JUSTICE 2 COMMITTEE

Wednesday 9 October 2002
(*Morning*)

Session 1

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JUSTICE 2 COMMITTEE
35th 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)
*Dr Sylvia Jackson (Stirling) (Lab)

*attended

THE FOLLOWING ALSO ATTENDED:

Brian Fitzpatrick (Strathkelvin and Bearsden) (Lab)
Mr Jamie McGrigor (Highlands and Islands) (Con)
Mr Duncan McNeil (Greenock and Inverclyde) (Lab)
Des McNulty (Clydebank and Milngavie) (Lab)
Allan Wilson (Deputy Minister for Environment and Rural Development)

CLERK TO THE COMMITTEE

Gillian Baxendine

SENIOR ASSISTANT CLERK

Irene Fleming

ASSISTANT CLERK

Richard Hough

LOCATION

The Chamber

Scottish Parliament

Justice 2 Committee

Wednesday 9 October 2002

(*Morning*)

[THE CONVENER *opened the meeting at 09:50*]

The Convener (Pauline McNeill): Good morning. I welcome everyone to the 35th meeting in 2002 of the Justice 2 Committee. I ask members to do the usual and switch off mobile phones and anything else that is likely to disrupt the meeting.

There is only one item as part of the convener's report. Bill Aitken, the deputy convener, and I visited Reliance Monitoring Services on Monday. For the committee's benefit, Bill will say a few words about the usefulness of that visit.

Bill Aitken (Glasgow) (Con): I agree that the visit was useful, in that it gave us an opportunity to study the technology involved, to speak to those who run Reliance Monitoring and to carry out an initial review of the operation of the tagging process.

I was extremely impressed with the technology, which seemed both discreet and effective. The problems with it have been limited, which I found encouraging. As members know, the Executive rolled out a couple of pilot projects, one of which was based at Hamilton sheriff court. My recollection is that the liberty of about 69 offenders has been restricted for varying periods and the compliance rate has been high.

The technology is such that Reliance Monitoring can tell when the conditions of the order have been breached to the smallest extent. A degree of slippage has been built into the system, in that an offender is allowed to be up to a total of 90 minutes late, spread over the tagging sentence. However, if he goes over that 90 minutes, he will be reported for breaching his order. Reports are made for every significant incident of lateness.

When an offender is in breach of their order, Reliance Monitoring notifies the sheriff clerk at the relevant court within two working days, which is perfectly satisfactory. However, there has been a problem with the system, as it was taking about six weeks for offenders to be returned to Hamilton sheriff court to face the sheriff and explain the breach. In some cases, by the time the sheriff had dealt with the offender, the sentence—that is, the order—had been completed. In those cases, the offender was given a financial penalty. If the system is to work, there must be a built-in procedure in which those who are in breach are brought before the court within a much tighter time scale. Otherwise, word will get out and the system will break down altogether.

As I said, I was somewhat encouraged by the visit. The technology was extremely impressive and seems to have worked thus far. However, these are early days, given the number of cases in the prosecution pipeline and the fact that the experiment has been of short duration. The jury is out on how effective the system will be over time.

The Convener: We will get a report on our visit, which I am sure members will find useful, given that the Criminal Justice (Scotland) Bill proposes an extension of electronic tagging. We must examine that issue in more detail and the report will give us an opportunity to do so. The visit to the centre alerted me to the fact that we must consider which offences tagging should be used for and whether we should restrict the type of offender involved. The full report will be available before stage 2 of the bill.

As there are no questions, we will move to agenda item 1.

Item in Private

The Convener: Do members agree to take item 4, on consideration of our future work programme, in private?

Members *indicated agreement*.

Petition

Asbestos (PE336)

The Convener: Agenda item 2 is consideration of petition PE336 by Frank Maguire, on behalf of Clydeside Action on Asbestos. I welcome Brian Fitzpatrick, Des McNulty and Duncan McNeil to the committee. I also welcome members of Clydeside Action on Asbestos and the Clydebank Asbestos Group, who are in the gallery.

I remind members of where we are with the petition. This is the seventh time that we have had the opportunity to discuss it. Members will recall that, when we first received it in May 2001, we thought that it was of the highest importance. We have given the petition a high level of commitment since then. It has been on our committee agendas and we have worked on it in the background at various meetings.

Members will recall that we lost our reporters—Mary Mulligan and Margaret Ewing—when they moved on. Since then, because of the petition's importance, Bill Aitken, who is the committee's deputy convener, and I, as convener, have worked on it.

During the summer, Bill Aitken and I attended Lord Mackay's by-order roll court to observe what was happening. That procedure is a direct result of our correspondence with Lord Cullen on speeding up the process. Today, members will have the chance to discuss what work needs to be done. The issue is complex and members have many papers in front of them, which I hope they have had the opportunity to read.

For the committee's benefit, I will crystallise the issues on which we need to make progress today. Members must consider whether they wish to take more evidence. If the committee wishes to do so, we should consider how evidence should be taken. If we want to ensure that our deliberations are completed in the shortest period—I think that we do—we may take the view that we have enough evidence and that we need to do something else to progress matters. Other options in paper J2/02/35/1 include setting up a sub-committee or incorporating evidence taking into the main committee's business.

