JUSTICE 2 COMMITTEE

Wednesday 4 September 2002
(*Morning*)

Session 1

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CONTENTS

Wednesday 4 September 2002

JUSTICE 2 COMMITTEE
26th Meeting 2002, Session 1

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Bill Aitken (Glasgow) (Con)

COMMITTEE MEMBERS

*Scott Barrie (Dunfermline West) (Lab)
*Mr Duncan Hamilton (Highlands and Islands) (SNP)
George Lyon (Argyll and Bute) (LD)
*Mr Alasdair Morrison (Western Isles) (Lab)
*Stewart Stevenson (Banff and Buchan) (SNP)

COMMITTEE SUBSTITUTES

Roseanna Cunningham (Perth) (SNP)
Lord James Douglas-Hamilton (Lothians) (Con)
*Donald Gorrie (Central Scotland) (LD)

*attended

THE FOLLOWING ALSO ATTENDED:

Rhona Brankin (Midlothian) (Lab)
Dennis Canavan (Falkirk West)
Brian Fitzpatrick (Strathkelvin and Bearsden) (Lab)
Murdo Fraser (Mid Scotland and Fife) (Con)
John Farquhar Munro (Ross, Skye and Inverness West) (LD)
Mr Mike Rumbles (West Aberdeenshire and Kincardine) (LD)
Dr Richard Simpson (Deputy Minister for Justice)
Allan Wilson (Deputy Minister for Environment and Rural Development)

CLERK TO THE COMMITTEE

Gillian Baxendine

SENIOR ASSISTANT CLERK

Irene Fleming

ASSISTANT CLERK

Richard Hough

LOCATION

The Chamber

Scottish Parliament

Justice 2 Committee

Wednesday 4 September 2002

(*Morning*)

[THE DEPUTY CONVENER *opened the meeting at 09:49*]

The Deputy Convener (Bill Aitken): Good morning, ladies and gentlemen, and welcome to the first meeting of the Justice 2 Committee after what was, I hope, an enjoyable and relaxing recess for all. We have received apologies from George Lyon. I assume that Donald Gorrie is coming; we will take the appropriate declaration of interests from him when he arrives. We have received no other apologies as yet, but I know that there are transport difficulties this morning so some members may have been delayed.

This meeting has been opened by me, the deputy convener, for reasons that will shortly become apparent. Before we start, I give the usual admonition: will everyone—and especially the ministerial team—ensure that their mobile phones and pagers are switched off, as they are disruptive if they go off in the middle of discussions.

I welcome Irene Fleming to the committee. Irene replaces Fiona Groves as senior assistant clerk. Fiona has gone on to—if not better—different things with the Scottish Executive. Welcome, Irene, to your first meeting.

Subordinate Legislation

The Deputy Convener: The first item on the agenda is subordinate legislation. As members can see, we have five negative Scottish statutory instruments to consider. For two of them, motions to annul have been lodged. The Deputy Minister for Justice, Dr Richard Simpson, will attend the debate on both those instruments.

Court of Session etc Fees Amendment Order 2002 (SSI 2002/270)

The Deputy Convener: The first motion to annul relates to the Court of Session etc Fees Amendment Order 2002. I invite Pauline McNeill to speak to and move the motion.

Pauline McNeill (Glasgow Kelvin) (Lab): Thank you. I have lodged a motion to annul so that the committee may discuss the principles behind this negative instrument. Representations were made to me by a number of MSPs and by the Scottish Trades Union Congress. The minister will be aware that the STUC was concerned that it was not consulted on the instrument. I was satisfied with the Executive's response to that concern, in that it has made commitments for the future, but I feel that we have to discuss with the Executive the general policy on full cost recovery of fees in civil courts.

In the main, the instrument would increase costs only in line with the rate of inflation, but it would increase the fees for proceedings before a judge by much more than that. The Executive may say that it has already made a compromise on those fees and that, after listening to what people had to say, the increase that was proposed has been reduced to an uplift of 25 per cent. However, the Parliament has never had the opportunity to discuss its attitude to the cost of civil justice, which is a live issue especially for the Justice 1 Committee, which has had an interest in the cost of civil justice as part of its inquiry into legal aid. Can the minister offer the committee a future discussion about the general policy on the cost of civil justice?

I feel strongly that it is hard to justify increasing the fees for proceedings before a judge by 25 per cent. At least one petition that the Justice 2 Committee has dealt with—the petition from the victims of asbestos—will be directly affected by the increase in the cost of justice because the petitioners were not covered by legal aid. The costs for those who do not receive legal aid and must pay their own way to take ordinary actions such as divorce or personal injury will rise by more than the rate of inflation if the instrument is passed.

I am concerned by the legislation. It is right that we should at least have a commitment to a discussion in future on the principle of full cost recovery of fees. Otherwise, the committee will be asked to agree to other negative instruments that will also implement increases that are higher than the rate of inflation.

I move,

That the Justice 2 Committee recommends that nothing further be done under the Court of Session etc Fees Amendment Order 2002 (SSI 2002/270).

The Deputy Convener: Does the minister wish to respond?

The Deputy Minister for Justice (Dr Richard Simpson): Let me give some of the background. The running of the sheriff courts and supreme courts—the Court of Session and the High Court—costs the Executive some £69 million a year. In addition, the annual salary bill for the permanent judges and sheriffs is £23 million. Under the current Administration, there are more judges and permanent sheriffs than at any time in our history.

We are under constant pressure to improve the quality and user-friendliness of court buildings. The committee will be aware of the need to provide for disability, witness protection and the separation of witnesses, which are all issues for which our court buildings need to be improved. That is not an inexpensive operation. At the moment, we cannot meet all the demands, but we are working to do so, because we believe that coming to court for civil business should be as stress-free as possible.

The question is whether the general taxpayer should foot the whole bill. There are those who subscribe to the view that the state should provide people with the means to settle their civil disputes when other means of settling them have not worked, but the Executive does not agree with that view. Why should the general taxpayer, most of whom will never see the inside of a court, subsidise those who use the courts to win a victory over another party or parties that often involves substantial sums of money for the winners?

I make one important exception to that statement of my views. I believe that we should assist people who cannot afford to pay court fees. That is why, for the first time ever, the Court of Session etc Fees Amendment Order 2002—and the matching order, the Sheriff Court Fees Amendment Order 2002—introduces a policy of exemption from fees for those who receive legal aid and for those in receipt of earnings-related state benefits. That policy change has been widely welcomed by all those who use the courts. We are not financing the change by passing on the costs to other court users, because the vast majority of individual fees will increase only by the rate of inflation.

I have received arguments that those whose income is only slightly above the benefits level may also struggle to afford fees. However, those who are prepared to pay for a solicitor will find that the court fees are on average only a fraction of the overall cost of going to court.

Pauline McNeill asked why the fees for proceedings in front of a judge will increase by 25 per cent, when all the other fees will increase only by the rate of inflation. We believe that judges' time is a precious resource. There are substantial pressures of work on the Court of Session. Indeed, Lord Bonomy's committee is sitting partly in response to those pressures. It is essential that the courts function as efficiently as possible, so that as many people as possible can have their cases heard with the minimum of delay.

I believe that part of the efficiency agenda means asking those who take up judges' time to meet a substantial share of the real cost of doing so. Of course, it will be the losers who pay for the costs. One judge sitting costs the taxpayer around £600 a day. The fees that we are asking for fall far short of that figure. Indeed, we are asking for payments in Scotland that are substantially less than those in English courts. The orders that we are debating today would put up the fee for appearing before one judge from £13 per half hour to £16 per half hour—an increase of £3. For appearing before the inner house, the fee goes up from £26 to £33 per half hour. If you feel that those figures are outrageous, you should compare them with plumbing fees. If you call out a plumber, you will pay a similar amount.

The average length of a court day is five hours. If the two parties to an action engage a single judge in their case for a whole day, the fees for each party would be £160, or £320 for two parties. I told the committee that an individual judge's time costs the taxpayer £600 a day, so under our proposals the taxpayer will continue to fund about half the real cost of those proceedings. At inner house level, the subsidy would be even greater, as the real cost of salaries is £2,000 compared with total fees of £660 in a two-party action.

Full cost recovery is a long way off. I have gone into the arithmetic to try to demonstrate that. Although the Executive is moving towards full cost recovery, we are a long way from that—at least in terms of charging at a realistic level for judges' time. That is deliberate. We consulted court users, although I take Pauline McNeill's point that we omitted to consult some other users, such as the STUC; that is an omission that we shall rectify in future consultations. Payments would have to rise to 100 per cent if we were to recover the real costs of the Court of Session. We were told that that was unacceptable and unaffordable, so we have listened and substantially moderated our proposal

to a rise of 25 per cent at present, instead of 100 per cent.

What will we do with the extra fee income? It will go straight back into reducing the running costs of the Scottish courts. It frees up some money in the court service budget to do other things and there are lots of useful things that we can do, as I mentioned.

Why do I believe that the committee should reject the motion? I ask the committee to recognise that the order represents no more than a bit of good housekeeping and a reasonable approach to funding the real costs of the civil courts. It contains a number of good things, notably a provision to increase the exemption from fees for people on legal aid or state benefits. At the same time, however, I note that the motion reflects a real anxiety that court fees should not become a barrier to people seeking the help of courts to resolve disputes. I believe that increasing the costs of the courts to real time in the long term will mean that people are more likely to settle disputes. The asbestos dispute was mentioned, and almost all those cases have been settled. I do not know how many have gone to court, but I believe that the vast majority of those cases do not proceed to court. That is true of 95 per cent of all cases. Increasing the fees—although the increase is not substantial—puts one more bit of pressure on the defendant to say, "Is this actually worth tackling?" It pushes matters in that direction, and that is important. However, I accept that we must look closely at whether increasing fees creates a barrier to people in seeking help from the courts.

