

# **LOCAL GOVERNMENT AND TRANSPORT COMMITTEE**

Tuesday 3 October 2006

Session 2

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## **LOCAL GOVERNMENT AND TRANSPORT COMMITTEE**

**24<sup>th</sup> Meeting 2006, Session 2**

### **CONVENER**

\*Bristow Muldoon (Livingston) (Lab)

### **DEPUTY CONVENER**

\*Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP)

### **COMMITTEE MEMBERS**

Dr Sylvia Jackson (Stirling) (Lab)

\*Paul Martin (Glasgow Springburn) (Lab)

\*David McLetchie (Edinburgh Pentlands) (Con)

\*Michael McMahon (Hamilton North and Bellshill) (Lab)

\*Mike Rumbles (West Aberdeenshire and Kincardine) (LD)

Tommy Sheridan (Glasgow) (Sol)

\*Ms Maureen Watt (North East Scotland) (SNP)

### **COMMITTEE SUBSTITUTES**

Mr Bruce McFee (West of Scotland) (SNP)

John Farquhar Munro (Ross, Skye and Inverness West) (LD)

Dr Elaine Murray (Dumfries) (Lab)

Murray Tosh (West of Scotland) (Con)

\*attended

### **THE FOLLOWING GAVE EVIDENCE:**

Alison Douglas (Scottish Executive Justice Department)

Patrick Down (Scottish Executive Justice Department)

Ms Margo MacDonald (Lothians) (Ind)

Tavish Scott (Minister for Transport)

Damian Sharp (Transport Scotland)

### **CLERK TO THE COMMITTEE**

Martin Verity

### **SENIOR ASSISTANT CLERK**

Alastair Macfie

### **ASSISTANT CLERK**

Rebecca Lamb

### **LOCATION**

Committee Room 6



## Scottish Parliament

### Local Government and Transport Committee

*Tuesday 3 October 2006*

[THE CONVENER *opened the meeting at 14:03*]

### Item in Private

**The Convener (Bristow Muldoon):** Under our first agenda item, I ask members to agree to take in private item 4, which is consideration of the content of our stage 1 report on the Transport and Works (Scotland) Bill. It is normal practice for the committee to discuss draft reports in private. Do we agree so to do?

**Members** *indicated agreement.*

**The Convener:** I intimate that we have received apologies from Tommy Sheridan, who will not be at today's meeting.

## Transport and Works (Scotland) Bill: Stage 1

14:04

**The Convener:** I welcome to the committee the Minister for Transport, Tavish Scott, who is supported this afternoon by Frazer Henderson, who is the head of the bill team, Andrew Brown and Catherine Wilson, who are solicitors in the Scottish Executive, and Damian Sharp, who is the head of major projects for Transport Scotland.

Minister, I invite you to set out the case for the Transport and Works (Scotland) Bill.

**The Minister for Transport (Tavish Scott):** It is important to recognise that there has been a positive response to the bill. We all recognise the benefits of removing transport projects from the private bills process, particularly those of us who have sat on private bill committees.

One of the key considerations behind the bill is that the new process should not take place in a vacuum. It will sit within the existing processes of our parliamentary democracy. If the bill is enacted, transport proposals will continue to be subject to scrutiny, from the strategy documents, beginning with the strategic projects review, through to the infrastructure investment plan and culminating, for nationally significant projects, in the national planning framework. The input of the Scottish transport appraisal guidance, which I understand you have been discussing, will be vital in evaluating projects that involve the investment of public money. As you may recall, I previously announced a review of STAG. That review is now under way and it is due to finish in June 2007. MSPs will, of course, have an opportunity to influence the final proposals.

We expect the bill to build on the existing processes to ensure that a full and thorough appraisal process takes place involving the local community, local MSPs and, where appropriate, the Parliament. The onus will be on promoters to ensure that engagement takes place with the right people at the right time, and they will be held to account for that. Although anyone will be able to promote a project under the bill, the parties that are most likely to do so are Transport Scotland, Network Rail and the regional transport partnerships.

To pick up a point that David McLetchie made in a previous meeting of the committee, that front-loading process might involve additional investment and effort at the start but, in return, we expect that the legislation will enable us to provide an efficient and structured authorisation process once an application has been submitted.

As you are aware, the bill distinguishes between local and nationally significant projects. I understand that there has been some confusion about the distinction between those terms. However, the definition of nationally significant projects will become clear during stage 2 of the Planning etc (Scotland) Bill and as a result of the consideration of the national planning framework. It might be helpful if I say that transport projects that are currently being taken through the capital programme, such as the M80 project and the Edinburgh airport rail link, would be examples of nationally significant projects.

I have already given evidence to the Procedures Committee in which I focused on the role of the minister and the attached accountability. I do not intend to repeat those arguments, but I will make a final point in that regard. All of the transport-related private bills have concerned partnership agreement commitments, which means they have taken forward Executive policy. I concur with Fergus Ewing's point that a Government has a right to promote its own policies as it has a mandate from the Scottish people to do so. Of course, the detail of the projects must be scrutinised, and the bill will ensure that independent scrutiny takes place.

