JUSTICE 2 COMMITTEE

Wednesday 18 September 2002
(*Morning*)

Session 1

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JUSTICE 2 COMMITTEE
† 30th 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:

Dennis Canavan (Falkirk West)
Dr Sylvia Jackson (Stirling) (Lab)
Mr Jamie McGrigor (Highlands and Islands) (Con)
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

† 29th Meeting 2002, Session 1—joint meeting with Justice 1 Committee.

Scottish Parliament

Justice 2 Committee

Wednesday 18 September 2002

(*Morning*)

[THE CONVENER *opened the meeting at 09:54*]

The Convener (Pauline McNeill): If members will find their seats, we can begin. As usual, it would be helpful if people turned off anything that makes a noise. I welcome everyone to the 30th meeting in 2002 of the Justice 2 Committee.

I have some brief remarks as a convener's report. I intend to finish the meeting at 12.30 pm today in view of another important piece of work on the Criminal Justice (Scotland) Bill. I assume that members will agree to that.

Members *indicated agreement*.

The Convener: I propose a very short comfort break at about 11.30 am, if the committee wishes that. I take members' silence as a yes.

The quality and practice review unit's report into the prosecution of High Court cases and the consultation document on the appointment and role of advocate deputes are now available on the Crown Office website. I thought that the committee might be interested to know that, as those topics form part of our inquiry into the Crown Office and Procurator Fiscal Service.

Subordinate Legislation

Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment No 3) 2002 (SSI 2002/328)

Registration of Births, Deaths and Marriages (Fees) (Scotland) Order 2002 (SSI 2002/389)

Births, Deaths, Marriages and Divorces (Fees) (Scotland) Amendment Regulations 2002 (SSI 2002/390)

The Convener: Item 1 is consideration of subordinate legislation. We have three Scottish statutory instruments to consider. I refer the committee to the relevant papers—notes are attached to each of the statutory instruments. Does anyone wish to raise any points or is the committee happy to note the instruments?

Bill Aitken (Glasgow) (Con): I am happy to note them.

The Convener: Is it agreed that we note the instruments?

Members *indicated agreement*.

Land Reform (Scotland) Bill: Stage 2

The Convener: Item 2 concerns the Land Reform (Scotland) Bill. This is the fourth stage 2 meeting on the bill. Members should have the bill in front of them, the fourth marshalled list of amendments and the list of groupings for the meeting.

I welcome Dennis Canavan and Sylvia Jackson to the meeting. I understand that Murdo Fraser is unable to make it but that Bill Aitken will act on his behalf. I should have said earlier that we have apologies from Duncan Hamilton, who cannot be with us. I believe that he has hurt his foot. We will pass on the committee's regards to him.

I remind members that we are still on section 6. Members will note that there are quite a lot of amendments to early sections of the bill. That means that, when we come to vote, the situation gets rather complex. I ask members to bear with me.

I have discussed with Bill Aitken, the deputy convener, the procedure that we should follow in dealing with amendments in my name. For my amendments, I will call myself from the chair to speak, as Bill Aitken has other things to do. There is no reason why I cannot do that. It may look bizarre but, if there are no objections, we will proceed in that way.

I also welcome to the meeting the Deputy Minister for Environment and Rural Development, Allan Wilson, and the rest of his team.

Section 6—Land over which access rights not exercisable

The Convener: Amendment 148, in my name, is grouped with amendments 95, 154, 115 to 117, 96 and 97. If amendment 154 is agreed to, I will not call amendments 115 to 117, 96 and 97.

Amendment 148 would remove paragraph (j) of section 6, which states that access rights are not exercisable on land

"in which crops have been sown or are growing".

We need to be consistent with the stage 1 report. My interest is to ensure that we allow the maximum access and responsible access. Where we can do that, that is what the bill should reflect.

Much of the clarification would be better dealt with in the access code than in the bill. I am concerned that section 6(j) could cause difficulties with enclosed land. There should be access to enclosed land if that can be exercised responsibly. I emphasise that I do not seek to allow those accessing such ground to damage crops. I have no interest in doing anything other than protecting the interests of farmers and others.

However, I can envisage situations in which people are unable to access the margins of a field or get around a field. If a field is ploughed to the margins, people will not be able to access it. That cuts across the principle of what we are trying to achieve through the bill. It would be useful if the minister would say whether farmers are obliged under the common agricultural policy to plough to the margin of fields. If they are, that could create difficulties.

10:00

I am concerned that the bill links section 6(j) with section 7(7)(b), which

"includes land on which grass is being grown for hay and silage, but does not otherwise include grassland".

That is a restrictive provision, as it would mean that people could not access land around the margin of a field on which grass was being grown for hay or silage. Amendment 154 is intended to address that issue.

Section 7(7) states that

"land on which crops are growing—

(a) includes a plantation of trees which are at … an early stage of growth".

I appreciate that trees at an early stage of growth may be damaged if people access an area in which they are located. However, it should be possible for people to exercise access rights responsibly. The problem could be dealt with more easily by insisting that people exercise their rights responsibly than by including a list of sweeping exclusions in the bill.

I find it difficult to accept that we are legislating to restrict access to all land on which crops are growing, including grass for hay and silage. I would like to have clarified whether allowing people to access the margins of fields on which grass for hay and silage is growing would be damaging in any way.

I will not support the other amendments in the group, which would have the opposite effect to that of those in my name and would exclude enclosed land from access.

I move amendment 148.

As Murdo Fraser is not here, I ask Bill Aitken to speak to amendments 95, 96 and 97. He may also speak to the other amendments in the group.

Bill Aitken: I will deal first with amendment 95. Increasingly, farmers and land managers are planting field margins, headrigs and endrigs with special tussock grasses for ground-nesting birds. Special wild birdseed, cover mixtures and other

special crops are being planted to provide food and shelter for wild farmland birds, game species and other farmland species, including biodiversity action plan species such as the brown hare.

That work—some of which is encouraged by grant from the Scottish Executive—will be negated if field margins become access corridors for walkers and horse and bike riders. Significant damage is likely to be inflicted if, after we have encouraged wildlife to occupy such habitats, we disturb or destroy it or its reproductive cycle—albeit unwittingly. That is the thinking behind amendment 95.

Amendment 96 concerns a related matter. Even if they are not specifically planted, field margins are often left fallow to encourage wild farmland birds and other species to occupy them. The bill in its current form would be damaging to that process.

Amendment 115 is related to amendment 116. Orchards are fruit crops that are cultivated for commercial purposes and they should not be considered as woods and forests, the purpose of which is largely recreational. Regard should be paid to the Agricultural Holdings (Scotland) Act 1991, in which the term "agriculture" includes fruit growing.

Amendment 117 takes me back to my days as an insurance underwriter. Grass should be considered as a crop for the purposes of sections 6 and 7 of the bill. Grass that is grown for the purpose of grazing is a resource for livestock and is part of the farmer's stock-in-trade. Therefore, land on which that resource is grown should be exempt from the exercise of access rights and should not be considered in a similar manner to rough land, to which recreational access is perfectly permissible and, indeed, should be encouraged.

I am concerned that amendment 148 would remove the protection for crops. Crops are vulnerable to disturbance and are easily damaged, both in the early stages of development and as they approach maturity. The countryside is a place of work—people derive their living from it. We must be sensitive to the fact that the agriculture industry has taken a number of serious hits during recent years. Some of those setbacks have been the result of natural disasters such as foot-and-mouth disease; others have been the result of actions by an insensitive Executive. We should not make life more difficult for those who work in the agricultural sector.

Scott Barrie (Dunfermline West) (Lab): I support amendment 148 and I oppose amendment 117. Amendment 148 is important because we must take cognisance of the fact that we wish to ensure that the bill will not diminish existing rights. People want to access land that has crops on it. If we are not careful, we will end up in a situation in which we have less access than we have at the moment. We would not want to deny access whenever there are crops in a field, depending on how those crops are defined.

I am also concerned that some land managers might use the provisions in sections 6 and 7 to plant crops in order to prevent access that people enjoy at the moment. I know of an example in my constituency of a landowner who has planted on an historic pathway at Gallowridge, between Crossford and Dunfermline town. It is arguable whether the pathway is a right of way. Crops have recently been sown on the path and people are being denied access to an historic route. If that is happening in Dunfermline West, it could also be happening in other parts of Scotland, particularly in the central belt.

We must be extremely careful about amendment 117 because, if it were agreed to, most people would effectively be denied access to the majority of lowland Scotland. The situation would become so restrictive that most of the countryside to which people reasonably have access, and to which they have enjoyed access without difficulty for a long time, would be denied to them as a result of the restrictive nature of the framing of amendment 117. We should reject amendment 117 on that basis.