If the motion is withdrawn, I will undertake to review the impact of the fee increases after a year, and we will reflect on whether a further move towards full cost recovery should be contemplated. If we feel that that is something that we wish to move for, we will consult fully before any move is made to introduce another fees order. In addition, I will be happy to appear before the committee again to discuss the Executive's plans before they are finalised and before another statutory instrument is submitted to the committee under the negative procedure. Before we move further along that line, we need to consult further and we need to allow the committee to have a debate with the Executive on the exact nature of the move and on the proposals that would accompany it.

The Deputy Convener: I thank the minister for that, because there have been concerns about the consultation or lack of it.

10:00

Pauline McNeill: Brian Fitzpatrick intended to come along to speak to the motion this morning, but because of a fire at Falkirk High, the trains have been delayed substantially.

Many months ago I made the point to Jim Wallace that I have always been concerned that there is too stark a distinction between fairness in civil justice and fairness in criminal justice. I accept the minister's point about the taxpayer who might never see the inside of a civil court, but many taxpayers might never see the inside of a criminal court and they probably hope that they never will. I am keen that civil justice does not take such a backseat to criminal justice because, for many people, it is as important. Some people have no choice but to go to court and ask the judge to determine how their finances are separated in their divorce action, and there are people who have disputes with their employers who have no choice but to go to court.

As long as there is at least acceptance of my point that civil justice should not be regarded as less important than criminal justice, I am happy to accept what the minister said. His response has been fair, but it is important that not only the committee but the Parliament has an opportunity to think about whether its approach to the policy of full cost recovery in civil justice is one that we want to pursue. We are talking about one fee only and I have noted the statistics that the minister provided—I did not know that the figure was as high as 95 per cent. However, we might be heading towards much greater increases in the future and that is my primary concern.

Motion, by agreement, withdrawn.

Gaming Act (Variation of Fees) (Scotland) Order 2002 (SSI 2002/281)

The Deputy Convener: The next order concerns the Gaming Act 1968.

Stewart Stevenson (Banff and Buchan) (SNP): I am not proceeding with motion S1M-3341, which would limit the debate to 20 minutes, because I am happy to place myself in the hands of the convener.

The order—SSI 2002/281—has two difficulties for me, which members will probably share. First, it deals with the cost of fees for gaming licences in casinos and bingo halls in relation to recovering the costs that are incurred by local authorities in administering the licences. However, no information is given to justify the six fees that are being increased—rises that range from 7 per cent to 30 per cent.

In the previous debate, the minister referred to an efficiency agenda. We appear to be accepting the Gaming Board for Great Britain's recommendations to which we as a committee are not privy. We are expected to rubber-stamp them simply because the minister has said that he has read the regulatory impact assessment and he is satisfied that the balance between cost and benefit

is the right one in the circumstances. There is nothing in the papers that have been presented to the committee that shows he is right.

My second point concerns the general value that bingo has for people in Scotland. The following quotations are from a paper by Glass, de Leon, Marottoli and Berkman from the Harvard School of Public Health, published in the *British Medical Journal* on 21 August, 1999. The authors studied 2,812 elderly United States citizens and their participation in bingo over a 13-year period. I will give the committee three quick quotations from the article. The authors say:

"Our findings corroborate those … studies that have found a link between survival and social activities that entail little or no physical activity."

Moreover, they say:

"Public policy measures that reduce barriers to continued social engagement would be important interventions."

Finally, the authors tell us:

"Clinicians can add powerful new intervention tools by recognising the health benefits of social activities as complements to exercise."

The essence is that people, particularly older and widowed people who attend bingo, receive both mental stimulation that keeps them functioning at a higher level and social interaction that delays state intervention to support them. It will be of public benefit not to increase the costs of access to bingo.

On those two counts, I move motion S1M-3342,

That the Justice 2 Committee recommends that nothing further be done under the Gaming Act (Variation of Fees) (Scotland) Order 2002 (SSI 2002/281).

The motion will ensure that we do not proceed with these usurious increases in the costs of licensing for bingo and casinos.

Dr Simpson: The order is made under the Gaming Act 1968. The Gaming Board for Great Britain is the regulatory body for casinos, bingo clubs, gaming machines and the larger society and all local authority lotteries in Great Britain.

Gaming is generally a reserved matter and the board makes recommendations on the appropriate level of fees for the next financial year to the Department for Culture, Media and Sport. In Scotland, licences for the grant, renewal or transfer of a casino or bingo licence are administered by the local authority licensing boards. However, the power to vary the level of licence fees is devolved to Scottish ministers.

The policy intention is that the fees should be set at levels that meet the whole cost to the public purse of the licensing and administrative work that is carried out by licensing boards and the police in achieving the proper regulation of the commercial gaming industry. The fees usually change every year to reflect predicted changes in costs and demand, and the Gaming Board for Great Britain is best placed to make such forecasts.

That policy was endorsed by a recent National Audit Office report, which was published in 2000 and accepted by the House of Commons Public Accounts Committee. The NAO study found that the previous fee levels had not recovered the full costs of licensing in each sector and that there had been cross-subsidy between sectors of the gaming industry and of the industry as a whole by local authorities. In particular, the casino sector had been subsidising the bingo sector.

It is not expected that the fees will place an unreasonable burden on businesses. The largest increases relate to the grant of bingo licences and the transfer of casino and bingo licences, which are comparatively rare. Most operators will be paying renewal fees, the increases in which are relatively low.

It should also be remembered that the fee for the grant of a casino licence actually fell by £9,321 last year and that the fee for the transfer of a casino licence fell by £2,002. Although the cost of renewing a bingo licence rose by £437, the fees for the grant and transfer of a bingo licence were unchanged. In so far as the new fee levels are intended to ensure only that local authorities cover their costs, the financial impact on local authority licensing boards should, of course, be neutral.

The new fees were introduced in England and Wales on 1 April and the DCMS has received no representations about the new fee levels. Although the new fees were not introduced in Scotland until 15 July, no representations have been received here either.

I acknowledge Stewart Stevenson's comments about the Harvard School of Public Health paper, which I read with considerable interest. However, I feel that he should be making representations to the health department for it to subsidise bingo. If it is felt to be a healthy pursuit, it should rightly fall within that department's purview and not the purview of the local authorities or the justice department. I wish him well in that particular endeavour.

The Deputy Convener: If no other member wishes to contribute to this debate on the therapeutic qualities of bingo, I ask Stewart Stevenson to wind up.

Stewart Stevenson: I thank the minister for his quite full and understandable reply. I ask him to note that this committee and many other committees would have been helped if information on how the increases were arrived at had been delivered to the committee initially.

I knew that the BMJ was the minister's favourite journal, so I expected him to have read the article. The minister did not necessarily endorse the article's conclusions, and I accept that some continuing research seeks to establish the hypotheses that the article makes. Nonetheless, I refer the minister to the Executive's repeated claims that it seeks cross-cutting initiatives. We have the opportunity to take a decision, or at least to allow the Parliament to consider a decision, that would mean not necessarily proceeding with the Gaming Board for Great Britain's recommendations, but allowing casinos to continue to subsidise bingo, since there is a fair probability that the bingo sector provides a health benefit, which is not suggested for the casino sector. On that basis, I will test the committee's opinion by pressing my motion to a vote.

The Deputy Convener: The question is, that motion S1M-3342, in the name of Stewart Stevenson, on the Gaming Act (Variation of Fees) (Scotland) Order 2002, be agreed to. Are we agreed?

Members: No.

The Deputy Convener: There will be a division.

FOR

Hamilton, Mr Duncan (Highlands and Islands) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)

AGAINST

Aitken, Bill (Glasgow) (Con)
Barrie, Scott (Dunfermline West) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Morrison, Mr Alasdair (Western Isles) (Lab)

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

Motion disagreed to.

The Deputy Convener: That concludes the minister's involvement in the meeting. I thank him and his officials for attending.

Sheriff Court Fees Amendment Order 2002 (SSI 2002/269)

Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment No 2) 2002 (SSI 2002/274)

Act of Sederunt (Fees of Witnesses and Shorthand Writers in the Sheriff Court) (Amendment) 2002 (SSI 2002/280)

The Deputy Convener: No motions have been lodged on the other Scottish statutory instruments that the committee is to consider. There is no controversy about them. Does the committee agree to note the instruments?

Members *indicated agreement*.

Interests

The Deputy Convener: I am pleased to welcome Donald Gorrie to the committee this morning as a substitute for George Lyon. As a substitute, Donald Gorrie has the voting rights that would be conferred on George Lyon. In accordance with normal practice, I ask Donald Gorrie whether he has any interests to declare that relate to today's business.

Donald Gorrie (Central Scotland) (LD): I have no interests to declare.

The Deputy Convener: I will suspend the meeting briefly to allow the convener to take the chair and I will revert to my role, which will be one of constant opposition this morning.

10:12

Meeting suspended.

10:13

On resuming—

Criminal Justice (Scotland) Bill

The Convener (Pauline McNeill): I reconvene the meeting and thank Bill Aitken for taking the chair for item 1. Item 2 is the Criminal Justice (Scotland) Bill. For the summer, we planned several possible visits in relation to the bill. One visit that took place was to the challenging offending through support and intervention—CHOSI—which involves young offenders and which is run by Barnardo's Scotland. Bill Aitken was good enough to make that visit, on which I invite him to give us a brief report.

Bill Aitken (Glasgow) (Con): Accompanied by a clerk, I visited the CHOSI project in Motherwell on 22 August. We were met by Kelly Bayes, who has given evidence to the committee, and by Debbie Noble, who is in charge of the project. The first session took place with them and two representatives of North Lanarkshire Council's social work department. The North Lanarkshire and CHOSI representatives dealt with ways in which they interrelated and the services that CHOSI offers to offenders and children who are at risk.

After that session and other discussions with staff, we met two of CHOSI's clients and representatives of the local children's panels. I found the visit interesting and I was extremely impressed by the dedication and commitment that was shown by those who are involved. The children's panel representatives seemed very supportive of the project.