As you are aware, the bill gives local authorities, national park authorities and those who are affected by compulsory purchase a right for their objections to be heard at an inquiry. I have followed the discussions of this committee and the evidence of witnesses and I am pleased to advise that I shall lodge an amendment at stage 2 to extend that right to be heard at an inquiry to navigation authorities, Network Rail and regional transport partnerships. I hope that that will address some of the concerns that have been expressed.

I hope that members recognise that the bill balances the priorities of efficiency and natural justice. I hope that we achieve a better process for the delivery of important transport projects on behalf of the people we serve.

I am happy to answer questions.

**Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP):** There is a measure of consensus about the bill, and I am pleased that, following the submission of evidence to us, Network Rail, the regional transport partnerships and the navigation authorities are to be statutory consultees. The evidence that we heard from Shetland Islands Council was probably instrumental in ensuring that the navigation authorities gained that status.

The minister is quite correct: Governments should be able to promote their own policies. You will appreciate that, in advocating that, I am thinking beyond next May.

The fundamental point about the bill is the timing of projects, which I am sure concerns everybody. We must have consultation, and it should be front-loaded. We must involve the public as well as those who are directly involved in the process. Projects take an awful long time. Personally, I feel that they take too long. How will the bill affect how long major national projects take to deliver? Will the bill do enough to deliver such projects within a reasonable time, given their strategic importance to Scotland?

**Tavish Scott:** We might reflect on the other evening's members' business debate, which was secured by Bill Butler, on the Glasgow crossrail project. I said that I was from the school of decision making that Charlie Gordon illustrated in his speech. It might be strange for Charlie Gordon, Fergus Ewing and I all to agree, but we share a concern about the length of time that projects take to get through the process and come to fruition. I imagine that it is fair to say that all members agree. I would not be promoting the bill if I did not believe that we could achieve a better process for future Governments—of whatever persuasion. It is crucial that the bill does that.

I am clear about the importance of front-loading the process, which David McLetchie and other members were right to raise earlier. The nuts and bolts of sorting out projects must happen at the beginning. It is in the Government's interests—whoever is in Government—to ensure that the process is as robust as it can be, taking into account the natural concerns of communities and individuals' rights to object to projects that they do not like, while dealing with as many issues as possible up front. There will be a bit of work to do on how best to manage the first project to go through the new procedure, but that is the essential core of making a more efficient process that delivers the time savings that we are seeking and provides a better process for the promoter and the Government in seeking to meet their transport objectives.

**Fergus Ewing:** If the bill is enacted, a major change—perhaps the major change—will be the replacement of the work of ad hoc committees of MSPs with the involvement of the Scottish Executive inquiry reporters unit, or SEIRU. That will mean that the delays that result from MSPs being restricted to meeting on a weekly cycle, broadly speaking, with various gaps for recesses will be avoided, as SEIRU will presumably be able to deal with an inquiry in a continuous period of one to three weeks. Is that your understanding of the main way in which we will make time savings in the national projects that come under the bill?

**Tavish Scott:** That is a reasonable and fair assessment of how time efficiency can be brought into the process. It is important to reflect on the

fact that in carrying out its work, the inquiry reporters unit must ensure—and this is the Government's job—that the resources are available, in particular the skilled men and women who are able to conduct assessments.

At the moment, we put an inordinate amount of pressure on colleagues of all parties who are members of private bill committees. We need to strike the right balance between preserving Parliament's absolutely appropriate right to scrutinise the Government's transport project intentions and providing a much more effective mechanism for dealing with them.

The other side of that—which I am sure is behind the line of questioning—is that, with roads projects, Government decides to build a road and, subject to the appropriate statutory processes, simply gets on with it, no matter how large the project might be. It is important to achieve some consistency in our handling of transport projects.

14:15

**Fergus Ewing:** Indeed. The consensus continues apace, minister.

Is SEIRU adequately resourced to cope with the task it will face?

**Tavish Scott:** Yes, it will be. It is Government's job to ensure that that happens. By the time the bill is an act of the Parliament—which will be, of course, subject to parliamentary approval—SEIRU will be in a position to take forward the work that it needs to take forward.

**Fergus Ewing:** Finally, I want to focus on the nuts and bolts of SEIRU's approach to rail projects. How will it acquire expertise in a field in which I assume it has not been involved previously? Will it establish a unit of specialist advisers who are familiar with the delivery of rail projects? If that is not part of the plan, is there a plan to equip it with the expertise that will enable it to come to a reasoned and fair judgment in each case?

**Tavish Scott:** Yes. The plan is to bring in appropriate expertise. That has been built into SEIRU's operating business plan. The situation is equivalent to the way in which we developed expertise in Transport Scotland, for example, by bringing in highly able men and women to scale up the organisation to cope with the commercial pressures for which the organisation has responsibility and to deliver an extensive programme of transport improvements. Mr Ewing can take it that we plan to ensure that the necessary expertise is in place to allow SEIRU to do its job properly.

**Fergus Ewing:** I might come back to you later with a question about heritage railways, but I will leave the matter there for the moment.

**Mike Rumbles (West Aberdeenshire and Kincardine) (LD):** A number of heritage railways, including the Deeside light railway in my constituency, have contacted us about the bill. I am quite used to dealing with legislation in which ministers try to gather powers to themselves. However, with section 21 we are being asked to agree that powers—in this case, the power to make light railway orders—be taken away from the Scottish ministers. That is unique in my experience of considering legislation. The irony is that the light railway companies that have contacted the committee are concerned about ministers losing that power. As I understand it, the costs under the current system are quite low, whereas the companies will incur major costs under the system prescribed in the bill. What is the purpose of section 21? Why are you taking away that power? Moreover, will you give us more information about costs?