Stewart Stevenson (Banff and Buchan) (SNP): I, too, want to speak in favour of amendment 148 and I have some observations on Bill Aitken's remarks.

I do not disagree especially with Bill Aitken's comments on the need to protect farmers' and land managers' rights, but I come to a different conclusion. Amendments 95 to 97 and amendments 115 to 117 simply cannot cover the diversity of ways in which land managers in the countryside exploit land. There is a relatively successful co-existence in the countryside between agriculture in all its forms and the exercising of recreational access. For example, farmers regularly leave tractor tracks through crops as a result of spraying or other operations. Ramblers successfully use those tracks to walk through fields without damaging the crops. That does not apply in all instances, but it applies in some.

There is also the danger that new crops of one sort or another will be introduced over the life of the legislation and that statute law will not be able adequately to reflect those crops' particular requirements. The basic argument is whether how we treat crops should be included in statute law or in the access code, which offers the flexibility to respond to the changing pattern of land management. I firmly adhere to the idea that the code is the proper place to address the question of

responsible access to the farmer's land.

The amendments lodged by Murdo Fraser and Bill Aitken would restrict access rights that are currently exercised. In that regard, I do not believe that we should accept them. I believe that amendments 148 and 154, which are linked, offer the most suitable way in which to deal with the issue. They transfer to the code the questions of what crops are and how responsible access may be exercised in relation to them. The other amendments in the group, and indeed the bill as introduced, do not adequately address the various risks and accesses that it may or may not be proper to exercise at different stages of a crop's growing cycle. That is exactly the sort of matter that can properly be developed and addressed in the access code. On that basis, I will be supporting the convener's amendments 148 and 154 and opposing the other ones in the group.

Dr Sylvia Jackson (Stirling) (Lab): I will not go over what the convener and Stewart Stevenson have already said. Amendments 148 and 154 give us much more flexibility around what can be included in the code and allow more detailed information to be presented.

I invite the minister's comments on an issue that has been raised at various farming venues and discussions. As we move towards rural stewardship schemes and environmental practices involving margins around fields, the issue increasingly arises that people walking through or on those margins might cause difficulties for the habitat that we are trying to generate. I have asked various people about that and I get the impression that the occasional walker will not do damage. If a sufficient number of people to cause damage were walking over a field margin, we should think about extending the core path network to that place.

We need a judgment on whether field margins can be damaged by ordinary access. We have to consider a range of locations, from places where access is not sufficiently heavy for the field margin to be considered a major walkway, to field margins leading up a Munro, for example. In the normal course of events, field margins would not be damaged by occasional access.

George Lyon (Argyll and Bute) (LD): I oppose amendment 148. I believe that there is a genuine case for excluding growing crops. If people had unfettered access to walk over potatoes or vegetables growing under plastic, for example, that would damage the potential harvest. To draw a parallel, I do not think that any committee member would enjoy the sight of a freshly planted vegetable patch in their back garden being walked over by neighbours on a regular basis. Householders seeing that would be up in arms and would demand that it stop, as it would clearly be damaging the growing crop. Section 6(j) is there for a good reason—land is not just for access but for a farmer to try to make a living and run a business from it. Newly planted crops are easily damaged and I believe that amendment 148 should be rejected.

10:15

I also oppose amendment 154, which goes too far. However, there is an argument for further defining hay and silage. As a land manager and farmer, I recognise the fact that it is difficult to judge when a field of grass is being shut up for hay and silage. At any stage during the season, it is easy to say that a field has been shut up. A little further definition of hay and silage would be helpful.

I have spoken to the minister about the possibility of the Executive dealing with the issue by lodging an amendment that would refer to the two or three weeks prior to a crop being harvested. That is the stage at which the damage would be done if people walked through the crop. In the initial stages of its growth, there would be no damage to a crop of hay or silage if that happened. However, in the last two to three weeks, as the crop bulked up, anyone walking through it would tread it down. The evidence would be seen when the mower travelled through the crop—the mower would miss half the crop because the crop would be flat to the ground. If members have ever seen a harvested field of silage or hay into which—for whatever reason—sheep had escaped 12 hours before the harvest, they will have seen an immense amount of grass left behind where the mowers could not get underneath it. There is a good reason why, in the last two or three weeks before it is harvested, grass that is being grown for hay or silage should be excluded from the definition.

Amendment 117 is virtually a blanket exclusion for the whole of Scotland—not only lowland Scotland, but upland Scotland—because it refers to what could be defined as grazing ground. It is, therefore, what might be termed a wrecking amendment.

The matter that amendment 96 addresses is already taken care of in section 7(7)(c), which states categorically that the definition of

"land on which crops are growing … does not include unsown headrigs, endrigs or other margins of fields in which crops are growing".

The Deputy Minister for Environment and Rural Development (Allan Wilson): I hope to address all the points that have been raised in relation to the amendments in this group and to satisfy the committee that the Executive acknowledges its concerns, where they are justified, and that we have good reason for asking

members to withdraw their amendments.

Section 6(j) provides that access rights are not exercisable on land

"in which crops have been sown or are growing".

Principally for the reasons that were outlined by George Lyon, section 7(7) further explains what is meant by

"land on which crops are growing".

Amendments 148 and 154 seek to delete those provisions. Amendment 157, which has not been grouped with these amendments, would provide, under section 9, that

"causing significant damage to crops through the failure to follow guidance in the Access Code"

would be deemed irresponsible. I would be surprised if any member suggested that people should have the right to walk through crops causing any damage, not just what might be considered "significant damage". That is why we have written the exclusion into the bill. As George Lyon said, access to crops is a matter of concern to farmers, whose livelihoods depend on the growing and selling of those crops. I therefore consider it appropriate that the exclusion remains in the bill.

We have always made it clear that the exercise of access rights should not compromise the ability of others to manage their land. The convener will accept that principle. I am not sure why there is concern about the inclusion of the exclusion provision. It has been suggested that farmers might abuse the provision by planting crops solely to deny access, and Scott Barrie has cited an example of where that might take place. However, if that were to happen, it would be caught by section 14.

Section 14 relates to actions that have the purpose of preventing or deterring the exercise of access rights. I suspect that we will not reach that section today, but we have lodged amendments to widen its scope. If they are agreed to, those amendments will prevent any actions that have the purpose or main purpose of deterring or preventing the exercise of access rights, which would include planting crops with the intent of taking land out of access rights.

In addition, section 3 of the Scottish outdoor access code will address issues of land management that relate to access rights. The code will include guidance on the sowing and growing of crops in ways that are responsible in respect of access rights. That addresses the convener's concerns about precluding growing to the margins in all circumstances.

Section 7(7) provides for walking on crops at the margins. The exclusion of cropland from access rights is the correct approach. That does not deny responsible access to arable land. Access rights can be exercised on paths across fields, on tramlines and around field margins, irrespective of where crops are growing. That is reasonable and does not open the way for farmers to deny access to areas by sowing crops in them.

The code will address land management issues and will set out guidance. Moreover, as I said, any attempt to use crops to deny access, as described by Scott Barrie, would be caught by section 14, which precludes growing or permitting to grow

"any hedge, tree or other vegetation"

for the purpose of deterring any person from exercising their right of responsible access.

I hope that the convener accepts that farmers have a legitimate concern. The approach that we have adopted is appropriate. However, I take the point that the convener and George Lyon made that in excluding from access rights land on which crops have been sown or are growing, it would be nonsense to classify grass as a crop, as was suggested, and thereby exclude grassland from access rights. Nevertheless, following representations from the National Farmers Union of Scotland and others, we acknowledge that grass that is grown for hay or silage is a crop, so the bill properly excludes such land from access rights.

I understand the convener's concerns about the exclusion from access rights of land on which grass is grown for hay or silage. That exclusion was included because we acknowledged the validity of the arguments that the NFUS and others advanced. However, I recognise that grass is not at the same risk of damage as are crops such as wheat or barley. Walking through a field of grass that is grown for hay or silage is only liable to cause damage in the period shortly before the grass is to be cut. I also recognise that section 7(7)(b) could be open to abuse, as has been suggested, so I will consider lodging an amendment at stage 3 to qualify the provision, to allow the exercise of access rights except in the period when damage could occur, which is just before the grass is cut.

Amendment 117, which Bill Aitken almost spoke to with a straight face, would take out of access rights land on which grass is grown for grazing. I am not convinced that responsible access to grazing land is a problem. The public must be aware of the issues that Bill Aitken raised, such as safety when in the vicinity of livestock, but that is a matter for the code and for education. Amendment 117 could be far-reaching. I will give Bill Aitken the benefit of the doubt and assume that he did not intend to remove all grass that is grazed by sheep from the application of access rights and most of

the bill, but that could be the effect of the amendment. I am sure that that is not Bill Aitken's intention and I hope that he will not move his amendment.