I have read all the submissions in detail. I do not believe that the conclusions in Lord Cullen's letter would lead to a fast enough process. The timetabling that we were offered as a result of Lord Coulsfield's report has already been delayed—implementation has been delayed from January until April, which is a cause for concern.

Another concern is that, although the new timetabling may be faster—there is some dispute about that—even if it were accepted as it stands, Lord Mackay would no longer fulfil his role. The committee had wanted to pursue the principle of the involvement of the judiciary. We were convinced by Frank Maguire's argument that the intervention of a judge would be extremely helpful and we must also consider that matter.

It would be helpful to consider the appointment of an adviser to pore through all the correspondence and written submissions that we have received rather than have a further evidence-taking session. The difficulty with appointing advisers is the length of time that that takes. However, appointing an adviser would certainly cut down the need to take more evidence.

Having considered the issues and all the papers that are before us, members must come to a firm decision on the definitive point of our report. We have made progress, but should we go further? If so, what measures should we take? I suggest that we should aim to make suggestions to the Executive by December at the latest. We should consider Lord Cullen's point that a procedure that involves heavier judicial intervention—as in the commercial court—will require one more judge. We should consider making a case to the Executive for an additional judge, which would require a regulation to increase the number of judges from 32 to 33.

I have given a brief summary of the work that we have done. I want members now to focus on the action that the committee should take. We must try to stick to a timetable and be firm about where we want to go.

10:00

Bill Aitken: It is important to stress that action has been on-going on the matter, which is of great concern to the committee and which is complex and difficult. It strikes me that, although there is no possibility of a quick fix, we are quite far down the road. We can reasonably expect to have an answer by the end of the year, after which we can lean on the Executive to take certain steps. I believe, from my observation of it, that Lord Mackay's court provides problems as well as a solution. I was disturbed that cases did not seem to be prepared to the extent that I thought necessary. That problem was not exclusive to those acting on behalf of defenders. The Coulsfield recommendations will go some way towards resolving matters, but they will not be implemented properly until April 2003, which is unsatisfactory for the petitioners.

Bearing in mind the complexity of the situation, the committee must ensure that it is properly advised and should, as a matter of urgency,

appoint either counsel or a solicitor to help us through the difficulty. I have ideas on how the issue might be pursued, but the technicalities might mean that those ideas are not practicable within the existing court set-up. We must appoint an appropriate adviser immediately and get the matter moving. We should fix the end of the year as the deadline for resolving the matter.

The Convener: I will offer a further piece of information. One of the issues that arose from our visit to Lord Mackay's court was that, when cases involve a dispute about, or a need to confirm, a person's workplace or employer, it can take up to six months for the Contributions Agency to confirm the details. I wrote to the Inland Revenue on behalf of the committee and sent a copy of the letter to Helen Liddell, the Secretary of State for Scotland. Technically, the matter is reserved, but in this case we were justified in asking whether the process could be speeded up. Lord Mackay suggested that that might assist in some cases.

If no other committee members wish to speak at this point, I will call the other members who are in attendance.

Des McNulty (Clydebank and Milngavie) (Lab): I advocate strongly that we do whatever we can to get the matter into the Executive's hands as speedily as possible. The committee has gathered a substantial amount of evidence and taken on board a lot of information, both written and oral. That information and the committee's point of view must be conveyed clearly to the Executive so that action can follow. That is the top priority.

The committee needs to discuss the speediest way of achieving that aim. Given the limited time scale in respect of evidence gathering, it is incumbent on the committee to resolve that part of the issue and get the matter into the hands of the Executive.

To assist the committee, I undertook some research into the way in which asbestos cases are handled in other jurisdictions. I have produced a short note on the handling of such cases in New South Wales, Australia, where they are dealt with by a special tribunal that is set up under the procedural rules of the New South Wales Supreme Court. Six judges are appointed to hear cases and each case is managed by an experienced judge in order to speed up its determination.

Although the New South Wales system is different from ours and is based on a no-fault compensation system rather than on civil actions against employers or insurers, two lessons can be learned from it. The first is case prioritisation and the time scales within which such cases are dealt with. The second is case management. When a statement of claim is first submitted, the case is given a category, which is dependent on the state of health of the plaintiff. Urgent cases, which include all those involving mesothelioma or patients who are in extremely poor health, are placed in a special category under which they are heard within two weeks.

There is a substantial gulf between the system that operates in New South Wales and what happens in Scotland. In New South Wales, priority cases in which the complainant is seriously ill but death is not imminent are allocated on the basis of a statement about the state of health of the individual. Those cases are normally heard within nine months, which is still significantly quicker than is the case in Scotland. Ordinary cases, in which the patient is suffering from a non-life threatening illness, are also dealt with more speedily than is the case in Scotland. The process of identifying priorities in a system that bases categories on the state of health of the individual is another attribute that I would like to be adopted in Scotland.

The petitioners also highlighted the issue of case management. In New South Wales, the judge has the power to direct action by all parties in preparation for the case to be heard. Members will find in the paper a list of the orders that the judge may make. Those orders are designed to expedite the progress of the case. When the judge has completed the orders and directions, a date for the hearing is allocated. That allows the hearing to progress more speedily.