**Tavish Scott:** The straight answer to Mike Rumbles's first question is that we seek to treat all transport developments in the same way. The situation is similar to our management of road versus rail in the few brief years since 1999. Our focus is on ensuring that, as far as possible, we put in place the same procedures to deal with all transport developments. As with any other railway development, heritage railway projects can raise issues of noise, vibration and disturbance.

It is fair to say that not all the heritage railway proposals that I have seen are for rural areas. Some of them would impact on suburban and urban areas, so noise and vibration issues might be more important in particular localities. That is another good argument for dealing with heritage railways in the same way as we deal with other railway developments.

I appreciate Mr Rumbles's point about cost. The fees will not be set until next year, but I assure the committee that they will not be greater than they are currently. It is important that we reflect that as we continue our consideration of these matters, which we will do during the course of the next year.

**Mike Rumbles:** I am delighted to hear, minister, that there will not be any increase in costs for companies in relation to the Light Railways Act 1896. That addresses the fundamental point, and it is an excellent outcome.

Several witnesses have suggested that there is a problem with independent scrutiny when ministers can choose to go against the advice of a reporter, for example when an independent reporter considers a scheme and reports back to

the minister, either approving or rejecting it, and the minister overturns or does not recognise that advice. There is therefore an accountability issue. Several witnesses have suggested that, in such cases—and SEIRU reported that it happens in 5 per cent of cases, which is quite a lot—the decision should be referred to some sort of parliamentary committee. Do you agree?

**Tavish Scott:** No, I do not. Five per cent of cases is very low. It does not constitute a lot of transport projects in any one period. However, I understand Mike Rumbles's point and I assure him that the issue was debated extensively at the Procedures Committee.

My answer is similar to the one I gave to Mr Ewing earlier. We propose to put in place a process that will be front-loaded with the detail and core of the project, which will be gone into in advance. Subject to the definition of "national significance", a project such as the Edinburgh airport rail link, for example, would go through several levels of parliamentary scrutiny at a strategic level in addition to detailed assessment at local level, involving local communities, MSPs and statutory bodies.

The Government's transport proposals will therefore go through a number of different stages of one form or another, including direct parliamentary scrutiny and the local assessment of projects, all of which means that a considerable amount of detailed scrutiny will be done. Given the front-loading exercise and the significant top-line parliamentary scrutiny in the context of the national transport strategy, the strategic projects review and the planning framework, for example, as well as the run-of-the-mill members' business debates, parliamentary questions, and general debates, it will simply not be necessary to have yet another process. I know that it might be a forlorn hope, but I hope that the 5 per cent figure will come down because of the amount of work that will be done at the start of each project. We—or future ministers—might be able to reduce the number of cases in which ministers overturn the recommendations of a local inquiry. It is clear that there should be a right to a local inquiry, which will be an important part of the process.

**Mike Rumbles:** I understand that entirely in the context of projects that are of national significance, because such projects would come back to the Parliament for scrutiny, so there would be public accountability. However, if the development was not of national significance, the minister would appoint a reporter who would simply report to the minister. The minister could say yea or nay to the development without the matter coming back to the Parliament. Accountability is the nub of the issue. For projects that are not of national significance, should not someone else consider

the 5 per cent of cases in which there is a dispute between the reporter's findings and the minister's decision?

**Tavish Scott:** As I said, such an approach would put in place another hurdle for projects to overcome. We should distinguish between projects that are nationally significant and projects that are locally significant—

**Mike Rumbles:** I am not talking about nationally significant projects.

**Tavish Scott:** A locally significant project would undoubtedly be included in the local transport strategy that the local authority and the regional transport partnership take forward. If a local authority promoted a proposal for a road, it would have to overcome a considerable number of hurdles in relation to the local inquiry. In addition, the minister with responsibility for transport would have to satisfy himself or herself that the correct procedures had been followed locally. If the reporter found against the local authority and the case was referred to the minister for a decision on whether to ratify or overturn the reporter's findings, the minister would be accountable to the Parliament for their decision. As Mr Rumbles knows from his experience in the Parliament, members rightly hold ministers to account, through all the mechanisms that we know and love.

**The Convener:** If the inquiry reporters unit was considering the detail of a project to which the Executive was committed, could the reporter's remit make absolutely clear to the public that the Executive supported the project, so the reporter would consider not whether the project should go ahead but whether details of the project should be amended before it could go ahead?

**Tavish Scott:** From constituency work, we are familiar with cases in which the inquiry reporters unit has dealt with planning applications. It is clear that it is a quasi-judicial process. While you and I, convener, as members of the Scottish Parliament can write to the reporter to say, "Our constituent has written to us on this matter and we would be grateful if their comments were taken into account," reporters can airily chuck our letters into the bucket if they so choose. The process is independent, as it should be.