Nonetheless, it was difficult to get to grips with the approach to dealing with young offenders. There seemed to be a fairly informal and relaxed attitude towards attendance at the project and I was not convinced that the project brings home to youngsters the seriousness and possible consequences of their actions. There seemed to be a great deal of talk and much counselling, but I was not totally satisfied that the figures projected for success are as they seem to be. The total cost of the project is £184,221 per annum, 70 per cent of which is obtained from the local authority. Some 30 youngsters are worked with at a time, which means a net cost per offender of £6,000. CHOSI points out that that is significantly less than the cost of secure accommodation or custody generally. However, bearing in mind the fact that seven members of staff are employed in dealing with those youngsters, it appears to be a fairly labour-intensive process.

The two offenders whom we met were quite different in temperament and outlook. One youngster was extremely outgoing, but he was on a methadone course and seemed genuinely uncertain of his future. The other, who attended with his partner who had given birth the day before, was a quite different personality. Unlike his colleague, he was unable to demonstrate ways in which he felt that CHOSI had benefited him. It was an interesting visit, and some of the ideas that CHOSI put forward are not without merit. However, my view is that that type of project works in certain cases only and I do not regard it as the type of project that could be applied in the majority of cases.

For the record, I thank the staff of CHOSI, who were exceptionally helpful and welcoming. I wish them all the best for the future.

The Convener: Thank you for that concise report. Do members have any brief questions?

Members: No.

The Convener: I remind members that if they want to visit a similar project, we can arrange that. We hoped also to visit Reliance Monitoring Services at East Kilbride, which is the electronic tagging centre, but no one was available on the same day. We still propose to go ahead with such a visit, as it is important that committee members see how electronic tagging works. Quite a large part of the Criminal Justice (Scotland) Bill deals with electronic tagging.

Petition

Land (Equestrian Access) (PE521)

The Convener: We move to item 3 and I refer members to the clerk's note on petition PE521, from Ms Zoe Woods, concerning equestrian access to land. Unless members feel that any further action should be taken, I invite them to note the relevance of the petition to the Land Reform (Scotland) Bill and to agree to take it into account in stage 2 consideration of the bill. Is anyone otherwise minded?

Members: No.

Land Reform (Scotland) Bill: Stage 2

The Convener: Item 4 is the Land Reform (Scotland) Bill. I welcome several members to the committee: Dennis Canavan, Mike Rumbles, Murdo Fraser and John Farquhar Munro. It is my intention to conclude consideration of the bill no later than a quarter to 12, as the committee must leave some time to discuss a report on the Criminal Justice (Scotland) Bill. I trust that members have all the appropriate papers in front of them, including the Land Reform (Scotland) Bill and the marshalled list of amendments for stage 2.

I begin by calling amendment 11—or I would, if the minister were here. [*Interruption.*]

The Deputy Minister for Environment and Rural Development (Allan Wilson): I am here.

The Convener: Sorry, minister. I was going to start without you. Let me rewind. I welcome the Deputy Minister for Environment and Rural Development, Allan Wilson, and his officials to the committee. I believe that he will continue where Ross Finnie left off—I wish him good luck with that.

Section 4—Modification of sections 2 and 3 and enactments referred to in them

The Convener: The first amendment for debate is amendment 11, which is grouped with amendments 12, 13, 14, 17 and 18.

Bill Aitken: Amendment 11 relates to ministers having the power to modify access rights. As it stands, the bill will create an unfortunate precedent, as it will give ministers the power—without recourse to Parliament or any other body—to modify access rights.

The issues that have been debated under part 1 of the bill have been many and varied. However, at the end of the day Parliament will have decided what rights and restrictions should apply. In this case, it seems that we are giving ministers a blank cheque to change access rights.

I do not wish to suggest that ministers would behave irresponsibly. However, for the sake of the checks and balances that exist in any parliamentary democracy, issues that are important and that may be controversial should be open to public debate and—perhaps more important—public scrutiny.

If we support section 4, ministers will have carte blanche to deal with issues that may be controversial and that should be debated thoroughly in a public forum such as this committee. I know that the minister is a democrat and I am sure that he recognises that carte blanche should not be given lightly to anyone. The power that we are debating could damage the democratic process and cause considerable unrest and concern.

That is the principal issue. All the other amendments in the group are consequential on amendment 11.

I move amendment 11.

Dennis Canavan (Falkirk West): I do not often support Bill Aitken, but on this issue he has spoken good sense.

I would have no problem if the deputy minister had the discretion to decide on modifications to the provisions of sections 2 and 3, as I know that he is very much in favour of improving access to the countryside. However, I shudder to think that when the bill is on the statute book a right-wing extremist minister may take over the reins—someone even more right-wing than Bill Aitken. To give such a person complete ministerial discretion to draft and implement an order, without proper parliamentary debate, is to give ministers and their successors far too much power. That is why I have indicated my support for amendment 11, to "Leave out section 4".

Scott Barrie (Dunfermline West) (Lab): I support most of the arguments that Bill Aitken and Dennis Canavan have made. It is very clear that part 1 of the bill is about improving access to our countryside. Given that at this stage it seems to be the Parliament's will that we are working towards improved access to our countryside, if that goal of improved access were ever to be changed and a backward step taken, that should be done by full parliamentary scrutiny and not just by ministerial order. That is what amendment 11 aims to achieve, which is why I strongly support it.

The Convener: I echo what members have said. It would be useful if you could indicate in what circumstances you envisage ministers using such a power. The words that you use could be crucial to our attitude to amendment 11. We all hope to achieve the widest possible access. I seek some assurance that section 4 will not negate what we want to achieve. I am sure that you will give such assurance. It is important that you indicate on the record how you envisage section 4 being used.

Allan Wilson: I say to Dennis Canavan that I hope fervently that the new arrangements that the bill heralds will work in the way in which we intend—in other words, that they will extend responsible access. The balanced approach that we have adopted is the correct one. However, the number of amendments that have been lodged makes it apparent that concerns remain about the details of the bill and their application.

If the bill is passed, it will be some time before we are able to assess how effectively the new act delivers the objective of improving and widening access and whether any of the concerns that have been expressed have any foundation. It is realistic to expect that some difficulties will arise, but I do not know exactly where they will arise—if I did, we would take action now to exclude that possibility. Some of the difficulties that we would expect to arise may require us to revisit the legislation. An example might be where someone sought to use the provision to exclude responsible access. At such a point, we would want to revisit the act to make specific provision to ensure responsible access. That is an example that springs immediately to mind.

In such circumstances, I would want ministers to be able to respond quickly and efficiently to modify details of the bill in the light of that experience. Primary legislation would not be appropriate in those circumstances. We would not want to have to wait for an appropriate legislative slot for a bill to make the necessary amendments. That could take years. We would want to act quickly to close down any loopholes that made it possible to restrict the right of responsible access that we intend to introduce.

If I were to be replaced by a right-wing extremist at some future date—I hope that such a date lies far in the future—the objective of a right-wing Government of that kind would be to use primary legislation to repeal our legislation establishing a right of responsible access. I acknowledge that any modification of the legislation must be subject to the approval of the Parliament. Dennis Canavan and Scott Barrie made that point. That is why section 95 requires that any order to be made under section 4 or section 8 has the express approval of Parliament, with prior reference to the appropriate committee.

Dennis Canavan: I want to seek clarification. The minister is correct in his reference to section 95. Section 95(5) says:

"A statutory instrument containing an order made under section 4 … shall not be made unless a draft of the instrument has been laid before, and approved by a resolution of, the Scottish Parliament."

Is it possible for an order it be made without the production of such a statutory instrument or does the making of an order under section 4 mean that a statutory instrument, containing the order, has to be produced? If such a statutory instrument had to be approved by the Scottish Parliament, would the Scottish Parliament have the opportunity of debating any order that was made under section 4?

10:30

Allan Wilson: I refer Dennis Canavan to section 95(2), which I hope will clarify the point to his satisfaction. The section states:

"Any power of Ministers under this Act to make an order or regulations shall be exercisable by statutory instrument."

That means that a statutory instrument requires to be approved by the Parliament and that the order would be subject to prior reference to the appropriate committee of the Parliament.

In that context, there is no unfettered right, no blank cheque, no carte blanche—all of which were terms that I think Bill Aitken used to describe what is proposed in section 4. On the contrary, any order would be subject to the approval of colleagues in the Parliament. I hope that Bill Aitken will accept the argument to retain the powers under section 4 and agree to withdraw amendment 11.

The Convener: Since it is your amendment, Bill, you have the last word. I ask you to wind up and indicate whether you will press or withdraw amendment 11.

Bill Aitken: First, I reassure Dennis Canavan that, although my ministerial ambitions may be considerable, being put in charge of rural affairs is not one of them.

I found the minister's argument to be a little spurious. Although I accept that the situation that he described could arise and that urgent action may be necessary, to my mind that shows a lack of confidence. Surely, the bill should be sufficient to cope with any eventuality that might arise under that heading. With respect, I do not accept that his argument will wash.

We need to return to the greater principle of democratic government. Any Government or Executive has to go along with the will of its Parliament. If a Government wishes to change a law that it has introduced, it has to do so with the consent of its Parliament. A serious issue is involved. It is contrary to the democratic principles under which the Scottish Parliament was established if the bill goes down the road of allowing ministers the discretion to modify provisions, which in this case are access rights. The issue could raise its head in other directions that are unrelated to the subject matter of the bill and that is a dangerous route to go down. I will therefore adhere to the views that I expressed earlier and will press amendment 11.

The Convener: The question is, that amendment 11 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)
Gorrie, Donald (Central Scotland) (LD)
Hamilton, Mr Duncan (Highlands and Islands) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)

AGAINST

McNeill, Pauline (Glasgow Kelvin) (Lab)
Morrison, Mr Alasdair (Western Isles) (Lab)

ABSTENTIONS

Barrie, Scott (Dunfermline West) (Lab)

The Convener: The result of the division is: For 4, Against 2, Abstentions 1.

Amendment 11 agreed to.

Section 5—Access rights, reciprocal obligations and other rules and rights

The Convener: Amendment 136, in the name of Murdo Fraser, is grouped with amendments 108, 144, 187, 43 and 195.