Amendment 115 seeks to remove orchards from access rights. I must say to Bill Aitken that I do not see the need for the amendment. Some orchards will be excluded from access rights anyway, where they fall within the exclusions from access rights under section 6(a) and (b). For example, where an orchard is included as part of a formal garden that is attached to a house, the orchard would in all likelihood be excluded. Section 7(7)(a) also excludes orchards or small trees that are at an early stage of growth. I do not see the need to exclude all orchards. I therefore hope that Bill Aitken will not move amendments 115 and 116.

Amendments 95, 96 and 97 would, on conservation grounds, provide for the exclusion of certain agricultural land from access rights. It will come as no surprise to committee members that, as a rural dweller myself, I would be among the first to share Bill Aitken's credible concern to promote environmentally friendly farming practices. I recognise the contribution that farming makes to biodiversity. As has been said, field margins can provide an important refuge for wildlife and can be rich in fauna and flora.

However, let us pause for a moment to think through Bill Aitken's proposals. If I were a farmer managing my field margins for conservation purposes, what problems might a general right of access create for me? As Sylvia Jackson said, the occasional walker or rider is unlikely to cause disturbance or damage. If there were a more significant demand for access to my land, I agree with Sylvia Jackson that I would encourage the use of routes to avoid the sensitive areas. I might even go as far as seeking the assistance of the local authority to create a new path if the exercise of access rights were interfering with conservation issues.

For the few issues in which access could pose a threat to the conservation interest, Scottish Natural Heritage may use the powers provided under section 26 to advise people where access rights may threaten natural heritage—Historic Scotland may do so where cultural heritage is threatened. Also, section 12 gives local authorities the power to introduce byelaws. Therefore, the bill has plenty of provision to ensure that the conservation interest is addressed.

The management measures, backed up by the provisions in the code, are a better approach than introducing an unnecessary statutory exclusion from access rights. Moreover, I am sure that members will agree that simply allowing a landowner to erect notices that would have the effect of excluding areas of land from access rights would be open to abuse. A forest of notices could appear, each of which the local authorities would have to check for the validity of its conservation interest. Such an approach has little to commend it.

I hope that Bill Aitken will agree not to move those amendments.

The Convener: There are a few points that have not been addressed by the minister, the first of which is the point that I made. What pressure is there in reality under European Union rules for farmers to plough to the edge of the field? Does that mean that people will not be able to get access around the margins of fields? Our principal point is that we are concerned that lowland Scotland will become inaccessible if we do not resolve that issue. Sylvia Jackson said that she had received representations to the effect that allowing people access around the margins of fields would not cause any real damage. However, that point has not been addressed.

I welcome the fact that the minister has said that he will lodge an amendment at stage 3 dealing with hay. I also welcome his recognition that tramlines can be walked on because there are no crops there. That is helpful, but I may need to press him further. I will allow some debate on the issue, as I know that others want to speak.

Stewart Stevenson: We have heard some interesting comments from the minister, many of which I agree with and some of which I do not. For example, grass could be a crop for organic farms, as there may be issues associated with preserving organic status because of the role played by grass in the production of organics. I use that example because it reflects the changing pattern of land management. Organic farms are a relatively recent change and in the next 10 years we are likely to see others.

Section 6(j) says that access rights are not exercisable in relation to land

"in which crops have been sown or are growing".

George Lyon and the minister recognised that at various stages of various crops, there may or may not be a need to deny access. Clearly, we do not want people trampling over vegetables at an early stage in their development but, with grass grown for silage, the problem would be if it were trampled at a late stage. There is great variability.

The minister said that the code would address issues of sowing and the management of access. In relation to amendments 96 and 97, you used the phrase, "unnecessary statutory exclusion" but I do not believe that he has made a case that that argument applies to crops in general. Therefore, I continue to adhere to my view that section 6(j) should be deleted.

10:30

George Lyon: The convener raised a point about field margins. As someone who has ploughed a number of fields, I know that it is impossible to plough right up to the fence line—the machines leave a 12in or 14in gap—and that it would always be possible to walk around a field. If that margin is linked up with tramlines going through the crops, there is access through the fields. That myth has to be dispelled.

A point was raised about farmers planting crops to deny access. Planting crops is an expensive business. Given that it costs such a lot of money to plant an acre of a crop, I would think it unlikely that anyone who was planning to get a commercial return from their farm would plant a crop purely to stop access. That would be pretty perverse and would indicate that the farm was not being commercially farmed.

Dr Jackson: I thank the minister for his words on the subject of field margins.

If a farmer's crops are damaged, what difference would be made by having more detail in the code compared with the bill remaining as it is at the moment?

Allan Wilson: That is an interesting point. No one has the right to damage crops, as such. The bill restores a right of responsible access round the margins of fields, irrespective of whether crops are growing. That was my response to the convener. Section 7(7)(c) provides for the exclusion not to apply to

"unsown headrigs, endrigs or other margins of fields in which crops are growing".

Given that there will be guidance on land management practice to back up the point about the responsible use of land management techniques to provide for responsible access and to make land management techniques compatible with the right of responsible access, I think that I have addressed the concerns behind the amendment.

On the issue of land owners or managers growing crops to prevent access, which Scott Barrie and George Lyon talked about, as I explained in my preamble, section 14 gives the authority to address those problems in the unlikely event that a farmer, land manager or landowner sowed crops with the express purpose of preventing access.

Members should take into consideration all the assurances that I gave in relation to tramlines, field margins and the code. I commend the approach that we have taken. At present, people do not have the right to damage crops. Stewart Stevenson made a point about walking on vegetables: he said that the issue was one of the degree of growth of the vegetable. I cannot think of an instance in which walking on a vegetable, at whatever stage of its growth, would not cause damage to that vegetable. In the case of very small saplings, even more damage would be caused.

The purpose of the exclusion is to prevent damage being caused to crops that are grown by farmers in furtherance of their livelihoods. It is an important provision that we want to retain in the bill. Taking into consideration those comments and the caveats that I have made, I hope that Pauline McNeill will withdraw amendment 148.

Given that damage could result to grass that is grown for hay and silage, I will return at stage 3 with a better definition of when grass is defined as a crop.

The Convener: A few points of clarification arise.

Stewart Stevenson: I will give one example by way of clarification—it is one illustration out of many. It would be perfectly possible to walk between rows of potatoes without causing difficulty to the crop, which shows that there is a different risk of and opportunity for damage to each crop. I therefore adhere to the view that it is inappropriate to make a blanket restriction that denies access where crops are growing.

Allan Wilson: Walking between rows of potatoes is not walking on ground where crops are sown.

The Convener: That is helpful, but I want to press the minister further on the points that were made by Stewart Stevenson and Sylvia Jackson. Are you prepared to address the points that they made about the code?

Allan Wilson: I have given an assurance that the code will address responsible land management and give guidance on responsible access to ensure that farming and agricultural interests are protected. The code will strike the appropriate balance between the two interests to ensure that responsible access is properly managed and that agricultural practices are not exercised irresponsibly to exclude access.

Scott Barrie: I thank the minister for drawing section 14 to my attention, in particular the provision that sets out that action could be taken if a landowner puts up vegetation other than that which is included in section 14(1)(b). However, now that my attention has been drawn to the section, I notice that subsection (2) includes a provision that the local authority, having given consideration to a contravention of subsection (1), "may" require action to be taken. I accept that we are being given guarantees, but they are not very great if the provision includes the word "may".

I presume that a person would have to go to the local authority, demonstrate that something had happened and hope that the local authority "may" do something. We have had a similar discussion in respect of legislation that places different onuses on people. What would happen in the situation that I described, if a local authority said that what appeared to be a contravention was okay? In view of concern over who may be in control of a local authority at a particular point in time, I am sure that we will discuss that point again later this morning, if we get to the amendments on entrusting local authorities.

The Convener: I will allow the minister to address that if he wishes. He could address a very small point from Stewart Stevenson at the same time.

Stewart Stevenson: I welcome the minister's remarks about potatoes, but I want to nail down exactly what he is trying to say to us. Is he saying that the intention of section 6(j) is not to exclude people from access to ground on which no crop happens to be growing but which is within the boundaries of a field in which a crop has been sown? Instances of that situation exist. Potatoes, cabbages and carrots would be examples. That is by no means an exhaustive list. Is the intention not to deny access to the area in the field where the crop is not growing? That appeared to be the import of what the minister said.

The Convener: I think that we know what you are saying.

Allan Wilson: I thought that I had explained that access is permitted in tramlines. If crops are growing either side of a tramline, access is permitted in between. Access is permitted even where crops are growing, on the margins of unsown headrigs, endrigs or other margins of fields and even in those in which crops are growing. I have given a more than elaborate enough explanation of what is intended. The code will further clarify what the rights of responsible access will be across arable farmland.