That example shows that, when the political will exists and resources are made available, cases can be dealt with in a way that is appropriate to the individuals involved and that does not distort the entire judicial system. If such a system can operate in New South Wales, I cannot see why something similar cannot be done in Scotland. That would speed up the way in which cases are dealt with. I hope that the committee will highlight those issues.

Brian Fitzpatrick (Strathkelvin and Bearsden) (Lab): The matter is one for the committee to determine. I will make a number of observations, but first I refer members to my entry in the register of interests and declare my membership of the Faculty of Advocates. I am conscious that the Cullen review and the work that was undertaken by Lord Coulsfield are getting bound up in the more general and lengthy debate about reform of civil litigation. I urge the committee to take that point into consideration.

The issue under debate is not only one of dilatoriness. Serious issues arise about the nature of litigation and what it is to be a litigant, what is to be expected of parties and how litigation is to be conducted. It is well and good that the debate about civil litigation should be heard.

A number of events have interrupted the committee's intention to deal with the matter expeditiously, not least of which was the House of Lords litigation. The convener made a useful suggestion of exploring the possibility of a short piece of work by special advisers. Without wishing to appear impertinent, I will make a suggestion in that regard.

In relation to claims handling and how cases are processed, it is important that a solicitor who is experienced in handling asbestos-related cases should handle the issue. The area has always been a specialist one, although that has not always been recognised by the legal profession. However, the great bulk of the cases are also litigated in the Court of Session—I will come back to the committee at another time in relation to what I think is a rather unusual submission from the Forum of Insurance Lawyers—and will continue to be litigated there. I endorse that. We need to have the cases streamlined and it helps that they are dealt with in a centre that has a body of expertise.

I suggest that the committee contact an advocate who is experienced in the handling of asbestosis cases, particularly with regard to the presentation and the identification of the issues. Having not one but two advocates might create a useful synergy. I suspect that organisations such as FOIL will have a view, which could be dealt with by ensuring that the special advisers are open and transparent in what they do and who they do it with.

Convener, I am delighted that you and Bill Aitken have stressed that progress should be made. Apart from the work of the committee, there is a substantial body of evidence. As a solicitor, advocate and constituency representative, I have had the honour to act for many claimants pursuing damages actions for asbestos-related cases. All the cases place a tremendous strain on the claimants, their families and their legal advisers and representatives. When I represented claimants, I was conscious of the fact that, for many of them, the clock was ticking fast. That is not unique to asbestosis cases, but it is a factor that demands urgency in the response.

I have been in the legal profession since the mid-1980s and know that people have been urging action on this front since then. I have been involved in too many cases, both as solicitor and counsel, where I started out acting for the claimant and ended up acting for the executors, who were usually the widow and family, including children.

Not that long ago, there was a disgraceful period in Scotland's history when insurance companies and their representatives deliberately extended the length of litigation in order to exhaust the claimant's right to solatium. That situation has been addressed only by legislative action, despite the courts deprecating such behaviour over many years. I urge the committee to bear in mind the fact that, although the courts promised to get organised on that front, they were unable to do so without direct legislative intervention and advocacy on the part of various people.

There are ways of shortening the length of time that is involved. In most cases, there is a lengthy pre-litigation correspondence. The traditional position in Scotland is that you are on your own as a pursuer: you must prove your case and the defender is entitled to sit back and say that you have not established various key facts in relation to it—even if they know the key facts, they will not tell you. If justice is about finding out the issues that lead to a just resolution rather than simply being a game, we need to stop that happening. There are long-standing dicta, such as those of Lord Morrison in Docherty's curator bonis, that deprecate the behaviour of defenders who simply sit back and say that the pursuer must establish the key facts.

On the point that was made about trying to secure an additional judge either before appointment or in the course of early appointment, I suggest that that judge might consider using the commercial cause abbreviated procedure, which might reasonably claim to be the godmother or godfather of Lord Mackay's court. Carrots and sticks might be needed to incentivise parties on both sides in relation to disclosure of information and focusing on the issues. Des McNulty touched on that.

It is not on for an insurer, who knows that he employed X, Y and Z, to say, "You have to go to the Contributions Agency," which might say that its records are patchy. At one stage, I almost became an historical archivist of the relationships between shipbuilding companies on the Clyde. I can tell you that there were lots of ups and downs, but it is not on for insurers to say that they do not know what the interrelationships and connections were between shipbuilding companies on the Clyde. That is playing a game rather than delivering justice.

I would support the committee were it to suggest that early work be undertaken on a modified version of the abbreviated procedure in the commercial court. We cannot allow the situation to continue whereby ordinary citizens' experience of the supreme courts is that they are substantially delayed in the process of litigation while a Mercedes-Benz form of litigation is going on in the commercial courts in relation to matters that some people might think are not as significant, even though more substantial sums of money might be involved.

On support for the appointment of an additional judge, we are at the highly auspicious moment of

looking at level 3 spend as we roll out the comprehensive spending review. I urge on the committee the view that resources may need to be found in order to secure an additional judge.

We should not pretend that these cases are in our industrial past. The incidence of asbestos exposure is live and it is rising. We must deal with that. The current situation is unacceptable. I endorse the committee's view that the status quo cannot be maintained.