I would like to point out to the committee that amendment 136 does not pre-empt amendment 108 or amendment 144 and that amendment 108 does not pre-empt amendment 144. If amendment 136 is agreed to, amendment 108 becomes an amendment to leave out the text inserted by amendment 136 and replace it with that inserted by amendment 108. Amendment 144 would then become an amendment to replace the text inserted by amendment 108.

I am sure that you all understood and followed that precisely, which is good, because there is more. Amendments 136, 108 and 144 pre-empt amendment 187. If one or more of those are agreed to, I will be unable to call amendment 187.

While you are chewing on that, I call Murdo Fraser to move amendment 136 and speak to the other amendments.

Murdo Fraser (Mid Scotland and Fife) (Con): Amendment 136 is a fairly long and detailed one that deals with one of the key issues of concern in relation to part 1 of the bill. In my surgeries, the question of liability has come up more often than any other in relation to the bill.

As I understand the situation, the current law on liabilities is governed by the Occupiers' Liability (Scotland) Act 1960, which effectively says that the owner of land owes a duty of care only to those who are on that land with the status of invitees. In other words, if somebody comes on to your land without your permission or consent, you owe them no duty of care. The minister has said that he does not believe that the right of access that is contained in this bill changes that law. I am bound to say that there is some dispute and doubt over that issue and I am aware of some lawyers who would challenge the minister's view. That matter has to be put beyond doubt and, until the matter is tested in the courts, there is no way of knowing whether the minister's opinion or anyone else's is correct.

There is no great policy difference between any of the sides of the argument. There is a general understanding that landowners and property owners should not owe a duty of care to those who come on the land and that those who go on to the land should do so at their own risk. It makes a lot of sense to put that down in black and white in the bill. Doing so would remove a lot of the concerns that have been expressed by the farming and landowning communities about the liabilities that might accrue to them as a result of this bill.

I want to talk about some of the amendment's subsections to give a little bit of background.

The amendment is balanced and seeks to give rights to both sides. The proposed subsection (2A) says that no duty of care will arise as the result of any natural feature. That means that if, for example, someone is walking across your land and falls into a burn or trips over a tree trunk, there is no question of any liability arising. Similarly, if someone is crossing a fence and does themselves an injury when one of the posts give way, they will not be able to make a claim against the landowner. There is no dispute from any side about whether that is a fair and reasonable position.

The proposed subsection (2B) seeks to put an onus on the landowner to ensure that there is no question of a landowner escaping liability where something has been done deliberately with the intention of creating a hazard or if the landowner has been reckless. For example, the landowner cannot lay mantraps to catch errant passers-by and escape liability nor can he be reckless in the way in which he looks after his property as he has to be aware that people will come on to his land. I believe that that strikes a proper balance.

The proposed subsection (2C) deals with other factors that should be taken into account. For example, no undue burden should be placed on the occupier of the land; the character of the countryside should be maintained and historic and archaeological features protected; and anyone seeking access should comply with the access code and act responsibly.

Subsection (2D) disapplies, in effect, the Occupiers' Liability (Scotland) Act 1960. The provisions of amendment 136 would, if they were accepted, supersede the relevant provisions of the 1960 act.

Amendment 136 is balanced and fair. It addresses an issue of serious concern.

I move amendment 136.

The Convener: Bill Aitken will speak to

amendments 108 and 43 and to any other amendments in the group.

Bill Aitken: Like Murdo Fraser's amendment 136, amendment 108 seeks to clarify the duty of care. As Murdo pointed out, aspects of duty of care and of liability are outlined in the Occupiers' Liability (Scotland) Act 1960. The common law of negligence is also relevant. I queried this matter repeatedly during our stage 1 discussions but it was not made clear whether this bill would amend or increase the duty of care. That is a matter of concern.

Amendment 108 will probe the matter. If the extent of liability increases, land managers will be concerned. The extent of liability may be an open question, but it is likely to increase because more people will be visiting land because of this legislation. That has to be borne in mind.

A number of issues must be addressed. Insurers have indicated some concerns. That will affect property owners' liability premiums and that, in turn, could impact on landowners' businesses.

Amendment 108 deals with the crux of the matter in section 5. I see little point in speaking to any of the other amendments because of strictures of time. The principle of the duty of care has to be established. I look forward to hearing the minister's views.

The Convener: John Farquhar Munro will speak to amendment 144 and to any other amendments in the group.

John Farquhar Munro (Ross, Skye and Inverness West) (LD): Amendments 136 and 108 are rather complicated. I introduced amendment 144 because I felt that it would simplify matters considerably. The access code imposes a duty of care on every individual. When people access land, they are responsible for their own well-being—just as people walking on the street have a duty of care towards themselves and others.

I hope that amendment 144 will make the position very clear. It suggests that we

"leave out subsection (2) and insert—

'(2) Persons exercising access rights in relation to land do so at their own risk'",

which seems straightforward and sensible. That should be the case

"without prejudice to any duty of care owed to such persons by owners and occupiers of that land.'"

There is nothing complicated or untoward about the amendment. I hope that the committee will see fit to support it.

The Convener: I call the minister to speak to amendments 187 and 195 and to the other amendments in the group.

10:45

Allan Wilson: We have made clear on a number of occasions that it is not our intention that liability should increase as a result of this legislation. Equally, we do not seek to reduce the duty of care that is owed by occupiers to people on their land—although I know that some would like us to do that.

I am confident that section 5(2) as drafted delivers the policy that I have described. At stage 1 we said that we would consider this matter further and discuss it with the Law Society of Scotland. We have done that, and I remain of the view that section 5(2) as drafted provides an appropriate safeguard that should reassure landowners that their liability will not increase when the legislation comes into effect.

It is difficult to be certain what intention lies behind Murdo Fraser's amendment 136, even after the explanation that he gave. The amendment seems to have the effect of reducing the duty of care that owners owe to those exercising access rights. I am satisfied that section 5(2) as drafted ensures that the liability of landowners should not increase as a result of the bill. That approach fits better with Scots law than amendment 136.

I also reject amendments 108 and 144. Although they seek to give effect to the same policy as section 5(2) of the bill, neither amendment would improve the terms of that provision. John Farquhar Munro's objectives are commendable, but amendment 144 is contradictory. The first part of the amendment suggests that persons enter land "at their own risk", but the second part appears to suggest that, notwithstanding the previous provision, the duty of care owed by owners and occupiers to persons who are exercising access rights remains the same. It is not at all clear how amendment 144 would be interpreted or would work in practice.

As I have already indicated, I hope that the bill will enable us to attain our policy objective and will lead to increased access. However, increased access will not lead per se to increased liability, because no change will be made to the duty of care that owners and occupiers owe to persons on their land.

Section 21(3) states:

"Where the local authority make a path order—

(a) delineating an existing path, they have the duty of maintaining it".

Landowners are understandably concerned that, if poor maintenance of a path led to someone's being injured, liability should rest with the local authority and not with them.

Amendment 195 addresses those concerns by

providing that, under section 21(3) of the bill,

"Regard may be had, in determining whether a local authority has control of a path for the purposes of the Occupiers' Liability (Scotland) Act 1960"

to the maintenance duties on local authorities.

Amendment 43 addresses the same issue, but is too prescriptive.

I hope that Bill Aitken will agree that the approach taken in amendment 195 is more appropriate and that he will withdraw amendment 108 in favour of amendment 195.

Stewart Stevenson: I remind members of Scott Barrie's excellent amendment 19, which we agreed to at our previous stage 2 discussion. That amendment changed the bill by a single word so that it stated that we were securing the existing access rights. Ipso facto, we cannot be creating anything new; therefore, the provisions contained in the bill that relate to liability must be correct in stating that new liabilities are not being created.

If, in amendment 136, Murdo Fraser is seeking to clarify, he fails in that objective. In my opinion, he achieves the contrary objective. He also misses the point that access rights are granted or secured under the bill only when they are exercised responsibly, as defined by the access code. If Murdo Fraser is addressing anything, it is something other than responsible access. I am confident that the committee will have no difficulty in rejecting that invitation to change the bill.

At first sight, Bill Aitken's amendment 108 seems quite reasonable, but it contains a significant trap. It states:

"The duty of care owed by an occupier of land to a person exercising access rights on that land is the same as it would be if that person did not have … such rights."

That suggests that the duty would be the same towards someone who was committing a degree of criminal trespass—someone who would not have those rights. The amendment suggests that the duty of care owed by the occupier of the land would be the same if a person was not acting responsibly in exercising access rights. It creates a raft of difficulties that it is probably not Bill Aitken's intention to create, and it is unnecessary.

I agree with the minister's remarks on John Farquhar Munro's well-intentioned amendment 144. It is unnecessary and may create some difficulties.

Scott Barrie: As Stewart Stevenson says, we are securing what we already have. We should neither increase the duty of care, nor decrease it. Amendment 136 would reduce the burden of care that is owed by landowners and managers under the Occupiers' Liability (Scotland) Act 1960. Contrary to what Murdo Fraser said, the amendment is not about clarification, but about reducing what we have. Nothing in the bill should reduce the current duties or rights. For that reason, we should oppose amendment 136.

The minister was right to say that we should ensure that we have responsible access to the countryside. That is what the bill is about. Therefore, we should support amendments that encourage such access and reject amendments that would ruin it.

Donald Gorrie: I am new to this debate and I find Murdo Fraser's amendment 136 baffling. Amendments that focus on the word "not" or state that this does not apply to that or use double negatives are not helpful.

The argument that was advanced against amendment 108 by Stewart Stevenson seemed to be sound.

The minister said that the first part of amendment 144 contradicts the second part. I am not a lawyer, but it seems to me that amendment 144 is remarkably clear and states the position effectively. We live in an increasingly litigious society, and there is a considerable risk of people tripping over a tussock of grass in a field and suing the farmer. The bill should state clearly that, if someone exercises these rights of access, they do so at their own risk. Obviously, the farmer or landowner must have his normal duty of care. Amendment 144 seems to get the balance quite right, and I am attracted to it. As for public paths, amendments 187 and 195 seem quite sensible.