Scott Barrie's point is fair and we will consider it. I understand the bill to impose a duty on local authorities to provide for such an eventuality. That is how I envisage local authorities exercising responsibly their duty to uphold the rights of responsible access that we confer in the bill.

The Convener: I do not apologise for allowing members of the committee who are interested in the principle that we are debating to press the minister on those points. Some members of the committee consider that principle to be fundamental. We accept all the points that the minister has made about section 6(j) being intended to protect all the interests of farmers and to ensure that there is no damage to crops. However, if the bill is about access to lowland Scotland, it must also ensure that we provide the maximum amount of access as long as that does not damage or interfere with land managers' use of the land. That is why it is important to press the minister hard on the meaning of section 6(j) in combination with section 7(7). He said quite a lot. He talked about lodging an amendment at stage 3 to qualify what is meant by hay and silage. I welcome that, but I reserve my right to examine what he proposes at stage 3.

Scott Barrie made a very important point. Although the minister asks us to rely on section 14, further clarification may be needed on the duty on local authorities to ensure that they carry out their duties to ensure that no one deliberately excludes land from access. I welcome what the minister said on that. It helped me considerably in making up my mind.

I would have preferred many of those matters to be dealt with in the access code. I press the minister further and reserve my right to discuss the code with him so that it reflects what he said this morning. Stewart Stevenson put the argument better than I did: it is possible to exercise responsible access in enclosed land without damaging crops. If we agree on that, I will not press amendment 148.

Allan Wilson: We will be discussing section 14 later, and we have lodged amendments to extend the scope of its provisions, which is in line with much of what the convener has been saying. It is our express intent that the provisions of section 14 will deal with the unlikely event of landowners, recalcitrant farmers or others who go out of their way to sow crops to exclude access.

10:45

The Convener: I have already moved amendment 148, so it is up to the committee whether it is happy for me to withdraw it. Does the committee agree that I withdraw it?

Members: No.

The Convener: In that case, we will move to the vote. The question is, that amendment 148 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Barrie, Scott (Dunfermline West) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

AGAINST

Aitken, Bill (Glasgow) (Con)
Lyon, George (Argyll and Bute) (LD)
Morrison, Mr Alasdair (Western Isles) (Lab)

ABSTENTIONS

McNeill, Pauline (Glasgow Kelvin) (Lab)

The Convener: I am abstaining as this is my own amendment, which I sought to withdraw. The result of the division is: For 2, Against 3, Abstentions 1.

Amendment 148 disagreed to.

Amendment 95 moved—[Bill Aitken].

The Convener: The question is, that amendment 95 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)
Lyon, George (Argyll and Bute) (LD)
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 5, Abstentions 0.

Amendment 95 disagreed to.

The Convener: Amendment 101 is grouped with amendment 102.

Bill Aitken: The issues here are straightforward and relate to matters that we have already discussed. With these two amendments, I seek to ensure that there is a separation between people and livestock. The country is an attractive place, but it can also be a dangerous place. If animals are enclosed, that is clearly for their protection. However, from time to time, the protection of the public has to be considered. The effect of the amendments would be to define enclosed farm land and to install in legislation a prohibition on walking within that land. The concern is the public interest, as well as the potential increase in liability that is devolved to the land manager.

I move amendment 101.

Scott Barrie: I am totally opposed to amendment 101. Those of us who have chosen to take access to the countryside in the past can imagine situations in which the only way for people to get to where they are going is by going through enclosed farm land. The minister acknowledged that anyone crossing such land would do so with a great deal of discretion and caution. We should not say that people should not be able to cross an enclosed field where there are sheep if that is the only way to get through. What Bill Aitken proposes would be a draconian measure and would drive a coach and horses through everything that we are trying to achieve with the bill.

George Lyon: I, too, speak against amendment 101. It is clearly another wrecking amendment because, as Scott Barrie said, it would drive a coach and horses through the bill as drafted. It is clear that those who access farm land do so at their own risk. People must make their own judgments about when they access a field with animals in it. We discussed the question of liability at length: there is no extra liability on the land manager. Whether an individual accesses a particular field is a decision that is taken very much at one's own risk. Amendment 101 goes way beyond any concern about accessing land containing animals.

Allan Wilson: It is important to remind ourselves what our policy is and why we are all here. The bill creates new statutory rights of access to all land, subject to a code of responsible behaviour. That reflects advice from Scottish Natural Heritage to the then Scottish Office in 1999 that a statutory right of access to all land, both open and enclosed, and to inland water should be established.

As George Lyon pointed out, amendment 101 would restrict access to large areas of land in Scotland. That is not the intention and would not be appropriate. As we have discussed, guidance to the public on exercising rights of access to agricultural and enclosed land responsibly will be included in the Scottish outdoor access code. I have already described what the code may contain.

There is no reason to see the responsible exercise of access rights to agricultural land as creating problems. Not everyone wants to bag Munros or Corbetts. From personal experience, I know that many people simply want to enjoy the countryside around the area in which they live. The bill gives them the confidence to do that without fear of challenge.

Today it has been implied that access is a threat to farmers, but I do not see it that way. Increased access is also an opportunity for farmers. Recently, I saw on television the results of a survey of schoolchildren who live in an urban environment. When they were asked where eggs and milk came from, the children responded with blank looks. Increasingly we hear that there is a lack of public sympathy for farmers. The bill gives farmers a chance to communicate the vital role that they play in how we organise and structure our society. They can do that by not keeping the public away from agricultural land and by encouraging responsible access to it. I hope that Bill Aitken will agree to withdraw his amendment, which is not in the interests of farmers.

The Convener: The question is, that amendment 101 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)
Lyon, George (Argyll and Bute) (LD)
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 5, Abstentions 0.

Amendment 101 disagreed to.

The Convener: Amendment 149 is grouped with amendments 27, 33, 35, 171, 37 and 39. I ask members to note that if amendment 149 is agreed to, I cannot call amendment 27, which will have been pre-empted. I ask Stewart Stevenson to move amendment 149 and to speak to amendment 171 and the other amendments in the group.

Stewart Stevenson: Amendment 149 relates to section 11, reference to which it would delete from section 6. I recognise that my colleagues Scott Barrie and Dennis Canavan have lodged amendments along the same lines. I concede that their amendments are better, because mine would also delete reference to section 12, which may not be appropriate. I am likely to seek the committee's permission to withdraw amendment 149 in favour of amendments 27 and 33, which address the same issue but in a more appropriate way. I also intend not to move amendment 171. I am sure that Scott Barrie will want to say something on the matter.

I move amendment 149.

The Convener: I ask Scott Barrie to speak to amendments 27, 33, 35 and 39, and to the other amendments in the group.

Scott Barrie: Amendment 27 seeks the removal of the words

"in an order under section 11".

Later on, we will debate my amendment 35, which seeks to leave out section 11.

We must remember the evidence that we received from the Convention of Scottish Local Authorities at stage 1. A number of local authorities do not want the power to make such orders. When we legislate, we must be careful that we do not give bodies—particularly local authorities—powers that they do not want. Usually, things are the other way round. Local authorities are usually keen to get powers that Parliament, for whatever reason, is sometimes reluctant to grant. It is odd that we are approaching the issue the other way round.

I want to take people back to what happened—not in Scotland, thankfully—south of the border during last year's foot-and-mouth crisis. In an area of Lincolnshire that was not affected by the disease, the local authority chose to use its powers in a draconian fashion to restrict people from accessing the land by putting up notices everywhere. The people who were in control of the county council wished to restrict access to the land by using the foot-and-mouth crisis as a spurious argument. We must be careful that we do not unwittingly end up allowing similar situations to arise in Scotland through the use of section 11 powers.

When we come to debate section 11, I will argue for that section to be omitted from the bill. If I am to do so, I have to argue that we should not refer to those orders in earlier sections of the bill.

Dennis Canavan (Falkirk West): I support all that Scott Barrie has said.

I will comment briefly on amendment 27, because it is consequential to amendment 35, which seeks to leave out section 11. I am not in favour of giving local authorities what would be, in effect, the power to rewrite parts of the bill. Such powers would be inappropriate and I do not think that local authorities want them. Section 6(k) gives local authorities the power to exclude land that has been specified in byelaws. That is fair enough, but to give local authorities the power to make orders without byelaws is excessive.

I support amendment 27.

Bill Aitken: Some interesting arguments have been made, but surely the advantage of section 11 is that it would allow local authorities to adopt a stance on local issues in a sensitive manner. Local authorities know about what happens in their areas. Surely they should have the power to take the necessary action to remedy situations that may arise from time to time.