10:15

Mr Duncan McNeil (Greenock and Inverclyde) (Lab): I will be brief. We value the opportunity to come to the committee and we are grateful to the committee for the time that it has devoted to the issue. We know that this morning the committee is once again busy.

I do not believe that the implementation of the Coulsfield working party proposals represents a proportionate use of judicial time and resources. The life expectancy of mesothelioma victims and the substantial quality-of-life issues that face them demand greater urgency. I do not believe that the proposals overcome the obstacles that those victims have faced for too long in achieving a hearing or a settlement.

I am pleased to hear that the committee will decide whether further evidence taking is required. I hope for the sake of speed that the committee will decide that that is not necessary and that the reports and submissions that it already has will allow it to appoint advisers, as my colleague Brian Fitzpatrick suggested. There is a clear need to get the matter moving, to get it to the Executive and to provide the resources that will ensure justice for asbestos victims, for which they have waited too long.

The Convener: I thank all three members for coming along. Your comments have been very useful. I do not think that there is any disagreement with anything that has been said.

I have the job of summarising the committee's view on the matter, which I shall try to do. I think that the committee is agreed that the response that we have had on the asbestos cases, the urgency of which has been highlighted many times, has been inadequate. Although some progress has been made, it does not meet the expectations that the committee had at the beginning of the process. If we are agreed on that, we can move on.

The next question is whether the committee wants to take further evidence or whether we are satisfied that we have enough information on which to make further decisions.

Bill Aitken: We have sufficient information.

George Lyon (Argyll and Bute) (LD): I agree that we have sufficient information. We now need to take on someone to pull the information together. When the adviser's work is completed, we can make a judgment about whether we need further information to enable us to suggest solutions or whether we have concrete suggestions about how to move the matter on and take it to the Executive.

The issue has been running for a long time and people expect us to do something concrete to give them hope that we can resolve things speedily. I suggest that we appoint an adviser to collate all the evidence. If we then decide that further evidence is needed, we could consider how to gather it.

The Convener: Does the committee agree that we have enough evidence to allow us to move to the next stage?

Members *indicated agreement.*

The Convener: We must now consider the substance of the report and whether we should incorporate Des McNulty's paper. It seems that we agree that our report should say that because of the urgency of the asbestos cases—and of the mesothelioma cases in particular—we need a speedier system with heavy judicial intervention. We keep coming back to that point. If I picked up Brian Fitzpatrick correctly, I understand that the involvement of a judge will mean that paperwork can be cut through when there is a constant denial of basic information. Lord Mackay has been involved at the preliminary stages. A judge will be able to say, "You must know whether this person worked for you," or, "You must know whether you are John Brown Engineering." If the committee accepts that the principle of judicial intervention should be the basis of any new system, we will be able to focus our report. Does anyone dissent from that view?

Members: No.

The Convener: Obviously, this is the first chance that we have had to consider the system in New South Wales. I imagine that we will incorporate Des McNulty's paper into our principles as we consider how to make progress.

Des McNulty: I would welcome that. We need to embrace the two principles of, on the one hand, case prioritisation and timetable setting and, on the other, case management. The adviser could help us with the technicalities of proceeding within the Scottish justice system.

The Convener: That is agreed. Advisers are important. We may lack technical knowledge and advisers can help us to understand things and to speed up our thought processes. We can rely on them when we are not sure what to do on a

particular issue. Advisers also lend independence to the process.

Appointing advisers can be a lengthy process and we have to consider whom we want. Brian Fitzpatrick suggested that appropriate advisers would be someone from the Faculty of Advocates and someone from the Law Society of Scotland. In other words, there should be someone to represent the solicitors' point of view of the process and someone who has dealt with both sides of the issue, perhaps from the Faculty of Advocates.

We should bear in mind the fact that we want to proceed speedily; having an adviser seems to be our best way of doing that. Does the committee agree that we should trawl for advisers? In the process, everyone can nominate individuals and the committee will then choose. We could approach the Association of Personal Injury Lawyers to ask for a nomination of a solicitor, or would members prefer to receive a paper at our next meeting so that we can select the advisers whom we prefer and then approach them?

Bill Aitken: Our next meeting is in three weeks' time.

The Convener: Therefore, we propose to suggest potential advisers to the committee at our next meeting. Obviously, we will have to approach them thereafter. The committee will state its preference and we will take it from there.

Does the committee agree that a focus of the report should be whether we ask the Executive to appoint at least one additional judge?

Bill Aitken: There is a facility for appointing temporary judges. I understand that several appointments were made a couple of weeks ago. Therefore, there is a facility to divert a judge from the pool to deal with the asbestos cases. However, it would be useful to have an additional judge to deal with those matters.

The Convener: We must also clarify the powers of the Justice 2 Committee and the Parliament. Of course, the committee has no powers to do anything other than make recommendations and pressure Parliament and the Executive. The Executive's powers relate to the appointment of judges and deciding the number of judges, which would be done by order. The rules of court are under the jurisdiction of the judges, over whom we have no direct powers. However, as Frank Maguire points out, the Court of Session Act 1988 gives judges their powers.