Mr Duncan Hamilton (Highlands and Islands) (SNP): I will comment briefly on each of the amendments. However, it is probably worth saying that although Donald Gorrie might be a late starter, he seems to have Murdo Fraser sussed already. Perhaps he should have said that the amendment was entirely baffling.

Murdo Fraser is trying to reduce liability. Although that is understandable from his perspective, it will not wash. Moreover, I find amendment 108 very confusing. When I first read it, I thought that it was sensible in some respects. However, I acknowledge Stewart Stevenson's comments on this amendment, and also think that it becomes a circular argument to say that the duty of care should be the same even if someone were not exercising access rights. It would not be a duty at all unless someone were exercising those rights. That simply takes us back to square one.

Amendment 144 misses the point. I have no problem with the assertion that people exercise access rights "at their own risk", nor with the following stipulation that they do so without any prejudice to owners' or occupiers' duty of care. However, given that we are trying to define "duty of care", simply to reassert that access rights can be exercised

"without prejudice to any duty of care"

without defining "duty of care" takes us no further forward. In fact, it enshrines the problem instead of providing greater clarity. I am not persuaded by any of the amendments in the group.

The Convener: As there are genuine concerns about the obligations on landowners, it is quite legitimate for members to discuss this important matter. The consensus seems to be that we do not want to increase or reduce any obligations. As a result, it is important that we get this particular section right.

I thought that section 5(2) was okay as it stood and did not see anything wrong with it. However, I take the minister's point that there might be increased liability around the core path network, and amendment 195 takes the right approach.

I do not disagree with the sentiments behind amendment 144. However, if it had implied that people exercise access rights "at the usual risk" or at the level of risk defined under common law, I could see where it was going with the reference to

"without prejudice to any duty of care".

Instead, amendment 144 gives the impression that landowners are trying to avoid something, when the bill is trying neither to increase nor to reduce liability.

I wonder whether, when he sums up, Murdo Fraser will address the question whether there is any indication that insurance companies are proposing to increase their insurance premiums as a result of the bill. I do not see why they would when the Executive's intention is absolutely clear. We can argue about whether the current subsection has been drafted properly; however, I am fine with the way it is.

Murdo Fraser now has the opportunity to bite back.

Murdo Fraser: I have to say that I have not been convinced by many of the arguments I have heard. I am sorry if Donald Gorrie and other members are confused by the wording of amendment 136. A problem is that when clever lawyers become involved in drafting carefully worded amendments, people who are not lawyers sometimes find it difficult to follow all the wording.

Amendment 136 does not reduce liability, nor is that its intention. Instead, it seeks to set out in black and white the exact position in relation to duty of care and tries to clarify the general understanding of all parties of what the position should be. The minister said before that it is not the bill's intention to increase liability. I accept that. However, legal opinions exist that say that the bill will increase liability.

Furthermore, I should tell the convener that some property insurance agents are saying that they will need to look again at premiums if the bill is passed. The problem is that no one is entirely sure. It would be fine if we could categorically say yes or no on this issue, but we cannot do so. Until the bill becomes law in its current form—if it does so—and the matter is tested in court, no one will be sure where the law will end up.

That is why I felt that it was important that there should be a clear statement in the bill saying exactly where the line is drawn. Amendment 136 seeks to achieve precisely that. I do not think that there is any dispute about the policy; it is a question of being clear about exactly where the line is drawn about the duty of care. That is a matter of serious concern to the farming community and to property owners, and I shall press the amendment.

The Convener: The question is, that amendment 136 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Hamilton, Mr Duncan (Highlands and Islands) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Morrison, Mr Alasdair (Western Isles) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

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

Amendment 136 disagreed to.

11:00

The Convener: Amendment 108, in the name of Bill Aitken, has already been debated. I should point out that if amendment 108 is agreed to, I cannot call amendment 187, as it would be pre-empted.

Amendment 108 moved—[Bill Aitken].

The Convener: The question is, that amendment 108 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Hamilton, Mr Duncan (Highlands and Islands) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Morrison, Mr Alasdair (Western Isles) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

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

Amendment 108 disagreed to.

The Convener: Amendment 144, in the name of John Farquhar Munro, has already been debated with amendment 136. Again, I should point out that if amendment 144 is agreed to, I cannot call amendment 187. John Farquhar Munro, are you moving amendment 144?

John Farquhar Munro: Amendment 144, as I said earlier—

The Convener: I have already given you the opportunity to speak to amendment 144. I need to know at this stage whether you are pressing it. Do you want to move your amendment?

John Farquhar Munro: Yes. I move amendment 144.

The Convener: The question is, that amendment 144 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)
Gorrie, Donald (Central Scotland) (LD)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
Hamilton, Mr Duncan (Highlands and Islands) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Morrison, Mr Alasdair (Western Isles) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 2, Against 5, Abstentions 0.

Amendment 144 disagreed to.

Amendment 187 moved—[Allan Wilson]—and agreed to.

The Convener: Amendment 233, in the name of Scott Barrie, is in a group on its own.

Scott Barrie: Amendment 233 is a small amendment, which alters the definition of "road" under section 151 of the Roads (Scotland) Act 1984. The purpose of the amendment is to enable speedy and effective road powers to be used on core routes when necessary. Those powers would be used only in exceptional circumstances—for example, when a core path had been affected by a fallen tree or some other obstacle and mechanical devices were needed to remove it. The status of the core path would have to be altered in order to do that, and amendment 233 would provide for swift removal of any obstacles impeding a core path so that it does not remain blocked for an inordinate period of time. The amendment is no greater and no less than that.

I move amendment 233.

Allan Wilson: I am grateful to Scott Barrie for that clarification. I understood that the purpose of amendment 233 was to attract the powers that are available to local authorities under the Roads (Scotland) Act 1984 to the management of the core paths. However, amendment 233 would not have the intended effect of attracting those powers to all core paths. I am not convinced of the need for the amendment, although I understand the circumstances to which the member refers.

The powers concerning core paths that are to be made available to local authorities by the bill are sufficient; there is no need to import powers that are designed for the management of roads and to apply them to country paths. If accepted, the amendment would result in unnecessary confusion for local authorities and, perhaps, unnecessary bureaucracy. It would not have the effect of applying the definition of road to all core paths. Certain paths—some of which are core paths—are excluded from the definition of road in the Roads (Scotland) Act 1984. Therefore, local authorities will have some core paths that are roads and some that are not. Of those that are roads—in inverted commas—some will be public roads—in inverted commas—and some will be private roads, in inverted commas. Within those classifications, some so-classified roads will be footpaths and some will be cycle tracks. I think members see where I am going with this.

Scott Barrie's amendment 233 is a sledgehammer to crack a nut. We will consider the point that he made about the necessity for mechanical removal of blockages to core paths—there is no reason to preclude that. However, amendment 233 would be confusing because a single core path would be likely to include sections that come under each of those classifications. That would be unworkable and it would involve local authorities in a vast amount of record keeping for little, if any, benefit.

With that caveat, we will consider the particular circumstances to which Scott Barrie referred in the context of stage 3. If the bill requires amendment to provide for those circumstances, we will lodge an amendment to that effect. I ask Scott Barrie to seek to withdraw amendment 233.

Scott Barrie: Far be it from me to prolong a complex and difficult explanation, but going through a similar exercise at stage 3 in the Parliament might provide some levity in what could be a long day.

Amendment 233 raises an important point. If the minister is saying that he will consider the matter and that he does not believe that there is an impediment in the bill, or that we can find another way of remedying the problem, that is what is important. Perhaps the best thing to do is to leave the matter today, but I will take up the minister's

invitation to discuss the matter further with him and to raise the point again at stage 3 when we might have some levity during some sort of ministerial explanation. I seek to withdraw amendment 233.

Amendment 233, by agreement, withdrawn.

The Convener: Amendment 145, in the name of Stewart Stevenson, is in a group on its own.

Stewart Stevenson: Amendment 145 is straightforward and would delete section 5(7) on access rights, which reads:

"A person exercising access rights is to be regarded as being in a public place for the purposes of section 53 (obstruction by pedestrians) of the Civic Government (Scotland) Act 1982 (c.45)."

I seek that deletion because the existence of that provision will allow landowners to summon the police. The power is draconian and could be abused through use against people who exercise their access rights responsibly. If some landowners were known to invoke section 53 of the Civic Government (Scotland) Act 1982 regularly, that could be a significant deterrent to the exercise of access rights. Retaining the provision in the bill will give the few landowners who remain determined to deny access to the public the opportunity to create maximum difficulty for the public and to promote their resistance to access.

I move amendment 145.

Donald Gorrie: I see the point that Stewart Stevenson makes. However, just as there is a minority of unreasonable landowners, there might be a minority of unreasonable users of the act. If such people picketed someone's farm and a dozen of them blocked a gate, that could prevent the farmer from operating his farm, which should not be allowed. Will Stewart Stevenson consider that aspect, as well as the unreasonable landowner?

The Convener: The minister's response will be useful. Stewart Stevenson alarmed me a wee bit, because I did not think that that was how section 5(7) was to be understood.

Allan Wilson: When Stewart Stevenson hears what I have to say, he might have a different perspective. Section 53 of the Civic Government (Scotland) Act 1982 makes it an offence for persons on foot in public places to obstruct the lawful passage of any other person. Section 5(7) of the bill says that a person who exercises access rights is to be treated

"as being in a public place".

Ipso facto, a person who obstructs the lawful passage of any person who exercises access rights may commit an offence under section 53 of the Civic Government (Scotland) Act 1982, so Donald Gorrie's comment was correct. That applies to those who are being obstructed, as well as to those who obstruct.

It has been incorrectly suggested that section 5 creates a new offence. The offence is in the Civic Government (Scotland) Act 1982. The bill simply makes it clear that persons who obstruct others while exercising access rights may be subject to the relevant provisions of the 1982 act. I am sure that when Stewart Stevenson considers that, it will seem appropriate that anyone who obstructs the passage of others who are exercising their right of responsible access should be subject to the provisions of the 1982 act. The fact that people might claim to be exercising access rights should not of itself provide exemption from the 1982 act.