Section 11 powers should not be seen as forcing local authorities to do something—any action would be a matter for the local authority concerned. We are content to devolve powers under many headings to local authorities, so there should be no problem with doing so for this aspect. Frankly, amendment 27 would damage the coherence of the bill and would do nothing to improve the bill's fairness or workability.

Allan Wilson: I agree with much of what has been said on this group of amendments. I also agree with Scott Barrie's comments. We gave careful consideration to the matter that he has raised and approached it cautiously because of recent events, such as those in Lincolnshire.

In our consideration of the legislation, we were aware that many of the access issues that arise

are best dealt with at a local level, where local knowledge prevails. That was recognised in the initial advice that we received from the access forum and in the supplementary advice from Scottish Natural Heritage. The bill recognises that in many ways. For example, the bill gives local authorities a central role in the provision and management of access. The bill also places new duties on local authorities—as we just discussed—and requires the establishment of local access forums. The bill also provides for the planning of core paths at a local level and properly provides local authorities with new powers for the management of access.

In that context, the power to exempt land from access rights or to exclude it from certain activities is entirely appropriate, especially considering the other duties and responsibilities that we are placing on local authorities. If we are serious about the local management of access, we must provide local authorities with the appropriate powers. Nonetheless, I agree with Scott Barrie and, to an extent, Dennis Canavan. I do not expect local authorities to make widespread use of the powers. We will make that clear in the guidance that we issue to local authorities.

11:00

I recognise the fear that has been expressed that a few local authorities might attempt to abuse those powers. However, the procedures that we have introduced for making an order are deliberately demanding, and I doubt that any authority would embark on such a course lightly. The bill sets out the requirements for consultation on an order, and I have lodged amendments to strengthen those and to require local authorities to explain the purpose of any proposed order. Moreover, any order that would be in effect for 30 days or longer will have to be confirmed by ministers. I am confident that those safeguards will ensure that no local authority will be able to exercise its powers in an inappropriate manner, as happened in the example that Scott Barrie gave.

There is no specific class of land to which an order might apply. If there were, we would simply exclude that class of land in the bill. The guidance that we will issue to local authorities will set out the situations in which an order might be appropriate. That guidance will be laid before Parliament in due course. An example of such a situation concerns public safety. Some time ago, it was necessary to close Dollar glen because of safety concerns. Access through the glen was provided by wooden walkways, which became unsafe. Once the bill has established new rights of access, an order made under section 11 would allow the suspension of access rights in areas such as Dollar glen on safety grounds.

The Executive is also keen to promote rural development, and some development may depend for its commercial success on charging for entry. Most developments would be excluded from access rights under section 6, but a few might not be. In a few cases, a local authority might consider it to be in the general public interest—for which it is locally responsible—to restrict access to allow a development to proceed. That could be done by order. As I said, I do not expect widespread use of the order-making power, and guidance to that effect will be issued. However, we believe that the power should be available to local authorities in the wider context that I have described.

Amendment 171 would mean that byelaws would not be able to exclude an area of land from access rights. However, it might be appropriate for a local authority to make such a byelaw in certain circumstances, which is why the power was included in the bill. Byelaws are concerned primarily with the management of access, but part of that management may entail excluding from access rights part of the land to which the byelaws apply. Byelaws are subject to wide consultation and require to be confirmed by ministers, and those checks and balances ensure that local authorities cannot exclude land from access rights without good reason.

In that context, and bearing in mind Scott Barrie's concerns, which I share, I advise the committee that we have the appropriate checks and balances—the requirements for consultation and ministerial confirmation—in the system, and that there is good reason for allowing local authorities to make such byelaws in certain circumstances, for example on behalf of their communities and in the interests of public safety. I therefore ask Scott Barrie not to move amendment 27.

The Convener: Stewart Stevenson will wind up, as the first amendment in the group is in his name.

Scott Barrie: The minister says that the Executive will issue guidance to local authorities on how they should use the section 11 powers. What status will that guidance have? There is guidance and there is guidance—there are different ways of offering guidance. There is helpful-hints guidance and there is this-is-what-you-should-do guidance. How does the Executive propose to offer guidance?

Allan Wilson: Guidance will be issued to local authorities expressly to advise them on how to exercise their powers. Given that they have to come back to us in exercising those powers, we would expect them to follow that guidance. If they did not follow it in making an application, they could not reasonably expect their application for exclusion to be approved. The guidance would emphasise the necessity of using the powers

sparingly in any locality and only in certain circumstances—in the interests of public safety, for example. We would expect local authorities to follow the guidance, or else they will not have their order approved.

Stewart Stevenson: One of the difficulties that section 11 presents is that it allows local authorities to suspend only the access rights that the bill grants. As far as I can determine, it does not alter in any sense the common law access rights that currently exist for people to take access over the land, and it is those rights that the bill seeks to secure. Giving the local authority the power to suspend rights under the bill does not in fact prevent people from taking access. It appears to me that section 11 is likely to be ineffective in achieving what the bill is trying to achieve. The minister may wish to comment on that.

I remain of the view that Scott Barrie's amendments, which would remove references to section 11, and amendment 35, which is also supported by Dennis Canavan and which would remove section 11 altogether, are by far the safest way of ensuring that there is no abuse of power, for however short a period. Since section 11 is not likely to be effective in any event, there should be no opposition to removing it.

The Convener: Would the minister like to respond to that?

Allan Wilson: I can only reiterate what I have said. As I have explained, we are proposing a power for local authorities in specific circumstances. If, for example, a wooden walkway was unsafe and access had to be suspended for a period of time so that it could be made safe and so that people would not injure themselves by using it, that would be a responsible use of the local authority power to suspend access rights. I cannot see any reasonable argument against that. There are sufficient safeguards and caveats attached to the power to protect the wider public interest. There is a ministerial veto on orders extending beyond 30 days, and we will issue guidance to all local authorities on how to exercise the power responsibly. I envisage the power being used sparingly in the circumstances that I have described.

The Convener: Stewart Stevenson gets the last word, as the lead amendment is in his name. Perhaps he can answer a question for me in winding up. How could the question of safety be dealt with if section 11 were removed?

Stewart Stevenson: I was going to address that point by asking a question of the minister. Clearly, local authorities have already been able to restrict access under existing legal provisions. To what extent does the deletion suggested by amendment 149 remove the existing provisions that local authorities have? In other words, in the example used by the minister, are there not sufficient legal provisions to allow a local authority to act to protect public safety? How does the deletion remove, in any sense, the existing provisions that local authorities have? I think that asking that question addresses the issue that the convener raised.

Allan Wilson: I think that Mr Stevenson is in danger of disappearing into his own rhetoric. We want to extend the powers because the existing powers do not extend to cover the new rights that we are creating. It is a fairly simple explanation.

The Convener: Does Stewart Stevenson wish to press amendment 149?

Stewart Stevenson: I seek to withdraw amendment 149 in favour of those lodged by Scott Barrie, who I hope will press his amendments—although, in so doing, I place myself in his hands.

Amendment 149, by agreement, withdrawn.

The Convener: Does Scott Barrie wish to move amendment 27?

Stewart Stevenson: No! [*Laughter.*]

Scott Barrie: This is quite difficult, because some of the things that have been said will form the substance of the debate when we come to discuss section 11. However, I can see that, if we do not—

The Convener: Okay, you are not moving amendment 27. I think we take the point. Mr Stevenson and others will have the chance to have more of a discussion when we come to section 11.

Scott Barrie: We can come back and discuss things at stage 3.

The Convener: All is not lost.

Amendment 27 not moved.

Amendment 53 moved—[Bill Aitken].

The Convener: The question is, that amendment 53 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)
Lyon, George (Argyll and Bute) (LD)
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 5, Abstentions 0.

Amendment 53 disagreed to.

Amendment 74 moved—[Allan Wilson]—and agreed to.

The Convener: Amendment 44, in the name of Bill Aitken—

Dennis Canavan: On a point of order, convener. If an amendment is passed to delete section 11, section 6(k) will not make sense. Can we return to that point after dealing with section 11? Will we still be able to vote on Scott Barrie's amendment 27, which I support?

The Convener: Yes, there will be a vote. If section 11 is removed, section 6(k) will be picked up on at stage 3. Any inconsistencies that remain after stage 2 will have to be picked up at stage 3.

Dennis Canavan: Thank you.

The Convener: Amendment 44, in the name of Bill Aitken, is grouped with amendments 47, 48, 50, 51, 52 and 49.

Bill Aitken: Members will be somewhat relieved to learn that amendment 44 does not raise an especially complex matter. We will be able to deal with it fairly expeditiously. The amendment and consequent amendments seek to ensure that routes that have been used by the public for many years as rights of way can still be declared as rights of way, and that such use in the future will not be regarded as an exercise of access rights. The effects of the amendments would be fairly straightforward and would in no way inhibit or impinge upon the ability of responsible ramblers to exercise their rights upon the land. I shall listen to the minister's response with interest.