Reporters will properly assess the detail of projects. If the Parliament endorses strategic documents or a planning framework that includes proposals for a significant new railway in Scotland, the reporter will be bound to take that into account—as they currently do. For example, if the Government intends to build a road, the reporter who considers the project takes account of that intention. The reporter considers details such as whether the Government followed the correct procedure and whether environmental assessment



was properly undertaken, as well as aspects of the project that independent objectors or statutory consultees have questioned. That is a fair assessment of the manner in which engagement will take place in the proposed new system.

14:30

**Ms Maureen Watt (North East Scotland) (SNP):** We have asked most witnesses what they see as a project of national significance. What do you understand by the term “national significance”? What is your definition of it? In what circumstances will ministers use their discretionary powers?

**Tavish Scott:** I appreciate that this is not the answer that is looked for but, as I said, that matter will be considered in Parliament as the Planning etc (Scotland) Bill is scrutinised, particularly at stage 2. Transport projects such as the M80 and the Edinburgh airport rail link—to name but two that are in our capital transport programme—are nationally significant. I cannot add to that today, because the precise definition is ultimately a matter for the Planning etc (Scotland) Bill. As I am sure Maureen Watt fully appreciates, the definition affects not only transport but infrastructure spending throughout the Executive.

**Ms Watt:** What steps have officials taken to ensure that the Planning etc (Scotland) Bill and the Transport and Works (Scotland) Bill are complementary rather than contradictory?

**Tavish Scott:** That is a fair question. Officials have engaged at an appropriate level to ensure that transport is thought about carefully in relation to how the definition works. That will continue as we consider the Planning etc (Scotland) Bill at stage 2.

**Ms Watt:** It has been said that the Transport and Works (Scotland) Bill is the English act with bells and whistles. Apart from section 21, the bill will give ministers more powers than the English act does. Why was it thought necessary to do that?

**Tavish Scott:** What I will say might be slightly unpopular south of the border, but I think that we have produced a better model. We have learned from how the system has worked at Westminster and we have taken advice on it. The bill team has contacted colleagues in the south to learn from the experiences of the Westminster mechanism.

We have sought to put in place a system that we hope will reflect the essential points of the strategic overview of Government transport spending and transport projects while using front-loading to ensure that more work is done earlier to iron out the problems that we know from our private bill committee experience can emerge. I

hope that time will reflect that we have made a reasonable job of that, but the proof will be shown in how future Governments progress transport projects after next year.

**Ms Watt:** Are you willing to share examples of the English legislation not being strong enough?

**Tavish Scott:** I cannot be drawn on that today, but I would be happy to reflect on that in correspondence, if that would help.

**Michael McMahon (Hamilton North and Bellshill) (Lab):** I will ask about triggering of public inquiries. I cannot—given our experience and the reason why the bill was introduced—conceive of a nationally significant transport measure that would attract no objections. The idea that we could dig a sod of ground anywhere and Friends of the Earth would not object is beyond the realms of possibility. However, should no objection be made, the bill will give the minister discretion to call in a proposal. If a transport proposal were nationally significant, would not it be better for the minister automatically to require a public inquiry?

**Tavish Scott:** That is a judgment call—ministers of the day would have to make an assessment based on the circumstances. We have achieved the right balance in leaving the potential for a minister simply to move a project forward in the circumstances that Michael McMahon described. That is probably the right judgment call in those circumstances.

I share Michael McMahon's view. It is difficult to imagine a major project—particularly, dare I say it, a road project—to which no objection would be raised. Last week, there were objections from curious quarters to a rail project. However, I think that we have achieved the right balance. We have left some flexibility in the system. We must also remember that we all want projects to progress more quickly. I suppose that a minister might come under slightly curious attack for putting in place an unnecessary process, but we have made a judgment call and have suggested that approach to Parliament.

**Michael McMahon:** I am not greatly concerned by the matter, but I want to press it further because clarification will be worth while. Why would an objection by a national park authority, local authority or landowner who is directly affected by proposals automatically trigger an inquiry, whereas a discretionary approach would be taken to an objection by the Scottish Environment Protection Agency or Scottish Natural Heritage?

**Tavish Scott:** The process would be triggered in compulsory purchase cases in which the promoter was seen in law to be removing a right.

**Paul Martin (Glasgow Springburn) (Lab):** I want to ask about the evidence that we heard from objectors last week on their experiences of processes. Do you accept that parity between objectors and promoters does not exist because much more significant resources are available to promoters than to objectors? Is there a way by which we can ensure that there is parity, or movement towards it, that will allow objectors to engage meaningfully in the process?

**Tavish Scott:** That is a genuinely difficult question. Paul Martin is right—obviously, if the Government is promoting a major rail or road project through Network Rail, Transport Scotland or a regional transport partnership, it can spend a lot to promote the relevant bill.

There are two important issues. First, front-loading the exercise to try to sort out issues is important—I am sorry to labour that point. Secondly, the potential for an inquiry independent of Government is important. No matter how much money Transport Scotland, for example, might have invested in a project, an inquiry must fully consider how properly the organisation had conducted itself in assessing a business case or part of a project. We can certainly give the committee more details about the process. It is important that the reporter be adequately resourced to do their job properly. Questions have been asked about that.

**Paul Martin:** You mentioned front-loading the process. Objectors have expressed to us concern about the independence of processes. They are concerned that the outcomes of work will be contaminated because the promoter will be fiercely in favour of the project in question and will seek the outcome that it has proposed.