If Stewart Stevenson was in the countryside exercising access rights and his passage was obstructed by others, he would expect to have some remedy. Section 5 will provide that. With that explanation, I hope that Stewart Stevenson will agree that the provision is reasonable and that he will seek to withdraw amendment 145, because the bill strengthens the rights of those who undertake responsible access.

Stewart Stevenson: With the committee's consent, I am happy to withdraw the amendment if the minister will place on record the comment that the provision is as likely to bear on the actions of unreasonable landowners who seek to obstruct people who exercise their access rights as it is on anything else.

Allan Wilson: If I were asked that question directly, the answer would be yes.

Stewart Stevenson: On that basis, I am happy to ask leave to withdraw the amendment.

Amendment 145, by agreement, withdrawn.

Section 5, as amended, agreed to.

After section 5

11:15

The Convener: Amendment 109 is in the name of Scott Barrie and is in a group on its own.

Scott Barrie: Amendment 109 seeks to ensure that when the bill is passed, public bodies will have to take on board the promotion of part 1, which deals with access rights, and to ensure that the policies that they consider bear that in mind. We keep stressing that the aim of part 1 of the bill is to increase responsible access to our countryside. The purpose of amendment 109 is to lay a duty on public bodies to ensure that that happens. The National Parks (Scotland) Act 2000 laid a similar duty on public bodies and

amendment 109 is born of that sort of philosophy. I hope that we can do the same for access to the countryside.

I move amendment 109.

Mr Hamilton: I understand what Scott Barrie seeks to achieve, but my first thought was, "Why do we need amendment 109?" When the bill is passed, it will become law and public bodies will be bound to adhere to it. Amendment 109 not only imposes a duty on public bodies to comply with part 1 of the bill, but to "further the aims" of that part of the bill. That is a wide responsibility for public bodies, which could impose on them additional burdens and additional costs. Would those burdens apply to local enterprise companies and local councils? In my opinion, amendment 109 is rather wide-ranging and on that basis I ask Scott Barrie to reconsider it.

Bill Aitken: I concur with the views that Duncan Hamilton expressed. I question whether amendment 109 is necessary in that when the bill is passed, it will become part of the law of the land and it will be incumbent on all local authorities and other public bodies to follow it. Amendment 109 would also create a potential cost implication, which we would not wish to encourage.

The Convener: I am greatly sympathetic towards amendment 109. It is true that we are seeking to pass legislation, but the nature of the legislation means that its success in securing access rights relies to a large extent on good will. I will be interested to hear the minister's views. The idea of including in the bill the stipulation that everyone should work towards the provision of responsible access is a good thing, because only the co-operation of all the bodies and parties that are involved will make the bill a workable and, more than that, positive piece of legislation.

Allan Wilson: Although I understand the reasoning behind amendment 109, members have made the point that it would have far-reaching implications for all public bodies, irrespective of whether they have any duties or functions that are relevant to part 1 of the bill.

The bill places several duties and functions on local authorities, for example. They are required under section 13 to uphold access rights, and under section 24 they must establish local access forums. That approach is entirely consistent with our policy to provide for the local management of access rights and for local accountability.

Amendment 109 does not define or specify public bodies. Therefore, I assume that it would have to apply to all devolved public bodies, which would include the Accounts Commission for Scotland and the Parole Board for Scotland, for example. It is not clear what such bodies would be intended to do to

"further the aims and purposes"

of part 1 of the bill. In so far as part 1 of the bill creates duties and functions that relate to particular public bodies, those public bodies must act in compliance with the duties and functions in question. We have powers of direction in relation to relevant public bodies. Scottish Natural Heritage and Scottish Water are such public bodies as we could expect to have an interest in part 1 of the bill. We have powers of direction, which we would exercise, were those bodies not exercising their functions with the expressed intent of furthering the interests that are covered in the bill.

I do not think that the national parks analogy is relevant. When we say that all bodies should further the aims of national parks, that is different from saying that they should create a right of responsible access. This does not apply to all bodies, but we would certainly use powers of direction to relevant bodies in the unlikely event that we had to. On that basis, I contend that amendment 109 is unnecessary. I hope that Scott Barrie will seek to withdraw it.

Scott Barrie: Sometimes we see the writing on the wall. I accept the points that Duncan Hamilton and the minister have made, and I take responsibility for the poor definition of which public bodies I was referring to.

I will seek to withdraw amendment 109. However, I feel that the intent behind the amendment is important. I appreciate that, if an amendment is not pressed, it cannot become enshrined in legislation, but the second part of the amendment gives a clearer indication of the wide range of policy areas that affect access. Part of the aim was to achieve the clichéed notion of joined-upness; trying to get it across that that and the access code will be at the front of our minds. I was looking towards that sort of policy development. However, because of what other members and the minister have said, I seek to withdraw amendment 109.

Amendment 109, by agreement, withdrawn.

Section 6—Land over which access rights not exercisable

The Convener: Amendment 67, in the name of Stewart Stevenson, is grouped with amendment 74.

Stewart Stevenson: The use of the phrase "or other structure" in section 6(a)(i) leaves open a wide range of things that landowners and land managers may choose to put on a piece of land to restrict or prevent the exercise of access rights. The phrase encompasses far too much. A general point—which has arisen before and will, I am sure, arise again—concerns the definition of a responsible exercise of access rights. That will be

covered in the access code, to which we will come in due course. If it is necessary to expand the definition, and to describe particular structures, that should be done in the code. The Executive's amendment 74 will complicate, rather than simplify, the matter. Amendment 67 seeks to delete the phrase "or other structure".

I move amendment 67.

The Convener: The minister will speak to amendment 74 and to the other amendments in the group.

Allan Wilson: The exclusion of access rights to land on which there is a structure was not intended to restrict access to bridges, as Stewart Stevenson has correctly pointed out. Clearly, access rights should be exercisable over such structures and my amendment 74 will provide for that.

The exclusions in section 6(a)(i) were included in the interests of public safety—something to which we would all subscribe. Their inclusion is to ensure that those who exercise access rights cannot intrude into an area where they might be at risk or where they could cause inadvertent damage. In that context, buildings and other structures were deliberately excluded to ensure that the exclusion applied to things such as portakabins, masts and antennas, which people should not be able to access because their safety might be put at risk. I am sure that the committee will agree that that exclusion is entirely appropriate. Given the additional definition that is provided by amendment 74—that the exclusion does not restrict access to bridges—I hope that Stewart Stevenson will seek to withdraw amendment 67.

We have debated whether leaving in the phrase "or other structure" might allow unscrupulous landowners a wide range of options whereby they could restrict or prevent the right of exercise of responsible access. However, it is precisely for such an instance that we might wish to retain ministerial power so that we could prevent such activity.

Scott Barrie: My issue with amendment 74 is the fact that it defines a list of things. It strikes me that an obvious omission from the list is gates. As we have discussed, the bill contains prohibitive lists, which might cause a problem if we then find that something has been missed from them. The argument is about what should be in the access code and what should be in the bill. My concern is that we might try to be too definitive in the bill about things that are perhaps moveable feasts, as it were, which might be changed at a later date.

Mr Hamilton: I echo that comment. I could understand the minister's point more clearly had he not gone to the length of proposing an exclusive list that contains only five things that are not to be regarded as structures. What would happen with structures that are not included in the list that is provided in amendment 74, but which are erected in any event? The purpose behind amendment 67 is to put the emphasis on providing for the widest possible access. I presume that other things that are not listed in amendment 74 would count as structures for the purposes of the bill.

Allan Wilson: I have covered that point. I presume that we all agree that things such as portakabins, masts and antennas are structures on which it would be unreasonable to confer a right of responsible access. The other points that have been made by Duncan Hamilton and Scott Barrie are precisely the reasons why we sought the reserve ministerial power, which will allow us—in the unlikely event that a structure could subsequently be defined as something on which responsible access could reasonably be conferred—to implement such a change by statutory instrument.

Amendment 74 will clarify the intent in relation to what constitutes a structure for the purposes of section 6. The amendment will leave little room for confusion beyond what is specified.

Stewart Stevenson: The minister has inadvertently succeeded in illustrating why we need to delete the words "or other structure". He suggested that, if we were to delete those words, we would be conferring a right of access over masts, but that is not so. The bill will give access to land, not to things that sit on land. [*Interruption.*] There is an antenna working somewhere, Duncan.

One might properly draw a distinction between a mast with an antenna that was decommissioned and one that was operating, which would present a different danger. In any event, masts that have antennas are regulated by the Radio Authority and would be perfectly safe to approach.

I have gone into such detail only to illustrate the significant difficulties that one starts to encounter when one draws up proscriptive lists in the bill rather than defining responsible access in the access code, in which the definition may be rapidly changed and adapted as circumstances require.

Amendment 67 agreed to.

11:30

The Convener: Amendment 110, in the name of Bill Aitken, is grouped with amendments 138, 111, 41, 188, 189, 146, 24, 152 and 28. I point out to the committee that amendment 138, if agreed to, would pre-empt amendments 111, 41, 188 and 189 and that amendment 146, if agreed to, would pre-empt amendment 24.

Bill Aitken: The committee's consideration of the bill has been bedevilled by the fact that there is little in the way of case law and by the fact that there is a lack of legal definitions of certain terms. It is fair to say that those who drafted the bill have not had an easy task.

Amendment 110 would provide a legal definition of the word "curtilage", which is not defined in terms of Scots law at present. If one goes to various dictionaries, one will find various definitions of the word. Amendment 110 would define curtilage as the area that lies within 50m of the building involved.

The issue arose down south when the Countryside and Rights of Way Act 2000 had to cope with a similar difficulty. The rights that were given under that act must be understood to be in addition to, not instead of, existing customary rights, common-law agreements and so on. It is not clear why the legislation is necessary in Scotland, but if new obligations and legal sanctions are to be imposed on land managers and owners of the land, the definitions that are contained in the legislation must be clear.

It is clear that the current definition of curtilage is sadly lacking. Given that many people will be in a situation where their livelihoods could be interfered with as a result of the bill, it is important that we give a level of protection. I concede that the bill intends to provide that protection, but the existing wording does not allow for that, which is why it is important that amendment 110 be passed.