Mr Alasdair Morrison (Western Isles) (Lab): Pardon my ignorance, but do we recommend the appointment of additional judges to the minister and then he makes the appointments? Do the appointments have to be referred to Parliament? Can Jim Wallace and Richard Simpson sit down for five minutes and decide those appointments?

The Convener: As you will remember, the committee agreed previously that, by regulation, there would be 32 judges. Therefore, another regulation for the appointment of additional judges would come before this committee or the Justice 1 Committee. We would then recommend that to Parliament by a negative or positive resolution—I can never remember which. I am advised that it is usually done by negative resolution. Ultimately, Parliament gets to decide. However, the main debate on the matter would come through the Justice 2 Committee.

Des McNulty: I have two suggestions. First, if there is clear information that an additional judge is required to meet what the committee sets out to do, the two justice committees might consider making a recommendation on that in their stage 2 response to the Finance Committee on the budget.

My second suggestion is on how we might engage the Executive more quickly. The Executive might be receptive to an approach from the committee to appoint advisers jointly to consider how the issue might be taken forward. The Executive might not be receptive to such an approach, but a letter to the minister might draw the Executive into the process of examining how what the committee wants could best be achieved. I am a member of a committee that successfully managed to do something similar. I suggest that approach as a variant on the convener's suggestion.

The Convener: I think that your first point, in relation to stage 2 of the budget process, is a good one. We are discussing the spending review and what the justice department will be spending its money on, so we ought to alert the Executive that we might want funding for at least one additional judge. I do not regard doing that as a problem, if no one else does. The second issue is whether we approach the Executive about the joint appointment of an adviser. I think that we need to discuss that suggestion.

Brian Fitzpatrick: Might I suggest that in the early stages consideration be given to having dialogue, either through the clerk or the advisers, with the Lord President about the deployment of resources within the supreme courts? There are other issues to do with how the business of those courts is organised and prioritised. When there was a will to do so, we moved quickly towards the introduction of the commercial court.

I heard what Bill Aitken said about temporary judges. I do not want to be offensive about them, because I know that many able people are appointed as temporary judges. However, I would

be loth, given the priority and importance that we attach to the asbestos cases, to suggest an ad hoc measure.

Temporary judges exist to fill the gaps that sometimes open up between business and the availability of judges. That can happen particularly in the outer house because the judges are required to give priority to High Court business. Rather than using temporary judges who could come from a variety of backgrounds, we need nominated judges who deal with commercial court cases. The Lord President would have a key role in identifying which judges have the expertise.

This will probably win me no friends in the Faculty of Advocates, but I caution the committee not to commission the faculty to nominate an advocate. The advocate should be one who is experienced in dealing with asbestos-related diseases. The point that I made about the wider argument over civil litigation necessarily impinges on this area. I should not dare to suggest that some in the faculty have a view on that, but I will make that suggestion.

10:30

The Convener: It is a sensible suggestion that any adviser whom we appoint should have that particular experience.

Returning briefly to Des McNulty's second suggestion, I think that at this stage we need to make a distinction between the committee and the Executive. Having said that, I agree that it would be useful to alert the Executive about the work that we are doing on the issue—if that is what Des McNulty is suggesting. I understand that there have been meetings on the issue between the members and the deputy minister, so the Executive will already have an interest and may share our view. The committee would be happy to alert the Executive to the work, which is the right thing to do. In addition, we will make our views known to Lord Cullen. If he takes on board some of the points that we make, that will be useful and further progress can be made.

Lastly, provided that the timetable goes according to plan, the committee has the option of seeking a debate in Parliament. In that way, we could at least establish Parliament's view on the matter, albeit that not all of the matter is Parliament's prerogative to decide. As Duncan McNeil will know from his role in the Parliamentary Bureau, there is a lot of competition for parliamentary time for committee debates. At some time, we also want to get a committee debate on our inquiry into the Crown Office and Procurator Fiscal Service. However, I lay that proposal on the table as a possibility. Getting Parliament to discuss and take a view on the matter could be one way of influencing the process. Before that, we need to get a bit further forward in coming to a definitive view on what we think needs to happen.

I seek comments from members about the timetable for a final definitive report.

Bill Aitken: Clearly, there is a serious degree of urgency about the matter. We were not able to process the issue as quickly as we would have liked because we were waiting for other people. Having now received all the responses that we are likely to get, we should set ourselves the target of resolving the issue by the end of the year.

The Convener: Does anyone dissent from that view?

Members: No.

The Convener: As I explained at the beginning, our having had a variety of reporters on the issue has allowed us to generate correspondence and hold meetings with people. Bill Aitken and I have been fulfilling that role over the past few months. Is the committee content to allow us to continue in that role? If any member has a particular interest, they would be welcome to take over the role.

Is Alasdair Morrison nominating himself?

Mr Morrison: No. Continue as you were, convener.

The Convener: Those are all the decisions that the committee can take at present, but I think that we have moved the issue on quite far.

Let me summarise what we have agreed by taking members through it from the beginning. We have agreed a timetable of the end of the year. We will focus on judicial intervention as the principle of the system. We want a system that will address asbestos victims. Des McNulty's paper looks at the system in New South Wales, which identifies urgent cases, priority cases and ordinary cases. We will appoint two advisers. Members will have some information the next time that we meet. After selecting the advisers, we will use the information that we have received in evidence. We will seek to report in December, with a view to asking the Executive for the resources that we believe are needed to implement a different system. We will notify the parties—Lord Cullen, the Executive and the petitioners—accordingly. They will want to comment on our decisions.