**Tavish Scott:** As the mechanism comes into being—subject, of course, to Parliament's approving it this year—the Government will look closely at the first stages of its introduction. We have been clear about that. If a transport project is being promoted by Network Rail, an RTP or Transport Scotland, the Government will closely check the adequacy of the process. If Paul Martin MSP was deeply unhappy on behalf of his constituents about something that was being done in that process I am sure that he would not be slow to raise it in Parliament. The minister of the day would receive direct representations and be under direct pressure.

**Paul Martin:** During the preparation processes, if an organisation expressed concern, you would see yourself as the adjudicator and say that you had received information that the environmental study had not been carried out properly and so wanted to adjudicate. Would that happen before or after the reporter came in?

**Tavish Scott:** That would be part of the normal democratic process. Ministers are rightly accountable to Parliament, certainly in relation to transport projects that the Government is promoting. If the front-loaded process was seen as being deficient, it would be for the minister to ensure, and to demonstrate, that that was not the case. We need to strike a balance between what I might loosely call ministerial meddling and driving hard to streamline the process to make it more efficient, so that the Government of the day delivers the transport projects that it wants to deliver and has a mandate to do so. If an individual or group felt aggrieved that the process at the beginning of the project design was not adequate, the mechanisms that I have described would be available to them and, undoubtedly, a minister would be accountable.

**David McLetchie (Edinburgh Pentlands) (Con):** I was interested in the minister's remarks in response to Paul Martin's question, given our experience last week when we heard from objectors to the tramline projects. You said that, under the new system of inquiries for major projects that you envisage, the reporter would have to examine the business case for a particular proposition. We do not have a final business case for the tramline projects—we were supposed to get one in December, but I believe that it will not be unveiled until April next year, which is more than a year after the bill completed the parliamentary process. When would the reporter examine the business case?

The viability or otherwise of business cases depends, in a sense, on how much free, or public—we know that it is not free—money is going into a project. If you are going to give only £500 million to Edinburgh trams and the promoter has to raise another £200 million, that will materially affect whether the business case is viable. How can a reporter assess a business case without knowing the project's funding commitment? It strikes me that, if he did not know that, he would not be able to do his job properly.

**Tavish Scott:** I am sorry; I should not mislead the committee. It is not the reporter's job to do what I expect Transport Scotland to do on the capital transport programme, which it will do whoever is minister for transport. It is Transport Scotland's job to ensure that the business case on every capital transport project is correct, robust and does what it says on the tin.

I am sure that, during the course of any capital transport programme, transport ministers will continue to make announcements such as the one that I made on 16 March on our numbers and timescale for every capital transport project.

Damian Sharp could give Mr McLetchie full details of how the process works. I have given a

flavour of it in numerous discussions in this committee and in private bill committees.

I did not mean to mislead the committee, but by the time a project arrives at the door of an inquiry, the ministers of the day would have signed off the formal business case, which would be the subject of a parliamentary record. As I have, I hope, said all along, if a material change was to put the business case in doubt I would expect, as happens now, Transport Scotland, through Damian Sharp's team, to bring me information, which I would lay before this committee and the Finance Committee. Thankfully, that is not the case with any of our capital transport projects. There is a big difference between the business case process that Transport Scotland carries out and what a reporter would do in assessing an element of the business case, perhaps because an objector had raised an objection about an aspect of the business case, such as traffic numbers. I am sure that a reporter would consider that matter.

14:45

**David McLetchie:** Following that helpful clarification, my next question is on the extent to which the business case will be a legitimate subject at an inquiry. To go back to the convener's question about remits, should it simply be said at the outset that the business case has been laid out by Transport Scotland, approved by the minister, endorsed by Parliament and that is that? Is it correct that inquiries will not involve arguments about whether proposals make economic sense or will represent value for money, although we may have discussions about that in the wider political theatre?

**Tavish Scott:** That is absolutely correct and is a fair understanding of what should happen. I simply add that, in certain circumstances, individual objectors may raise issues about, or may object formally to, statements in the business case. For example, an objector may ask about predicted passenger numbers for a particular mode and therefore call into question the modelling that has been used to justify the underlying principles in the business case. That is the sort of issue that I envisage might be raised. Whether the reporter chooses to take account of that will be a matter for them.

**David McLetchie:** The issue takes us back to one of the fundamental points that arose in last week's evidence, which is the confusion between the principle and the detail—I used the business case as an illustration of that. Last week's evidence from objectors was clear that they and many other people who go to inquiries, such as the inquiry on the M74, or who come to private bill committees in Parliament think that we are here to

debate the principle or that reporters are supposed to provide an independent Solomon-like judgment and that will be the end of the matter. However, the point that various committee members have tried to get across is that we have a process to take the decision in principle and then a process of inquiry. It would be helpful to the public to clarify that, because people confuse the two processes. The matter is not well understood.

**Tavish Scott:** That is a fair comment. Work needs to be done on that, perhaps as the bill goes through its formal proceedings. We might depend on our good friends in the press to get that line across clearly. Ultimately, if the Government says that it will do capital transport projects X, Y and Z, and if Parliament, through the mechanisms that we have described, endorses those projects, we are then into discussions about the detail of how the project will be delivered. David McLetchie makes an important distinction on which I agree.