Amendment 41 deals with the security of children. I am fully aware that one can be over-sensitive on this issue, but one of the lessons that was learned from the Dunblane tragedy of 1996 was that it is important that we keep away from schools those who have no direct business there. Happily, events such as the Dunblane tragedy do not happen frequently but, nevertheless, there is a clear public interest in keeping away from schools everyone apart from those who have a direct interest there, such as parents, teachers, tradesmen and officials visiting the school for a specific purpose. Not everyone who is around a school represents a danger to children, but we must tighten up the procedure in this respect. Although there has been a considerable tightening up since the Dunblane tragedy, it has not been thought necessary to include such measures in the bill. In the interests of public safety, amendment 41 should be acceptable to the Executive. It is a worthwhile amendment.

I move amendment 110.

The Convener: I call Scott Barrie to speak to amendments 138, 24 and 28.

Scott Barrie: Amendment 138 is the substantive amendment of the three; amendments 24 and 28 are consequential to it. Bill Aitken was right to say that it is important that we define curtilage. I will come to his amendment 110 later.

The bill's provisions that relate to curtilage are potentially open to abuse. The extension of curtilage to cover large areas of land is unnecessary for the purposes of protecting privacy. The phrase in the bill

"reasonable measures of privacy and undisturbed enjoyment of the whole"

could be applied to greater areas of estates than anyone would think reasonable. That issue exercised a number of committee members and other MSPs when we debated the bill at stage 1.

Although amendment 189, in the name of Ross Finnie, goes some way to improving the situation, it does not address the point that was raised in the committee's stage 1 report on the bill, which states:

"there are many places where access to open land can only be gained through farmyards. This is particularly so in relation to access on horseback or bicycle."

Given that, under the present definition, farmyards would fall within curtilage, there would be no right of access to such places.

Amendment 138 has two parts. First, it would provide a definition of curtilage and would give some security to people who have argued their case on the ground of privacy. Secondly, where the only way of exercising access rights is through a farmyard, the amendment would allow people such access. That is a fundamental point if we are serious about access in certain parts of the countryside.

Amendment 110, in the name of Bill Aitken, is absolutely ludicrous because it gives a definition of curtilage as being land within 50m of a building. That is too extensive to guarantee what is required. Amendment 110 would back up the bill as it stands because it would mean that in some cases a far greater area of land might be excluded from access than is reasonable. Amendment 110 should be rejected.

Murdo Fraser: I will speak to amendment 111 and comment briefly on a couple of the other amendments in the group. Amendment 111 would bring two other types of building—hospitals and prisons—into the category that at present contains schools. Hospitals and prisons are analogous to schools, which are to be excluded from the right of access in order to provide security for children. There is an analogy with hospitals, which are full of vulnerable people—the sick and the elderly. Given that there is a history of assaults on and thefts from patients in hospitals, it makes sense for hospital authorities to be able to exclude an automatic right of access to the grounds of hospitals.

Before some clever clogs asks how people can access prisons, I will say that there are such things as open prisons. Noranside in Angus and Castle Huntly in Perthshire are prisons that consist of separate buildings in a large open area. A large sign at Noranside states: "HMP Noranside: not open to the public." However, there is nothing to stop people walking in because there is no guard on the gate and no wall. Such prisons cover large areas for which it would be unreasonable to expect the general public to have a right of access at all times, for obvious security reasons. As with the hospital and school authorities, the prison authorities will wish to have the right to control who enters their premises. There is a clear analogy between hospitals and prisons and schools.

Scott Barrie rather misses the point with amendment 138, because he does not allow any reference to schools. The point about schools is not a question of privacy, but a question of security. We do not want the public to be admitted by right into school grounds and school playing fields. Unfortunately, amendment 138 takes out all the references to schools in the section.

I support amendment 41, in the name of Bill Aitken, which deals with activity centres. I have been lobbied heavily by outdoor centres, of which there are a number in my region. They have open grounds through which, generally speaking, the public can wander. However, the centres are used primarily by schoolchildren. The operators of those outdoor activity centres want to have the right to exclude the general public from accessing those areas, in the same way as the public would be excluded from a school. Amendment 41 is carefully and fairly worded, as it says that the public are excluded from those areas only when those areas are being used for educational or recreational purposes. It is not a blanket exclusion, but it would be effective at the times when those grounds were being used and occupied by children. Amendment 41 is a valuable amendment and I support it.

Allan Wilson: The term "curtilage" is a well-understood legal term, but it is extremely difficult to define in general terms and it is therefore perhaps unhelpful to try. Curtilage reflects the particular circumstances of a property and, in most cases, the extent of curtilage will be obvious. Where there is dispute, the bill provides for judicial determination as a last resort. I do not want to overstate the obvious, but reserved ministerial powers would have been useful if a dispute went against the objectives of the bill.

I do not think that a blanket exclusion zone of 50m around all non-domestic buildings, as proposed by Bill Aitken in amendment 110, is a sensible approach. In some cases, 50m may be excessive and may go well beyond the curtilage. In other circumstances, that might not be the case. In fact, the same argument would apply to any other arbitrary measurement or exclusion zone around a building.

Amendment 152 would define curtilage for the purposes of the bill as that land surrounding a building that is taken into account in valuing it for non-domestic rates. What forms the curtilage will, in most cases, be obvious on the ground, but the area taken into account by the assessor in his valuation will not constitute that definition. I also have doubts about the availability of the information. Even if it were recorded, I suspect that there are few clear lines drawn on a map in the assessor's office. The work that we envisage would be involved in providing the information, even if it were available, would be immense. I do not see the proposed approach having any advantage over what we now propose. In fact, it would probably have the opposite effect to that which John Farquhar Munro envisaged when he lodged the amendment.

I ask Bill Aitken not to press amendment 110 on the 50m exclusion zone and I ask John Farquhar Munro not to press amendment 152 on using the assessor's valuation as a definition, as that is not what constitutes curtilage.

Amendment 138 would delete the detailed provisions that exclude buildings, houses, industrial plants and the immediately surrounding land from access rights. As was said, the amendment would also delete the provision on school land, which is important. The wording was included to ensure the privacy of those who live and work in the countryside. It is significant that section 6(b)(iv), which deals with residential buildings, has been drafted to satisfy the requirements of article 8.1 of the European convention on human rights, which safeguards a person's right to respect for privacy.

11:45

Section 6(b)(iii), which refers to lands that are contiguous to a school, was included specifically in the interest of child safety. Some schools are surrounded by extensive grounds, not all of which would be considered as part of the curtilage of the school and thereby excluded under section 6(b)(i). Section 6(b)(iii) extends the exclusion to all the grounds that surround a school beyond the definition of its curtilage.

One effect of amendment 138 would be to limit the exclusion for schools to the school buildings and their curtilages and bring within access rights the remainder of the school grounds. Obviously, that has potential implications for child security as playgrounds, for example, could be opened up for

access rights. I am sure that we all agree that that would be undesirable and I ask Scott Barrie not to press amendment 138.

Amendments 188 and 189 address concerns, which I share, that the public may be prevented from exercising access rights over all land that surrounds large country houses. I understand the concerns about the words "enjoyment of the whole". The exclusion from access rights of the whole of an estate was never intended and I do not believe that the bill would have allowed it. However, to avoid any misinterpretation, we have lodged amendments 188 and 189.

Amendment 188 limits the land that is excluded by section 6(b)(iv) to land that is adjacent to a house, and not associated land. Amendment 189 clarifies that the provision should not lead to the exclusion of the whole of a large estate. I hope that members will agree that the amendments are helpful and address the concerns that the public would be prevented from exercising access rights over all land that surrounds large country houses. I hope that they will support the amendments.

Amendment 111 would exclude from access rights all the land that is contiguous to hospitals and prisons. I listened to Murdo Fraser carefully. I have been a union organiser in many hospitals and understand what he means. However, I have strong doubts about the need for what he proposes, particularly in respect of prisons. I am not sure that his case was well made, but I am willing to consider the issue further and lodge an amendment at stage 3, if that is considered to be necessary. I hope that, in the light of that assurance, Murdo Fraser will agree not to press amendment 111. We are having discussions with the health authorities—among others—but we will have further discussions with them in the light of the points that he has made. In that context, I hope that he will not press amendment 111.

Amendment 41 would exclude all land contiguous to an activity centre. I do not recall Bill Aitken mentioning activity centres per se, but he referred to schools and the two are obviously not the same. The land forming the curtilage of an activity centre building is excluded from access rights under the bill, although activity centres vary—I have knowledge of a few. Our understanding is that, in many cases, activity centres are not marked by clear boundaries as in the case of, for example, school grounds. Therefore we do not see the need to exclude the public from land other than that immediately surrounding activity centre buildings.

Beyond that, amendment 41 could be interpreted as excluding wide areas of land. For example, activity centres can be expected regularly to organise hillwalking for kids, but the amendment could have the effect of excluding all land used by the activity centre for that purpose. I am sure that that is not what was intended and we hope that our guarantee of excluding land contiguous to the building means that amendment 41 will not be pressed.

Amendment 146 would remove section 6(c), which was included in the bill to ensure that access rights would not extend to gardens such as those in several parts of the new town. However, I happen to know that those circumstances exist not only in Edinburgh. I remember that, when I was resident in Queen's Crescent in Glasgow, the residents had a communal right to a garden that they jointly owned and held for their private use. We would consider it entirely appropriate for those residents to continue to enjoy the private use of the gardens held by them in common ownership. Therefore, I hope that Stewart Stevenson will agree not to press amendment 146, as I presume that it is not his wish to militate against those residents' rights of communal ownership.

The Convener: Thank you. We have passed the allocated time and before we proceed further I want an indication of how many members wish to speak in the debate. I know that section 6 is an important section—I certainly had quite a bit of correspondence about it. We might have to leave the voting until next week, but I do not want to split the debate between this week and next. However, I may have to do that if members are keen to speak. I would not want to curb the debate on section 6 because I realise that it is important.