As there are no other issues that have not been covered, I thank Des McNulty, Duncan McNeil and Brian Fitzpatrick for taking the time to share their views with the committee. That has been extremely helpful.

Land Reform (Scotland) Bill: Stage 2

The Convener: I welcome everyone to day 8 of our stage 2 consideration of the Land Reform (Scotland) Bill. We have reached section 24 in what is a marathon consideration of legislation. I welcome Allan Wilson and his officials.

Section 24—Local access forums

Amendments 47 and 48 moved—[Bill Aitken]—and agreed to.

The Convener: Amendment 94 is grouped with amendments 133, 177, 394 and 395. As Murdo Fraser is not here, I presume that Bill Aitken will move amendment 94 in his absence.

Bill Aitken: Amendment 94 is straightforward. We feel that conservation interests should be represented in the new access forums. If the new access forums are to work—we all hope that they will—there must be the widest possible degree of representation from interested parties. That is the simple purpose of amendment 94.

I move amendment 94.

The Convener: Amendment 133 is in the name of Sylvia Jackson, who is not here. Does anyone want to speak to amendment 133?

Members: No.

The Convener: Rhona Brankin is not here either. Does anyone want to speak to amendment 177?

Members: No.

The Convener: Does anyone wish to speak to amendments 394 and 395, which are in the name of Stewart Stevenson?

Members: No.

The Convener: As no other member wishes to speak, I invite the minister to speak to the current group of amendments.

The Deputy Minister for Environment and Rural Development (Allan Wilson): Although the bill provides that local access forums should include reasonable representation of recreational and land-owning interests, it does not specify what the membership of those bodies should be. It is our intention that the guidance that will be issued to local authorities will address that issue. The guidance will include the need to consider conservation and other relevant interests. Access forums will have to take account of the interests of all those who exercise access rights, including those with disabilities. We believe that the matter is better addressed through guidance than through the bill. All interests are to be taken into account when appointing members to local access forums. As I have already explained, all guidance is subject to parliamentary veto.

Section 24, to which Stewart Stevenson's amendments refer, is already clear. Local access forums should include in their membership representatives of those exercising access rights.

On the basis of my assurance that these matters will be addressed through guidance, I hope that Bill Aitken will withdraw amendment 94, and that Sylvia Jackson and those members who favour Rhona Brankin's and Stewart Stevenson's amendments will not move the other amendments in this group.

The Convener: Sylvia Jackson has arrived. Would you like to speak to the amendments in your name?

Dr Sylvia Jackson (Stirling) (Lab): I apologise for my late arrival—I was a wee bit delayed. What amendments are we debating at the moment?

The Convener: Amendment 94, which is grouped with amendment 133. You may speak to amendment 133 and any of the other amendments in the group.

Dr Jackson: Amendment 133 is similar to amendment 94, which refers to "conservation interests". I would like to insert in section 24 a reference to

"the interests of conservation of the natural and cultural heritage"

because those are defined in the bill. The term makes clearer what is meant by this provision.

I am sure that the minister has already made the point that we could add to the bill one interest group after another. However,

"the interests of conservation of the natural and cultural heritage"

are an important group that should be represented on local access forums. Their input could be useful if rare birds were nesting in an area and one wanted to create an alternative route that avoided it. I must declare an interest—I am a member of the RSPB's committee for Scotland.

If the minister is able to give us an assurance—I am sorry if he has done so already—that

"the interests of conservation of the natural and cultural heritage"

will be represented on forums, that will deal with some of the issues about which I am concerned.

Allan Wilson: There is no argument between us. We do not want to list in the bill all the interest groups that local authorities may want to appoint to local access forums. Conservation and natural

heritage interests should be represented on forums, but it is best that that should happen at the discretion of local authorities. Our guidance to local authorities will specify that conservation and natural heritage interests should be represented on local access forums.

Amendment 94, by agreement, withdrawn.

Amendments 133, 177, 394 and 395 not moved.

Section 24, as amended, agreed to.

After section 24

Amendment 252 moved—[Allan Wilson]—and agreed to.

Before section 25

Amendment 305 not moved.

Section 25—Judicial determination of existence and extent of access rights

The Convener: Amendment 99 is in a group on its own.

Bill Aitken: Amendment 99 is perfectly straightforward. We are seeking to specify, by map, the extent of the land in respect of which access rights are, or are not, exercisable. Clearly it is in the interests of everyone that the situation be as clear as possible. I will wait for the minister's comments before I decide whether to press the amendment.

I move amendment 99.

10:45

Allan Wilson: Section 25 makes provision for any dispute as to whether access rights are exercisable over land to be referred to the sheriff, using the summary application procedure. An application would have to describe clearly the land in respect of which it is proposed that access rights are not exercisable. We envisage that in practice any written description would be accompanied by a map; it would be impossible to suggest otherwise, as we have discussed in other contexts. The declaration will refer to the land as described in the application. If the application refers to a map, and we expect that it would, the sheriff could make reference to the map. We do not see the need to make specific provision for that in the bill. Consequently, amendment 99 is unnecessary as it covers something that would happen as a matter of course in courts.