**David McLetchie:** I suggest that in any inquiry, that distinction must be reinforced at the outset. If the reporter starts to entertain wide-ranging debates about the principles or certain aspects of policy, that will serve only to increase confusion. If people are not ruled out of order, they will assume that what they are saying is in order.

**Tavish Scott:** Those are helpful remarks.

**David McLetchie:** Convener, may I ask another helpful question?

**The Convener:** Okay.

**David McLetchie:** I do not understand wholly the need for legislation on voluntary purchase schemes, which is another issue that arose in last week's evidence session. Why do we need to legislate for such schemes?

**Tavish Scott:** During the passage of the Waverley Railway (Scotland) Bill, it was discovered that funds that Government provides to promoters for transport developments cannot be used to operate a voluntary purchase scheme. The bill will rectify that anomaly. We simply do not have the power, so we propose to create it.

**David McLetchie:** What does a voluntary purchase scheme mean in this context? If I am promoting a scheme and I want to buy a bit of land, why cannot I just buy it? Why do I need a scheme? Why cannot I just tell the landowner that I will give them a certain amount of money for the 5 acres and then draw up a contract?

**Tavish Scott:** I am pleased that, voluntarily, Damian Sharp has come along to answer that question.

**Damian Sharp (Transport Scotland):** I would draw a distinction. With an advance purchase, the promoters identify what land they need to deliver a

scheme. They can either simply negotiate an agreement or secure compulsory purchase powers. There is no doubt about the ability of promoters to do that, nor about the ability of Transport Scotland to fund that.

Voluntary purchases, on the other hand, are purchases of properties that are not strictly required for the construction of the project, but in respect of which construction of the scheme will have such an adverse impact on residents that it will become very difficult or unpleasant for them to live in the properties concerned, given that they did not know that there was going to be a railway or tramway in close proximity. I stress that there is a very limited number of such properties in Scotland. The intention is to deal with that situation, which first came up in relation to the Borders railway.

**David McLetchie:** Are not the owners of properties that would be adversely affected able to gain compensation under land compensation legislation, which has been on the statute book for years?

**Damian Sharp:** They are able to gain compensation under that legislation in most cases, if the impact is to do with noise. However, that legislation is fairly restricted—in particular, it restricts claims for compensation to one year after the opening of the scheme in question. For example, a woman who had a disabled son needed to move because construction of a railway would have exacerbated his medical condition during that time, but the land compensation procedures do not cover that. There is no statutory means of dealing with such situations, so voluntary purchase is the only option. In that case, Scottish Borders Council had the powers to buy the property, but we had no means of funding the purchase under a voluntary purchase arrangement. That illustrates the anomaly that the provisions in the Transport and Works (Scotland) Bill seek to remedy.

**David McLetchie:** In comparison with the other methods of land compensation, acquisition and so on, will the proposed mechanism, which we are being asked to approve as a provision of the bill, be confined to limited circumstances such as the exceptional circumstances that you have just outlined?

**Damian Sharp:** Transport Scotland has published a policy in relation to the circumstances that we would expect to apply to schemes that it funded. We have made it clear that there is an initial presumption against use of a voluntary purchase scheme, and that there needs to be proof of the need for one. The policy gives examples of the types of situation in which it would be appropriate for such a scheme to be used.

It is worth remembering that, of the seven private bills that have come before Parliament, at least three of the projects—an argument is being made for a fourth—do not require any voluntary purchase provisions, and the others have required them only for very limited circumstances that relate to a very small number of properties in comparison with the total number of properties that border the schemes. Voluntary purchase schemes are intended to deal with such exceptional circumstances where existing statutory provisions do not cover what we think Parliament's intent is in ensuring that individuals do not lose out.

**The Convener:** I have a question about access to land in advance of preparations being made for a project. You have helpfully supplied us with some draft Scottish statutory instruments, one of which concerns access to land. Network Rail has expressed concerns about access to land near operational railways. A person gaining access to that land would need to be accompanied by someone who had experience of operational railways, and would need permission to be on the railway. Would the access arrangements take account of such issues and the limitations on when access could be gained, given that the railway's operation should not be disrupted?

**Tavish Scott:** Yes. The convener has set out the types of circumstances in which we would envisage that the arrangements would take into account, for example, health and safety considerations and timing of access, given the timing of railway maintenance. The promoter might have to deal with Her Majesty's railway inspectorate.

**Fergus Ewing:** The chairman of the Heritage Railway Association, Mr Ovenstone, expressed concern in a submission dated 22 August that if the procedure for making an order under the Light Railways Act 1896 is abolished, the cost of authorising Scottish heritage railways will increase. The minister was good enough to assure Mr Rumbles that, under the new regime,

"fees will not be greater than they are currently."

I welcome that assurance, not least because the Strathspey railway scheme in my constituency is likely to go ahead soon and the Strathspey Railway Company Limited has written to me to say that it is anxious not to have to pay more than the current fee, which I understand is set at a basic rate of £1,250. Will the minister confirm that the company will pay no more than £1,250 under the new regime?