I move amendment 44.

The Convener: If no one else wants to speak to the amendments, the minister may respond.

11:15

Allan Wilson: I was interested to hear Bill Aitken say in his preamble that the issue is not complex. He must be the only person to hold that view.

I recognise the legitimate concern that has been raised that, as a result of the creation of access rights, there may be circumstances in which different rights may apply along different parts of an access route, thereby causing some confusion for the public in identifying which rights apply to a particular part of any route. However, the bill is not a vehicle for amending the existing status of the law on rights of way in Scotland.

I shall reply to Bill Aitken's amendments as they appear in the group. Amendment 44 seeks to ensure that, subject only to the code, access rights would be exercisable over all rights of way, including rights of way over excluded land. The bill seeks to create new statutory rights of access to land, not to extend access over existing rights of way. That intention is made clear in section 5(3):

"The existence or exercise of access rights does not diminish or displace any other rights".

That is an important principle.

Amendment 44 would alter the status of rights of way by entitling the public to exercise access rights over them. That is inappropriate. For example, let us take a pedestrian right of way that passes through the curtilage of a house. Amendment 44 would allow cyclists and people on horseback to use that right of way in the future, which could have considerable implications for the householder. There may be a case for looking at the law relating to rights of way—I do not dispute that part of the argument—but the bill is not the appropriate vehicle for so doing.

Turning to amendments 47 and 48, I recognise that there will be a close link between the rights-of-way system and the access rights under the bill, in particular in relation to the core path plan. It therefore seems inappropriate that the local access forums should be prevented from advising local authorities and others about rights of way and from offering assistance where practicable in cases of dispute over rights of way. In the light of that, I am content to accept amendments 47 and 48, as they would, for example, give local access forums the right to advise in cases of dispute. In taking on board those amendments, I am making a compromise that recognises the practical difficulties that I have outlined.

In responding to amendment 50, I wish to confirm that section 28 currently provides that

"Section 15 … applies in relation to rights of way as it applies in relation to access rights."

Section 15 provides powers to local authorities to safeguard the public from danger. It appears to us appropriate that those powers should extend to rights of way. However, we are not convinced of the need to apply the provisions of section 14, which relates to actions to prevent or deter the exercise of access rights, to rights of way. The reason for that is that local authorities already have a duty under section 46 of the Countryside (Scotland) Act 1967 to

"protect and keep open and free from obstruction or encroachment any public right of way".

Moreover, where access rights are exercisable on rights of way, a person will in those circumstances be able to take advantage of the bill's provisions to deal with those obstructions. That is because section 14 supplements the rights that are provided under the Countryside (Scotland) Act 1967.

I am not convinced of the merits of extending the

jurisdiction of sheriff courts in the manner that Bill Aitken proposes. That would not be a matter for the Land Reform (Scotland) Bill. I admit that the current long-standing procedures for vindicating rights of way can be cumbersome and expensive. However, the difficulties that are inherent in those actions are not peculiar to actions relating to rights of way. It would not be appropriate to use the bill to reform the law on actions of declarator but only in so far as they apply to actions involving rights of way.

I understand the intention behind amendment 51. Some would like a statutory requirement to be placed on SNH to compile a definitive list of rights of way in Scotland. However, under current legislation it is the responsibility of local authorities to vindicate rights of way. In my view, there is no reason to change that, particularly in light of the functions and powers in relation to access that the bill gives to local authorities. It would be incompatible with those local authority functions and powers on access to place the requirement on SNH in other parts of the bill.

Amendment 51 would provide that any right of way that was included on the list should be presumed to exist, "including by a court". In other words, the mere listing by SNH would create a legal right of way. That would change the current long-standing procedures for vindicating rights of way, to which I have referred. In our view, the courts are better placed to assess the existence and extent of any rights of way. The courts have developed a body of case law on the considerations that it might be relevant to take into account. Although I accept that the relevant court process can be cumbersome and expensive, it is not the purpose of this bill to reform the law relating to rights of way.

It is not entirely clear what Bill Aitken's intention is with amendment 52, which appears to seek to maintain any person's right to maintain and carry out repairs to a right of way. However, the bill in no way affects any person's right to maintain and carry out repairs to a right of way. Therefore amendment 52 is unnecessary, in my humble opinion.

Amendment 49 seeks to ensure that rights of way can continue to be created, diverted or closed by order. I accept that there is a continuing need for the powers in the Countryside (Scotland) Act 1967 as they relate to rights of way and I am happy to accept amendment 49.

For the reasons that I have outlined, I accept amendments 47, 48 and 49, but I ask Bill Aitken to withdraw amendment 44 and not to move amendments 50, 51 and 52.

Stewart Stevenson: I seek clarification from the minister and his team about whether section 17(2), which states that core paths consist of "rights of way", requires all rights of way to be designated as core paths.

Allan Wilson: The short answer is no—only those rights of way that local authorities designate as core paths will be designated as such.

Stewart Stevenson: Would not the word "may" or some such conditional expression require to be inserted? Is it clear that the groups that are listed are groups from which core paths may be drawn and that not all the groups that are listed should be core paths?

Allan Wilson: Not all the paths and rights of way that are listed will be designated as core paths.

Stewart Stevenson: It is useful to have that on the record.

Bill Aitken: I was being slightly mischievous when I suggested that the issues were straightforward. I accept that a degree of complexity is attached to them. I listened to the minister's explanations with considerable interest and I note that he has gone some way to resolving the problems in question. Therefore, I will respond in kind.

The Convener: So you are seeking to withdraw amendment 44?

Bill Aitken: I am seeking to withdraw amendments 44, 50, 51 and 52.

The Convener: You can withdraw only amendment 44 at this stage.

Amendment 44, by agreement, withdrawn.

Section 6, as amended, agreed to.

The Convener: As we are moving to section 7, I propose that now would be a good time for a comfort break and coffee.

Members *indicated agreement*.

The Convener: We will resume in five minutes.

11:24

Meeting suspended.

11:40

On resuming—

The Convener: I hope to reach the end of section 8 and propose to stop at that point, because the debate on section 9 will be long and I do not want to cut it in the middle. I am conscious that the majority of committee members will be speaking in this afternoon's debate on the Criminal Justice (Scotland) Bill, so I want to ensure that we get away on time.

Section 7—Provisions supplementing and qualifying section 6

The Convener: Amendment 150, in the name of Stewart Stevenson, is grouped with amendments 151 and 235.

Stewart Stevenson: I do not believe that amendment 150 will cause a huge amount of debate. The intention is to clarify that the suspension of access rights after a planning application will take place only when the work of the developer starts.

Amendment 235 picks up on a phrase that the minister used when we were discussing section 11. He said that many issues are best addressed at local level, and made favourable reference to access forums. Amendment 235 simply seeks to bring the access forum to the table when a statutory undertaker might be undertaking works.

I understand that, in any event, statutory undertakers already have to notify local authorities. During that process, it would not be an unreasonable requirement for them to consult the local access forum so that, where possible, alternative routes could be found. Amendment 235 therefore protects the bill's intention to deliver effective securing of access rights.

I move amendment 150.

The Convener: Bristow Muldoon lodged amendment 151. As he is not here, Scott Barrie will speak to the amendment.

Scott Barrie: I will be brief. Amendment 151 covers the same ground that is covered by amendment 150. Amendment 151 seeks to deal with a scenario in which access to an area of land could be denied for a long time because of development work when perhaps only part of that area would be inaccessible due to the development.

It is obviously tempting to try to address the issues that Stewart Stevenson has raised. What Bristow Muldoon intends is valid. We should not see a huge development as impeding access to the countryside in any way.

Bill Aitken: I can see the intention behind amendments 150 and 151 and, although there is clearly an issue of public safety, to a greater or lesser extent both amendments have merit. I am a little uncertain about the wording of amendment 150, which perhaps lacks clarity. The bill is drafted in such a way that it makes it clear that a change in the status of land affects access rights only once the change has taken place and once the physical building is in progress. I feel that the balance between public safety and continued access is struck rather better in the wording of amendment 151. The issue is fairly tight, but both amendments have credibility. Although I would be happy to support either of them, on balance amendment 151 is slightly more tightly worded.

11:45

Allan Wilson: Section 7(2) provides that when planning consent has been granted for a development or change of use, the land would be excluded from access rights while that development or change of use was taking place. That is a clear position.