Bill Aitken: I am prepared to accept that.

Amendment 99, by agreement, withdrawn.

Amendment 39 moved—[Scott Barrie]—and agreed to.

Amendment 306 not moved.

Section 25, as amended, agreed to.

Section 26—SNH: powers to protect natural heritage etc

The Convener: Amendment 134, in the name of Jamie McGrigor, is grouped with amendments 198, 104, 100, 199, 200 and 201.

Bill Aitken: Amendment 134 seeks to place the onus on Scottish Natural Heritage to seek landowners' consent before taking appropriate steps to protect the natural heritage of land in respect of which access rights are exercisable. The thinking behind the amendment is fairly simple. Section 26 will enable Scottish Natural Heritage to take steps to protect the natural heritage of land in respect of which access rights are exercisable at present and requires regard to be given to section 3(1)(e) of the Natural Heritage (Scotland) Act 1991. As we all know, that section requires SNH to take into account the interests of owners and occupiers of land while carrying out its duties. It must take account of section 51(3) of the Wildlife and Countryside Act 1981, which requires 24 hours' notice to be given of intended entry to occupied land by an authorised person. The issue is straightforward. We are attempting to protect some of Scotland's beautiful land where clearly we should seek to protect both the buildings and the landscape.

Amendment 100 is a simple requirement for SNH to consult the occupiers and managers of land in relation to any powers to protect the natural heritage under the legislation.

I move amendment 134.

The Convener: Before I call the minister, I point out that if amendment 198 is agreed to, I cannot call amendments 100 and 104. Agreement to amendment 104 would also pre-empt amendment 100.

Allan Wilson: Perhaps a brief recap of the history of section 26 would be appropriate at this juncture.

Members will recall that during consultation on the draft bill concerns were expressed that the creation of new rights of access to all land could impact adversely on the natural heritage in some areas. We have considered that carefully and accepted that that might prove to be the case in a few situations. We therefore drafted section 26 just prior to the introduction of the bill. The section gives SNH powers to protect the natural heritage in that scenario.

We have been giving further detailed consideration to the issue and we are clear that there is not a problem with sites that are designated for their natural heritage value—

special areas of protection, special areas of conservation, and sites of special scientific interest. In those circumstances, SNH has adequate powers—by virtue of the special status conferred by European directives—to ensure that access does not pose a threat to those sites. In the case of the Natura 2000 sites, SNH is under a clear duty to ensure that the integrity of any site is not adversely affected. Section 26 is therefore limited to areas that are not designated for their natural heritage interest. There will be approximately 1,000 Natura 2000 sites by the end of the process.

There are existing measures to provide general protection to natural heritage interests and not just to designated sites. There is legislation in place relating to intentional disturbance of wildlife. As members know, we have plans to introduce regulations relating to reckless disturbance of wildlife and there is legislation in place that provides protection for plant life. In addition to all that legislation and forthcoming legislation, the code will include guidance on responsible exercise of access rights in respect of conservation of natural heritage interests. All that taken together suggests that there is no great need for more powers in the bill in respect of nature conservation. We consulted Scottish Natural Heritage on that question. We asked whether it wished to have more powers under the proposed legislation, but it took the same view as us; that there are sufficient powers in the bill and in other legislation to protect natural heritage interests.

That is why we lodged amendment 198. The effect of the amendment would be to limit the new powers that will be made available to SNH by the bill—powers that deal with issues such as extension of access rights and putting up and maintaining notices to warn people who are exercising access rights of any adverse effects that their presence might have on the natural heritage. Those powers will be reinforced by making it clear in section 2 of the bill that anyone who disregards such a notice will be considered to be acting irresponsibly and will, thereby, be excluded from exercising their access rights. That is a reasonable and balanced approach. I will not therefore support amendment 104, although I understand fully why it was lodged.

I hope that that explanation of how we have come to our position in conjunction with SNH will lead Sylvia Jackson not to move amendment 104 and to favour our approach. That approach has been taken in conjunction with the forthcoming wildlife protection bill, which will increase protection measures extensively. Some of that bill's measures on wildlife crime will probably, in due course, be considered by the committee. The wildlife bill will toughen up measures to protect wildlife from the criminal activities of those who seek to profit from stealing eggs and so on.

Amendments 134 and 100 would both require SNH to involve landowners before taking action under section 26. Amendment 100 would require SNH to consult landowners and amendment 134 would require SNH to obtain landowners' consent. I believe firmly that the decision on whether to act under section 26 should lie with SNH—in my opinion, that is what SNH exists for. If SNH considers action to be necessary, it should not be required to obtain landowners' consent. The introduction of such a requirement could undermine the whole of section 26.

Nor am I attracted to imposing a requirement on SNH to consult. Where practical, SNH should and would consult. SNH has an agreement with the Scottish Landowners Federation, as Bill Aitken will be aware, and with the National Farmers Union of Scotland, as George Lyon will know, that covers the procedures to be followed by SNH officers before they enter land. Those extant agreements between the parties will apply equally to the exercise of SNH's powers under the Land Reform (Scotland) Bill as to its powers under any other legislation.