**Tavish Scott:** I cannot add to what I said to Mr Rumbles, which is on the record. I meant what I said.

**Fergus Ewing:** I appreciate that you seemed to give a copper-bottomed assurance, which I welcome. I push the matter only because James McCulloch, from the Scottish Executive inquiry reporters unit, told the committee at last week's meeting that fees would be based on the cost of the work that the reporters unit will be required to do. The minister's assurance appears to be at odds with Mr McCulloch's evidence, because it will be impossible to set a fixed fee if the fee is to be based on the amount of time that reporters spend on an inquiry. I hope that the fee will continue to be £1,250. Can the minister confirm that the Strathspey Railway Company, for example, would pay £1,250 under the new arrangements?

**Tavish Scott:** Advisers advise and ministers decide. I said what I said on the record and will say no more or less than that.

**Fergus Ewing:** Your assurance does not appear to be as categorical as it first seemed to be, although I hope that I am wrong about that. Rule 17 of the draft Transport and Works (Scotland) Act 2007 (Applications and Objections Procedure) Rules 2007 says, under the heading, "fees for applications":

"DN: Yet to be determined await consultation exercise".

I do not know what "DN" means, but perhaps someone can tell me. I presume that the consultation will be based on the intention that the Strathspey Railway Company will pay no more than £1,250 for its application.

**Tavish Scott:** I am staggered that Mr Ewing is trying to pluck defeat from the jaws of victory. I will not change what I said on the record. I said it—full stop.

**Fergus Ewing:** I hope that that means what it seems to mean, although the minister will not be explicit—

**Tavish Scott:** Oh, come on—

**Fergus Ewing:** If the minister says that the fee will be £1,250, which is what the Strathspey Railway Company wants to know, we will both have snatched victory from the jaws of defeat.

**The Convener:** The minister has given his answer—

**Fergus Ewing:** He could answer if he wanted to.

**The Convener:** You have had about three tries at the minister. He has given the answer that he intended to give. I want to bring in Maureen Watt.

**Mike Rumbles:** May I ask a brief question on the point that we have been discussing?

**The Convener:** If it is to try to pursue the minister for an answer that he has already given,

then you cannot. If it is a slightly different point, I will allow it.

**Mike Rumbles:** I would not like the railway heritage people, who I presume are listening to this debate, to go away with the wrong impression.

15:00

**The Convener:** They will be able to read the *Official Report* and see what the minister's answer is.

**Ms Watt:** I want to follow on from what Michael McMahon and Paul Martin said about the role of ordinary members of the public in the planning process for projects of national significance. The minister said that if the front-loading process was regarded as deficient because people's expectations were not met, we would have to revisit it. However, we are at a stage now where we can build provisions into the bill.

It would not be misrepresentation to say that the evidence from the Edinburgh tram objectors last week was that they were disappointed with the process. Such people are deeply worried about the bill's front-loading aspects with regard to devolved Government and involving communities. What reassurances can you give to somebody who is not involved through the national parks or who is not a landowner? Every project of national significance will affect people, so how can you persuade them that the bill will not leave them feeling as disappointed with the proposed process as they are with the current one?

**Tavish Scott:** It is important to recognise that people who do not get what they want are never happy. If I may say so, we all talk glibly at times about consultation. We in Government are criticised day in and day out, as are local government and community councils, for issuing endless reams of consultation. However, if there is consultation on a subject and a decision is then made that someone is against, they are, by definition, not happy about that. That is the nature of parliamentary democracy, local council democracy and all levels of representative democracy of which I am aware. Ultimately, we do not satisfy everyone—that is the nature of the process.

What I am clear about—I am sure that the committee is also clear about this—is that by improving the process and ensuring that we set up a structure that achieves much more meaningful consultation and proper engagement at an earlier stage, people will feel that they have at least had their day in making their case. Ultimately, if their case is heard but not agreed with and the Government decides to proceed with, for example, a railway, tram scheme or road, I rather suspect that those people will remain unhappy.

Unfortunately, that is often the nature of such things. We all have experience of that in our own areas and nationally.

**Ms Watt:** People are happy to be consulted, but the major reason why people end up so dissatisfied is that they are never told why what they have proposed is not possible—feedback on consultation is missing from many projects, national or local. We cannot just rubbish people and say that they will never be satisfied. There are situations in which all the consultees give their evidence but get no feedback, which results in much of the misunderstanding and the feeling that they have not been properly listened to.

**Tavish Scott:** I do not accept that people are never given answers. I suspect that people just do not like the answers that they are given. Those are two different issues. Whether we are ministers, MSPs or whatever, we all experience situations in which we make an argument and do not think that we have been given an answer, although the person, body, statutory consultee or whoever gives the answer clearly feels that they have answered fully and properly. That is how such processes are.

In designing a process—for example, for national transport projects—that seeks to deal with the kind of points that Maureen Watt and other members have made, all we can do is ensure that we invest sufficient time and resources in the first stage, and think about how it will work. As a backstop to that, we then have to ensure that the inquiry process is adequately resourced, so that if people do not feel that their point or solution has been properly investigated at the first stage, there is another opportunity during the independent inquiry. We could die of paralysis by analysis: how many stages do we want? We agree that we need to make the system as efficient as possible to achieve the objectives of a democratically elected Government of whatever persuasion. The other side is to address the issues that people raise, as Maureen Watt rightly said. However—not to dismiss their views in any way—we have to accept that some people will not be satisfied because they believe that their view has not been listened to.