The effect of amendment 150 would be to allow the exercise of access rights in those situations until such time as that would interfere with the developer's ability to carry out the development. I understand entirely the intent behind the amendment, but it is not clear how that provision would operate in practice. For example, there may be disagreement about when the exercise of access rights would interfere with the developer's ability to carry out the development. For reasons of public safety, the developer would no doubt wish to adopt a cautious approach, whereas the person wishing to exercise access rights may not have such regard for their own personal safety.

Amendment 151 would allow the exercise of access rights while development was taking place if it was safe or practicable to do so. Again, that is fair enough in theory, but it is not clear how such a provision would be applied in practice. The circumstances could exist in which the developer and the person wishing to exercise access rights may have completely different views on the practicality of exercising those access rights and the effect on public or personal safety.

I sympathise with the aims of amendments 150 and 151, as stated by Stewart Stevenson and by Scott Barrie on Bristow Muldoon's behalf, but the amendments would introduce subjective judgments into an unambiguous provision. What amounts to interference? What is safe? What is practicable? In drafting the bill, we sought to make it clear where access rights can and cannot be exercised.

Not only would the amendments create uncertainty, but I doubt that they would have much practical effect in the circumstances that I have described. In any event, I suspect that the area of land that the amendments would bring within access rights would be small. Land on which building, civil engineering and demolition works are being carried out is excluded under section 6(h)(i). I am not convinced that the introduction of the amendments, open as they are to interpretation, would offer any practical advantage.

Section 6(h) excludes from access rights—mainly for reasons of public safety, with which I know the committee agrees—areas where

"building, civil engineering or demolition works"

are under way or where works are

"being carried out by a statutory undertaker",

which is defined in section 29.

Amendment 235 seeks to qualify section 6(h) by inserting a new provision into section 7 to the effect that access rights would not be excluded unless the statutory undertaker had first consulted the local access forums and local authorities before commencing the work to secure, where possible, an alternative route by which access rights might be exercised during the period when the works were being carried out.

I have some sympathy with the concerns that prompted amendment 235. However, we must think a bit more about how to tackle the problem. Amendment 235 would simply mean that access rights could continue to be exercised where there was no relevant consultation. Strictly speaking, that would create the possibility of people exercising access rights in areas where statutory undertakers were working, on the basis that the statutory undertakers had not fulfilled their consultation requirements. That could be unsafe. I will give further thought to the matter, with a view to lodging an amendment on the provision of alternative routing, where practicable. I will be happy to engage with members in that process.

Having given that assurance, I hope that Stewart Stevenson will agree to withdraw amendment 150 and not to move amendment 235 and that Scott Barrie, on behalf of Bristow Muldoon, will agree not to move amendment 151.

George Lyon: I would like to register my opposition to amendments 150 and 151. The minister has demonstrated clearly that agreeing to those amendments would leave the door open to disputes between those who wanted to exercise access and those who were working on the site. Those disputes, about when an area was safe, would involve subjective judgments. I support the minister in his contention that it would provide greater clarity to leave the bill as it stands.

The Convener: I seek clarification. Let us suppose that a planning application had been made in relation to an area of semi-natural woodland and that permission had been granted, but was subject to scrutiny by the Scottish Executive. In such a situation, I have known it to take up to a year before the local inquiry could be held. When an inquiry is held, the Executive can refuse permission. If that happened, the land in question would have been out of use for a considerable time, even though it might be ordinarily safe. The bill seems to allow for a blanket restriction.

Allan Wilson: I asked the same question, because I had encountered similar circumstances. Section 6(h) covers the provision that we are discussing. It excludes from access rights land on which

"building, civil engineering or demolition works"

are taking place and land on which works are being carried out

"by a statutory undertaker for the purposes of the undertaking".

The provision has been precisely worded to exclude land in that category.

I referred to the prospect of lodging an amendment that would relate to alternative routing. We would want to consider that issue in the more general planning context, not in the specific case of statutory undertaking.

Stewart Stevenson: I welcome the minister's comments on amendment 235, particularly the remark that suggested that there might be even more to the issue than is addressed in amendment 235. I am happy not to move amendment 235 on that basis.

However, I will provide an example to illustrate the need for amendment 150. Section 7(2) creates opportunities for a minority of land managers to abuse their privilege, should they wish to do so. A land manager might identify the potential of a piece of land for development as a golf course and might seek planning permission for that. Having been granted permission, the land manager might start construction of the first bunker of the first hole. For whatever reasons, he might do no further work for the period for which the planning permission remained valid. Access would be denied while such a development or change of use was taking place, in spite of the fact that it would be perfectly safe to exercise access, unless the bunker in my example was extremely deep.

Section 7(2) could be used as a mechanism by which unscrupulous land managers and landowners could thwart the granting of access. I would be relaxed if amendment 151 were to be agreed to rather than amendment 150. I put it to the minister that he has not yet addressed the general point that amendments 150 and 151 deal with.

Allan Wilson: I am happy to address that point, because it reflects a question that I asked officials about work in progress. I will provide a general response that relates to section 14, which we have not yet discussed. Section 14 would prevent anyone from using the bill's provisions for the purposes of denying access. Where the facts demonstrate that the actions that have been taken were taken specifically to exclude access, local authorities will have a duty, to which we have already referred, to take steps to obviate that. That is a matter of fact. The duty on local authorities

would apply to the hypothetical situation that Stewart Stevenson described and to other hypothetical situations that we could foresee. Sections 13 and 14 provide the necessary safeguards to prevent a developer from acting in such a manner with impunity, because they impose a duty on the local authority in that regard. We will return to examine the extensive powers for local authorities that are contained in section 13.

As I have said, amendment 150 would introduce uncertainty and could endanger people who exercised access rights in such circumstances.

Stewart Stevenson: I have listened carefully to the minister and, on the basis of what he said, I seek the committee's permission to withdraw amendment 150. However, I will listen carefully to the discussion on section 14 and, if I am not satisfied at that point, I might wish to return to the issue at stage 3.

Amendment 150, by agreement, withdrawn.

Scott Barrie: I will not move amendment 151, but, like Stewart Stevenson, I will reserve—on Bristow Muldoon's behalf—the opportunity to return to the issue at stage 3.

The Convener: That is noted.

Allan Wilson: We will return to the issue more quickly than that. It will come up during our discussion of section 13 and our proposed amendment to that section.

Amendment 151 not moved.

The Convener: Amendment 256 is in a group on its own.

Scott Barrie: Oh dear. Here we go again. Members will remember that last week I did not move amendment 138, which we had discussed the week before. Amendment 138 was an attempt to define curtilage vis-à-vis privacy. Amendment 256 represents another attempt to address the same issue, which came to light during our consideration at stage 1. In our stage 1 report and in the stage 1 debate, we discussed whether it would be possible to go through a farmyard or a farmholding where there were no alternative routes.

We had quite an extensive debate two weeks ago, on day 2 of our stage 2 consideration, when the minister brought up a number of issues. Let me remind members of what the convener said when she pressed the minister. She said:

"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."—[*Official Report, Justice 2 Committee*, 4 September 2002; c 1706-07.]

That strikes at the heart of what amendment 256 attempts to do, which is to define once and for all how the problem is to be addressed.

I accept the issues that the minister raised on that previous occasion. Committee members who are strongly supportive of the bill keep saying that we should not do anything to diminish the rights that people already have. On the other side, I believe that we should not diminish the rights to privacy that people currently enjoy. We need to get a balance between those two things. Amendment 256 is an attempt at addressing the problem. I am interested to hear what the minister has to say.

I move amendment 256.

12:00

George Lyon: I have concerns about amendment 256, because there is an issue about people crossing through farms. For many of those who work on farms, the farm is their home. It is where they live. Their children play in the yard. The farm is also a working environment, which is filled with dangerous machines and structures, such as slurry pits, on which one would not want people wandering around. I oppose the provision of access rights through farmyards and through what are basically private dwellings.

It seems to me that the simple answer is that, in most cases, people will be able to walk round a farm. I cannot think of an instance in which people could not walk round a farm, albeit that they may need to cross a fence or open a gate to do so. People should be able to circumvent the farm building and the farmyard.

From the points of view of safety and privacy, I oppose the amendment.

The Convener: I do not want to allow a rehash of the debate, but committee members want a solution. The problem is not going to go away.

For my part, I think that amendment 256 is well worded. I take on board George Lyon's point that the exercise of access rights should not be about invasion of privacy and that we need to strike a balance. However, the amendment seems to be carefully worded: the route must have constituted a recognised route, to which the public had access prior to the coming into force of the section.

All that the amendment is asking for is that a suitable alternative route should be provided. It seems to me that all that one need do to comply with the proposed new subsection is to provide an alternative route. It is fundamental to allowing responsible access that we ensure that we provide

for both sets of interests. Unless the minister can give me a good reason why the amendment does not balance both interests, I am minded to support it.