Dennis Canavan: Can I have an assurance that amendment 4 will be dealt with not today but next week?

The Convener: It will not be dealt with today. I am sorry about that, Dennis.

I ask Stewart Stevenson to speak to amendment 146 and any other amendments.

Stewart Stevenson: I will speak briefly on amendment 146. The minister properly drew attention to the existing rights that people in parts of Edinburgh and Glasgow—where I cannot afford a house—have in a shared garden. I recognise that amendment 146 would deprive them of their existing rights. That is not my intention, which is to prevent section 6 becoming a mechanism by which new shared gardens are created purely to prevent the exercise of rights under the bill.

I would welcome from the minister an indication that he would look favourably on a recast amendment at stage 3 seeking to address the creation of new shared gardens outwith urban areas. Is it permissible for the minister to respond to that, convener?

The Convener: Yes, if the minister is happy to do so.

Allan Wilson: I am tempted to say, but will not do so, that our reserved powers would have been useful in addressing that particular circumstance. We intend to amend section 14 along the lines that Stewart Stevenson suggests so that where there is an attempt—whether it is by the creation of shared gardens or whatever—to circumvent the bestowal of the right of responsible access, such a measure would per se be unlawful. That may well be the opportunity to address that matter. If there were a problem, it would be captured in an amended section 14 rather than in amendment 146. I hope that when we come to debate section 14 we can address those points.

Stewart Stevenson: On that basis, I will not proceed with amendment 146. Of course, I reserve the right to criticise and modify any proposal that is introduced.

Allan Wilson: I would expect nothing else.

The Convener: We can come back to that matter when we reach the appropriate point on the marshalled list. I ask John Farquhar Munro to speak to amendment 152 and other amendments in the group.

John Farquhar Munro: As the committee knows, there has been quite a debate on the determination of curtilage as being adjacent to a building. That has created difficulties in trying to determine how the matter could be rectified. As members will appreciate, many properties have extensive grounds around them, which could be claimed to be included in the curtilage of the building. If that criterion is applied to some of the larger units in rural Scotland, where we have some very large estates, that could extend over hundreds of acres. If the curtilage is deemed to be the boundary of the estate or the boundary of the farm, it will extend beyond what one would consider to be reasonable. To clarify the situation, we have established a criterion and a formula that could be adopted. As amendment 152 states, we should define "curtilage" in section 6(b)(i) to mean

"the extent of the land adjacent to a building which is or would be taken into account for the purpose of assessing the non-domestic rates payable in respect of the building."

That is a clear indication of the extent of the curtilage, as applied to each and every building to which the legislation would apply. I commend amendment 152 to the committee.

Mr Hamilton: I have only one comment to make. I accept almost everything that the minister has said on this group of amendments, with the exception of amendment 188, which will remove the phrase "or associated". An example that jumps to mind is a church manse where there is an associated parcel of land—the church glebe—which is sometimes but not always adjacent to the manse. I wondered whether the minister had considered those circumstances. It strikes me that it would be odd to remove rights on such a piece of land.

Donald Gorrie: I am worried by the phrase in section 6(b)(iv) about

"reasonable measures of privacy and undisturbed enjoyment of the whole".

I imagine that some large landowners have different ideas about what that would be than urban dwellers might have. I wonder whether that phrase will stand up in the law courts in the way in which most people believe it should. Might it not be better for us to determine curtilage using the method that John Farquhar Munro suggests, or to specify more clearly what curtilage is? I do not support Bill Aitken's suggestion that curtilage be set at 50m, but I am not happy with any of the suggestions that have been made so far. Members of the committee have wrestled a great deal with the issue, but it needs further consideration.

12:00

I hold a dissident view on the issue of schools. I believe that the more members of the public are around schools, the better, because then fewer weirdos may hang around unobserved. I do not support amendment 41.

As a newcomer to the bill, I do not find any of the provisions relating to curtilage and privacy very satisfactory. I support the point that has been made about areas held in common. We are not talking just about posh areas in the new town of Edinburgh, such as Queen Street gardens. When I was a councillor, new housing estates were built in my ward that included communal play areas for residents. It is important that those people continue to have use of such areas. If they are opened to the public, there is a high possibility that they will become the venue for gang warfare.

The Convener: I have two concerns about these provisions. First, the primary purpose of the legislation is to provide the widest possible access to land. We do not want to make it possible for some landowners to argue that people should be denied access to the largest possible section of their land. People have real concerns about the definition of curtilage.

Scott Barrie raised the second issue that concerns me, and I am not sure that any of the amendments deal with it. I refer to the issue of access to one place via another, which may require people to pass through farmyards or what could be regarded as private dwellings. If that problem is not overcome, access will be restricted in many cases. If people do not want farmyards to be used as a means of accessing land, another route must be found. I would not want the bill to

give people the right to march across any part of land and to invade others' privacy. However, the bill should provide people with a right of passage between pieces of land that are not joined up.

Amendment 189 is helpful and would make an important change to the bill. How would it deal with the issue that Scott Barrie raised concerning the use of farmyards as a means of access where there is no alternative route?

Allan Wilson: I am pleased that you welcome amendment 189, which seeks to balance rights of privacy under the European convention on human rights with the right to responsible access that we intend to bestow on people.

Farmhouses often form part of steadings. Amendment 138 would deny farmers and their families the privacy that is properly enjoyed by other households, and could be construed as discriminatory. Irrespective of the fact that amendment 138 would limit the exclusion from schools to the school buildings and their curtilages as opposed to the grounds—which is why I expressed the desire that Scott Barrie withdraw his amendment—you are quite right to say that it would have the effect, intended or otherwise, of denying the same privacy to farmers and their families that other householders enjoy. I am sure that the committee would not wish to do that.

The Convener: I would not wish to do that, but amendment 138 refers specifically to

"the extent that it consists of a route between two places to which no suitable alternative exists;".

I agree with what you have said, but there will be circumstances in which no suitable alternative route of passage exists. There should be measures to deal with those circumstances.

Allan Wilson: I was just asking my officials whether we are aware of any circumstances in which no suitable alternative routes exist. I am not aware of any such circumstances.

The Convener: Perhaps we need to think about that, because the point was raised specifically in evidence sessions at stage 1. People who enjoy access have said that if we were to agree to the provisions in section 6, problems—albeit only a small number—would arise. I do not think that there is a desire to detract from what you are saying about giving farmers or anyone else the same rights of privacy as other householders. That is the objective in the bill, but section 6 leaves us with a problem to sort out.

Allan Wilson: I am happy to work with the committee on that. We have moved to exclude the phrase

"the undisturbed enjoyment of the whole",

whose removal the Ramblers Association Scotland and others sought, because the phrase was felt to be too all embracing and could be construed as including the area beyond the house, which we did not intend. I am happy to work with the committee on section 6 with the proviso that we should not do anything that would impair the privacy of farmers and their families beyond that enjoyed by any other member of the community.

Bill Aitken: This has been a useful debate in that it has flagged up a number of problems around the question of access. Basically, I do not think that we are all that far removed from one another in what we are seeking to do. We are not relaxed about the idea of droves of people wandering past somebody's front window, but it would not be reasonable to have the situation to which John Farquhar Munro referred where the curtilage of large estates that cover many miles could be defined as the perimeter of the estate.

The minister indicated—to my mind perhaps unconsciously—that there is a difficulty when he said that although we all knew what curtilage meant, it had not been defined legally. That is what I am trying to do in amendment 110. The fact of the matter is that 50m is not the vast distance that Scott Barrie seems to consider it to be. He seeks to define in amendment 138 what is reasonable, which does not have a safe legal definition either. Many lawyers who are much more highly paid than any of us have spent an awful lot of time searching for the elusive legal paragon of the reasonable man, who is yet to manifest himself. We have to put down a reasonable distance in figures and I do not think that 50m is unreasonable.

I have listened carefully to what the minister said about amendment 41. My intention was clearly the protection of children and the term "activity centre" to my mind would denote a centre in which there was a congregation of young children. Having heard the minister, I concede that the definition is perhaps not as precise as it might be, so I will not move amendment 41. I will, however, press amendment 110.

The Convener: Thank you, Bill. We will move to the vote on amendment 110 and will stop there. As that is the lead amendment, it seems an appropriate place to stop.

Mr Hamilton: The minister will probably want answers to some specific questions, although we are not going to vote on the amendments. Perhaps we should put those questions on the record today to come back to. There was the question whether Murdo Fraser was going to withdraw amendment 111. It would be useful to know if he is going to do that. I also asked a question about "or associated" land, which the minister wanted to come back to.

The Convener: We can deal with amendment 111 next week. What was the other question to which you wanted an answer?

Mr Hamilton: It related to amendment 188. I know that we are not voting on all the amendments today, but there are outstanding questions. For the sake of completeness—and if it would take only 30 seconds—it would be useful to have an answer on the record.

The Convener: Okay.

Allan Wilson: I think that the question relates to associated land that is contiguous to a manse. Our amendment is designed to read for houses. A manse would be a church house, but a church would obviously not be a manse.

Mr Hamilton: I am with you to the extent that a church is not a manse and a manse is not a church. However, I have in mind a situation—I have experienced it—in which a glebe is divided by another building, which is perhaps privately owned, and continues beyond it. The whole of the glebe is therefore not adjacent to the manse. What happens there?

Allan Wilson: If you put to me a specific example, I would be happy to write to you, giving you our interpretation of how amendment 188 would operate.

The Convener: The question is, that amendment 110 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Hamilton, Mr Duncan (Highlands and Islands) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Morrison, Mr Alasdair (Western Isles) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

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

Amendment 110 disagreed to.

The Convener: As we have reached the end of today's business on the Land Reform (Scotland) Bill, I propose that we take a comfort break. I ask members to return as quickly as possible so that we can resume business. Our next stage 2 consideration will continue at the committee's next meeting, on 11 September. An announcement will be made in the business bulletin tomorrow about the deadline for amendments for that meeting.

12:13

Meeting suspended until 12:20 and thereafter continued in private until 13:22.

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