas on which nobody has consulted. We do not know what impact the amendment will have. To be frank, it is a wrecking amendment; some of those who voted for the amendment may have done so for good motives, but others did not. However, the important thing is that we recognise that the bill now goes far beyond what we agreed to. It is good that at least we have on record a commitment from the Executive to come back to us after the recess, as it promised, if the amendment has not been overturned by that time.

Michael Matheson: It is all very well to welcome the Executive's commitment to bring the Sewel motion back to the Scottish Parliament if the fundamental change is not reversed, but that simply begs a question about what such a procedure in the Scottish Parliament can achieve. If the bill remains in its current form, we have no power to change it. I am not clear how the minister can bring back to the Scottish Parliament the Sewel motion that we have already agreed to. Even if we were to vote against the bill in another Sewel motion because the principles of the bill had changed, Westminster could still legislate on the matter. The Sewel motion is nothing more than a convention. That is an important legal point. The Scotland Act 1998 makes no provision for the Scottish Parliament to stop legislation by not agreeing to a Sewel motion. An important part of the make-up of our discussion must be to acknowledge that we cannot stop the bill, although we can bring back the Sewel motion. It would be wrong for us to give the impression that we can do that.

The Convener: It is fair to say that this is new territory for everybody, including the committee and the minister. We just need to work our way through it as the circumstances arise. Our first response is to put the matter on record, as we are doing today. We have noted what has happened and we have received a response from the Deputy Minister for Justice. As a committee, we can make known any other concerns that we have.

As Michael Matheson has pointed out, the Sewel motion is only a convention whereby we agree to Westminster legislating on devolved issues. However, Westminster has not taken away those powers from us. I presume that it is open to the Executive to revise the legislation in the future if it is concerned about it.

Mr Maxwell: I do not know Westminster's procedures, but I think that bills that start off in the House of Lords ultimately return to the House of Lords. I think that even if the Government successfully amended the bill in the House of Commons, it could be amended again in the House of Lords. Margaret Smith suggested that the House of Commons might reverse the amendment by the end of our summer recess, but

if the bill is amended again when it returns to the House of Lords we will, in effect, come back to the position in which we find ourselves today. It will be useful to have clarification about procedures in Westminster.

Michael Matheson was absolutely correct to point out that the Sewel motion is no more than an agreement between this Parliament and Westminster. We have no powers whatsoever to deal with the bill. We have given up our competence and we have asked Westminster to legislate. As far as I am aware, that means that Westminster can go ahead and do that and that there is nothing that we can do to stop it.

11:45

A big debate was held in this committee and in the chamber about passing the matter to Westminster. It was inevitable that the situation that has arisen would happen at some point; the design of Sewel motions meant that they would cause that problem eventually. I am sure that that was not the intention when they were designed, but it was inevitable that we would eventually send legislation down to Westminster that was amended to our disagreement.

As the convener said, we could introduce further amending legislation. However, the Deputy Minister for Justice told us that he wanted the matter to go to Westminster because he wanted no inordinate delays in bringing the legislation into force. If having to legislate to resolve a problem that has been created at Westminster would not cause an inordinate delay in bringing the provisions into force, I do not know what would.

I am not surprised by this development, but we should for clarity seek information about the Westminster process. We should also ask the deputy minister what he intends to do if he brings the motion back to the Scottish Parliament. As Michael Matheson said, rather than just say that he will bring it back, the deputy minister should say what he will do when he brings it back. We need to know the Executive's intentions.

The Convener: I do not want to prolong the debate, because we do not have time for that. I want members to concentrate on the action that they want or do not want to be taken to address the matter.

Bill Butler: As the convener said, we are in new territory. It is right to note the situation. I see no reason why we cannot have the clarification that Stewart Maxwell seeks about Westminster procedures. However, the situation remains fluid—nothing is yet decided. The deputy minister said simply that he would, if necessary, bring back the motion. I hope that the Westminster procedures deal as expeditiously as possible with the wrecking amendment—Margaret Smith was right to call it that. If that happens, that will be all well and good.

As Asquith said, we should wait and see before we talk about matters constitutional. They are of some importance, but the main focus should be on ensuring that the bill, which is necessary, proceeds. To do anything else would be merely to indulge in more surmise.

Margaret Smith: Like Stewart Maxwell, I understand that once the bill has passed the committee stage in the House of Commons, it will return to the House of Lords, which would be able to amend the bill again. The political reality is that a two-line whip rather than a three-line whip was imposed. It is unlikely that that mistake would be made again. To ensure that we are ready if the situation that I described arises again, I would like more clarity. Michael Matheson said that we gave up competence on the issue.

Michael Matheson: I did not say that.

Margaret Smith: You said something similar.

Michael Matheson: I said that we had agreed to the principles; Stewart Maxwell talked about competence.

Margaret Smith: We have not agreed to the principles of the bill in its present form. The Sewel motion did not simply sign us up to the bill's principles; it signed us up specifically to giving same-sex couples the opportunity to form civil partnerships. Whatever happens from now will go beyond what the Scottish Parliament has agreed to. I would value legal advice from the Parliament's lawyers, because the Sewel motion was specifically drawn and we have gone beyond it.

Like Bill Butler, I think that we are in new territory. We should have a watching brief on the matter and wait to see what happens. It is quite likely that the matter will, at the end of the day, be dealt with. That might mean that the Government would have to return to the wider issue about carers, which I would welcome. At the moment, however, we are outwith the terms of the Sewel motion, so it would be useful to establish the legal position in relation to our consideration of the issue.

The Convener: I will clarify the procedure. Both Westminster houses must agree to the bill, but obviously a ping-pong match is currently going on and we do not know how it will end. The committee should seek clarification. We might know the answers to some of our questions but we should put it to the minister that the bill now appears to go beyond the terms of the Sewel motion and we should ask whether she has concerns about that. All we can do at this stage is

note our concerns and ask the Executive to anticipate whether the matter will be resolved.

Michael Matheson: If the bill remains as amended, what will the Executive do? I understand Bill Butler's point, but the Executive must have a game plan. The deputy minister said that he would bring the matter back, but it would be helpful to know what the procedure will be.

Mr Maxwell: I was going to make the same point. As Michael Matheson asked, the deputy minister said that he would bring the matter back, but what will he do then? It is reasonable to ask the Executive what its intention is. Surely the Executive has a contingency plan.

Margaret Smith: It would be reasonable to ask the Executive what the options are. I do not think that it would necessarily be reasonable to ask the Executive what it plans to do months ahead—

The Convener: I am clear about what the committee would ask, which is why I used the word "anticipate". The minister must anticipate that the matter might not be resolved and consider what might happen in that event. We need to clarify the procedure that would kick in at that point to bring the contents of the bill back to the Scottish Parliament. I think that we know the answer to that, but we need to ask the question for clarity so that we have in writing the Executive's understanding of the situation.

I propose that we have a short break before we go into private session.

11:52

Meeting suspended until 12:02 and thereafter continued in private until 13:37.

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