However, one can see foresee instances, such as in efforts to catch wildlife criminals, in which SNH would need to act quickly without necessarily going through a consultative process. I expect that the existing agreements between SNH and the SLF and the NFUS will continue to operate, so I see no need to put on the face of the bill a statutory requirement for SNH either to obtain consent or to consult beyond the existing requirement to do so. I expect SNH to follow the existing provision for consultation in any event.

The other substantive amendment in the group is amendment 199. Just as there might be situations in which it is necessary to warn people who are exercising access rights that their presence could adversely impact on the natural heritage, such situations could also arise in respect of the cultural heritage. For example, if someone was out exercising their access rights and inadvertently came across an archaeological dig, one could imagine that they might disturb the process and thereby prospectively harm our cultural heritage. Amendment 199 will provide Scottish ministers with a parallel power in respect of cultural heritage. In practice, that power would be exercised on ministers' behalf by Historic Scotland, which is our agency on cultural matters.

Hence, amendment 199 and consequential amendments 200 and 201 would extend the power to protect our cultural heritage as well as our natural heritage.

Dr Jackson: Amendment 104 is a probing amendment. If I heard the minister correctly, he

said that SNH already has the duty to cover all the areas that are listed in amendment 104, so there is nothing further to say.

The Convener: Do any other members wish to speak?

George Lyon: I welcome the minister's explanation of the current process by which SNH accesses land in order to carry out its work. I was not aware of the agreement, and I thank the minister for clarifying matters.

The Convener: Before I ask Bill Aitken to wind up, does the minister want to add anything?

11:00

Allan Wilson: No—other than to say that we will be strengthening the process by the provisions that will be in the new wildlife protection legislation.

Bill Aitken: I have listened to the minister with great care and I am sure that his intentions are the best, as always. However, I am not entirely satisfied that the bill as it stands offers sufficient protection. I will therefore press my amendment.

The Convener: The question is, that amendment 134 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)

The Convener: The result of the division is: For 1, Against 4, Abstentions 0.

Amendment 134 disagreed to.

The Convener: Amendment 198, in the name of the minister, has been debated with amendment 134. If amendment 198 is agreed to, I cannot call amendments 104 and 100.

Amendment 198 moved—[Allan Wilson]—and agreed to.

Amendments 199 to 202 moved—[Allan Wilson]—and agreed to.

Section 26, as amended, agreed to.

Section 27 agreed to.

Section 28—Application of section 15 to rights of way

Amendment 50 moved—[Bill Aitken].

The Convener: The question is, that amendment 50 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)

The Convener: The result of the division is: For 1, Against 4, Abstentions 0.

Amendment 50 disagreed to.

Section 28 agreed to.

After section 28

Amendment 51 moved—[Bill Aitken].

The Convener: The question is, that amendment 51 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)

The Convener: The result of the division is: For 1, Against 4, Abstentions 0.

Amendment 51 disagreed to.

Amendment 52 not moved.

Section 29—Interpretation of Part 1

Amendment 203 moved—[Allan Wilson]—and agreed to.

The Convener: Amendment 135, in the name of Jamie McGrigor, is in a group on its own.

Mr Jamie McGrigor (Highlands and Islands) (Con): Amendment 135 seeks to maintain the status quo in respect of non-tidal and tidal rivers, so that there is no change in the relevant rules and regulations.

I move amendment 135.

Bill Aitken: Mr McGrigor raises an interesting point about the difference between tidal and non-tidal rivers. For example, from Perth, the River Tay—I am sure that the minister is familiar with it—becomes tidal. Amendment 135 seeks to make it clear that the bill refers only to the non-tidal parts

of a river. Otherwise, there will be differing interpretations of what is and is not permitted and I would have thought that, in many cases, such interpretations would be governed by commercial interests. Section 29 contains a serious loophole and unless the minister can demonstrate that he has closed that loophole elsewhere, amendment 135 should be agreed to.

Allan Wilson: The overwhelming power of Bill Aitken's argument has persuaded me that we should support the definition that is contained in amendment 135. That would mean that section 29 would comply with section 123 of the Civic Government (Scotland) Act 1982, which is an important consideration. I am happy to accept Mr McGrigor's amendment.

Bill Aitken: I am pleased that the minister was persuaded by Mr McGrigor's eloquence.

Mr McGrigor: I am delighted that the minister accepts amendment 135, which will be to the benefit of the bill.

The Convener: The minister has made Bill Aitken's day.

Amendment 135 agreed to.

Amendment 204 moved—[Allan Wilson]—and agreed to.

Section 29, as amended, agreed to.

The Convener: That completes our consideration of part 1 of the bill—members may wish to celebrate now—and our consideration of the Land Reform (Scotland) Bill for today. We still have another two parts of the bill to get through, but we have completed a substantial part of it. I thank Allan Wilson for spending so much time with us. We will meet again after the recess to deal with part 2 of the bill.

I remind members that we will continue after the recess with a scheduled meeting on Wednesday 30 October, but members will be aware that we are trying to schedule additional meetings in order to meet our timetable.

George Lyon: Will there be a meeting on Tuesday 29 October?

The Convener: We will discuss that during our consideration of the forward work programme.

We now move into private session.

11:08

Meeting continued in private until 12:15.

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