Did Scott Barrie want to clarify something?

Scott Barrie: To respond to what George Lyon said, the key point is that the amendment provides for such access where no other route currently exists. We highlighted the issue in our stage 1 report, in which we said that access to farmyards should be permissible only where there is no alternative route. The rationale behind the amendment is that it would encourage the provision of alternative routes.

George Lyon: I understand fully what Scott Barrie is saying, but I can think of no circumstances in which there would not be an alternative route round the farmyard. I would like examples of where people cannot get on to the land without physically travelling through the farmyard.

The Convener: I think everyone's position is clear. Does the minister want to respond?

Allan Wilson: The convener posed the question why amendment 256 should be opposed. There are two reasons: safety and privacy.

That said, I understand Scott Barrie's concerns that the terms of section 6(b) should be enlarged to give access rights through farmyards and farmsteadings where those give access to other places. I also accept that many popular tracks pass through farmyards and that not all those tracks are rights of way. However, I do not share the view—perhaps it is not held by Scott Barrie—that farmers will necessarily use the bill's provisions as an excuse to prevent the public from using those routes in the future. That would not be in their interests.

Before I turn to the amendment, let me start by explaining why section 6(b) is appropriate. Section 6(b) provides a general exclusion from access rights for all non-domestic buildings and their curtilages. It also makes provision for the privacy of householders, as George Lyon mentioned. Perhaps the committee can see one, but I see no reason why farmers and their families should be denied the privacy that is afforded to other householders. That would clearly be inequitable.

The Convener: If I may stop the minister there, what does he mean by the privacy that is afforded to other householders? Although I own my house, I do not have a great level of privacy, because people march up and down outside my window. Perhaps that is because I live in a city.

Allan Wilson: I am talking about the privacy that is extended by curtilage. That should not be any less for farmers than it is for any other householder.

The Convener: Surely that is relative. My privacy may be a lot less than most people's.

George Lyon: Let me give an example—

Allan Wilson: I have given the answer to the question, so let me continue and then I will be happy to take on board that point.

Even where the farmhouse is apart from the farmyard and privacy is not an issue—this will address the point that the convener made—farmyards are potentially dangerous places, especially if machinery or livestock is present. Everybody knows that and George Lyon has made that point.

We have discussed the issue with the Health and Safety Executive, which has said that it would be concerned about public safety if access rights were extended to farmyards per se. We should not treat those concerns lightly. Many farmyards are busy places. Unfortunately, accidents on farms are increasing and too many of them result in serious injury. I know that the convener will share our concerns on that matter.

Amendment 256 seeks to minimise the difficulties by providing for the exercise of access rights through farmyards and other land excluded by section 6(b) only where there is—to use the terminology of Scott Barrie's amendment—an existing "recognised route". If members will pardon the expression, that introduces a third way to the debate. The intention behind the amendment is that, where there is a history of public use of a track through a farmyard, access rights should be exercisable if no suitable alternative route exists—although George Lyon has questioned whether there would never be a suitable alternative.

However, the wording that is proposed in the amendment is far from clear. What would constitute a "recognised route"? Would that be determined by direct reference to its level of past use? In that case, who would determine whether the level of past use was sufficient to constitute a recognised route? We have just discussed the difficulties that can arise in establishing use of a claimed right of way; the approach taken in amendment 256 could create the same difficulties for this new term, "recognised route".

Alternatively, is a recognised route any existing track, irrespective of whether it has been used by the public in the past? That could provide a right of access to busy farmyards that are full of machinery where the public had no access in the past. I am sure that that is not Scott Barrie's intention, but that could be one definition of a recognised route.

The amendment refers to "suitable alternative" routes. Who would decide whether an alternative

route was suitable? The landowner and the walker might have different ideas of suitability, so that could become a matter for the courts. That approach has no appeal for me and I am not convinced of the need for it. I am not persuaded that there is any reason to suppose that farmers will seek to stop access through farmyards that the public have enjoyed in the past.

How would that be in the farmer's interest? Access rights would be exercisable along the track as far as the farmyard, and again beyond the farmyard. The person who was exercising access rights would have to continue to use those rights to find a way round the farmyard. I accept that that could be inconvenient. Such unmanaged access might not be attractive to the farmer either. Different people would find different routes, which could create difficulties for the farmer. It is more likely that the farmer would continue to allow access through the farmyard, or would identify an alternative route.

It is difficult to envisage a situation in which it would be impossible to identify an alternative route, if the farmer considered that to be better than allowing access through the farmyard. That relates to George Lyon's point. In that context, the term "suitable" introduces dispute about the alternative.

The amendment would apply more widely than just to farmyards, and the same concerns about health and safety, and possibly privacy, would arise elsewhere.

I have doubts about the practicality of the proposal, but I understand why the proposal was made and that, at the extremes, circumstances could be created in which the problems that Scott Barrie describes could manifest themselves. However, the courts do not provide the best way of resolving those issues.

I look to Scott Barrie to define the phrase "recognised route" better. What is the third way? We need to nail that down in the bill, as it is one of the few remaining points of contention among parties with an interest in the bill. If Scott Barrie withdraws his amendment, I will be happy to discuss with him and others the definition of a recognised route, if such a term—a third way—can be better defined.

George Lyon: The minister has put the case well. I will restate my concerns. A farmyard is a place of work and can be dangerous. There are animals and machines around. Animals can react badly to strangers. Animals recognise the people who work with them daily, feed them and walk around the place. If strangers enter, animals can react strongly.

I return to the fundamental issue of privacy. There may be children and family around a farmyard. Would not a member who had a house with a garden object to people using that to access a field behind?

The Convener: That would depend on how big the garden was.

George Lyon: Would you not mind anybody walking through your garden at any time to access a field behind? That is the parallel.

Scott Barrie: It is interesting that another member of the Scottish Parliament—Alasdair Morgan—has a right of access through the garden of my property, but that is another matter.

As I have said both today and on numerous occasions in the past, the purpose is to ensure that the access that people currently have across such property, in the absence of alternative routes, is not diminished or denied by the eventual act.

I accept that amendment 256 is the second attempt at such a provision and it seems to have met with a slightly more positive response than did the last attempt. Perhaps the right way is third time lucky—although I do not want to go too far with the number 3 on this occasion.

We need to resolve the matter, which has exercised both the convener and me. If the minister's offer is to meet him and his officials to come up with a form of words to amend whichever point in the bill is deemed most appropriate, that might offer the best way forward and might satisfy the interests of those who wish to access the land and those who have issues around their privacy.

12:15

The Convener: So we are seeking a fourth way.

Amendment 256, by agreement, withdrawn.

Amendments 152 and 28 not moved.

Amendment 153 moved—[Stewart Stevenson]—and agreed to.

Amendments 242, 29, 235 and 154 not moved.

Amendment 115 moved—[Bill Aitken].

The Convener: The question is, that amendment 115 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)
Lyon, George (Argyll and Bute) (LD)
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 5, Abstentions 0.

Amendment 115 disagreed to.

Amendment 116 moved—[Bill Aitken].

The Convener: The question is, that amendment 116 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)
Lyon, George (Argyll and Bute) (LD)
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 5, Abstentions 0.

Amendment 116 disagreed to.

Amendment 117 moved—[Bill Aitken].

The Convener: The question is, that amendment 117 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)
Lyon, George (Argyll and Bute) (LD)
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 5, Abstentions 0.

Amendment 117 disagreed to.

Amendment 96 moved—[Bill Aitken].

The Convener: The question is, that amendment 96 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)
Lyon, George (Argyll and Bute) (LD)
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 5, Abstentions 0.

Amendment 96 disagreed to.

Amendments 97 and 102 not moved.

Section 7, as amended, agreed to.

Section 8—Adjustment of land excluded from access rights

Amendment 12 moved—[Bill Aitken].

The Convener: The question is, that amendment 12 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)
Barrie, Scott (Dunfermline West) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

AGAINST

Lyon, George (Argyll and Bute) (LD)
Morrison, Mr Alasdair (Western Isles) (Lab)

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

Amendment 12 agreed to.

The Convener: That ends discussion on section 8. We will move on to section 9 when we next meet. We have ended today's consideration of the Land Reform (Scotland) Bill.

Stewart Stevenson: Have we agreed section 8?

The Convener: Amendment 12 has removed section 8.

Just for confirmation, I advise members that stage 2 consideration will continue at our next meeting on 25 September. Announcements about deadlines for amendments will be made in the usual way in the business bulletin.

We have provisionally scheduled an additional meeting, because we are behind our target for stage 2. There will be full consultation with everyone with respect to the arrangements. If members keep in touch with the clerks, we will be able to manage something. I thank members for their attention.

Meeting closed at 12:23.

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