**The Convener:** That brings us to the end of questions. I thank the minister for his evidence, and I thank his team of supporting officials.

## Prostitution (Public Places) (Scotland) Bill: Stage 1

15:07

**The Convener:** Agenda item 3 is stage 1 consideration of the Prostitution (Public Places) (Scotland) Bill. Our first group of witnesses is from the Scottish Executive. I welcome Alison Douglas, who is head of the corporate killing and prostitution team, and Patrick Down, who is part of that team. As normal, I will ask them to make introductory remarks, after which we will move on to questions and answers.

**Alison Douglas (Scottish Executive Justice Department):** Perhaps I can start by explaining the context for the bill. The Local Government Committee in the first session of the Parliament considered Margo MacDonald's member's bill—the Prostitution Tolerance Zones (Scotland) Bill—following which it asked the Executive to examine the issue of street prostitution more broadly. The Executive set up an expert group, of which Ms MacDonald was a member. The group reported in December 2004.

The report included proposals for amending the existing soliciting offence under the Civic Government (Scotland) Act 1982. The Executive put the group's report out to consultation, which closed in April 2005. We then issued our response in November 2005 and made two commitments. One was to amend the existing soliciting offence and introduce a new gender-neutral offence, which would apply to both sellers and purchasers of sexual services and bring the purchaser into the picture for the first time.

It was decided that an objective test should be introduced, which would make it unnecessary for a complaint to be made. Although the expert group had suggested that there might be a number of possible models, the responses that the Executive received to its consultation made it clear that an objective test would be more effective.

As a result, a commitment was made to introduce new legislation that would repeal section 46 of the Civic Government (Scotland) Act 1982, which is on offences related to soliciting and importuning by prostitutes. In addition, guidance will be issued to local authorities and their community planning partners on how to deal with street prostitution at a local level to acknowledge the fact that, in Scotland's four major cities, the picture of the number of people involved in these activities and where they take place is rather disparate.

Patrick Down will explain the bill's provisions in more detail.

**Patrick Down (Scottish Executive Justice Department):** As Alison Douglas has outlined, the bill covers prostitution activity in public places and replaces the existing provisions in section 46 of the Civic Government (Scotland) Act 1982 with offences that apply to people who purchase and sell sex.

The bill makes it an offence to loiter or solicit for prostitution-related purposes

“in such a manner or in such circumstances as ... to be likely to cause alarm, offence or nuisance”

to “a reasonable person”. I should point out that the terms “loiter” and “solicit” are used to describe the actions of both purchaser and seller.

With an objective test, there will be no need for a member of the public to be caused actual nuisance, offence or alarm. Instead, the test is whether the offence will

“be likely to cause alarm, offence or nuisance”

to “a reasonable person” who might witness it.

There are two reasons for such an approach. First, if another test were applied, people might be reluctant to complain for fear of being intimidated. Secondly, the objective test will enable the police to enforce the legislation in practice. After all, we cannot rely on the prospect of an individual always being present to be caused nuisance, offence or alarm, even though, given the areas where such activities take place and the activities themselves, that is quite likely to happen.

The offences apply in what are termed relevant places, which in the bill cover public places and other places that other people would think of as such—even though, in a strict sense, they are not. For example, the term covers any place to which the public would usually have access

“whether on payment or otherwise”,

which includes theme parks, nightclubs and football grounds. The bill covers public transport separately because, strictly speaking, although buses and trains are generally regarded as public, they are not places.

In contrast with the loitering offence, the soliciting offence also applies explicitly to motor vehicles and to any

“place which is visible from”

a public place. If someone were to solicit for the purposes of prostitution or purchasing sex from a window from which they could be seen from the street, from a driveway just off the street or from a car being driven down the street, they would be committing an offence. However, the loitering offence applies only in relevant places.

I should also point out that hire cars are specifically exempted from the loitering offence.

Although hire cars are a form of public transport, they are much more analogous to private cars, to which the soliciting offence applies. If someone parks or drives around slowly supposedly for the intention of obtaining a prostitute's services, the loitering offence will not apply.

Given that these are only low-level summary offences, the maximum penalty is a fine not exceeding level 2 on the standard scale, which is currently £500. We are encouraging the use of alternative rehabilitative disposals, as outlined in the Executive's response to the expert group. However, that is not a matter for the bill, because such disposals might apply to a range of offences.

Section 2 gives police constables a specific power of arrest in relation to these offences over and above the general common-law power of the police. That is because the police tell us that nowadays they prefer to have statutory powers of arrest to clarify their powers in relation to individual offences.

15:15

**The Convener:** Thank you for those introductory remarks. We will move on to questions. Margo MacDonald is here; I am happy to allow her to ask questions, but I will take the committee members' questions first.

**Mike Rumbles:** Section 1 is concerned with the sellers and purchasers of sexual services. Section 1(6) says:

“No offence under subsection (4)”,

which is on loitering,

“is committed by B if B is in a motor vehicle which is not public transport.”

I cannot find anything in the explanatory notes about section 1(6). Are you saying that the loitering offence for which someone can be arrested under the special powers in section 2 is not applicable to someone in a motor vehicle?

**Alison Douglas:** Both the loitering offence and the soliciting offence are applicable in principle to the purchaser and the seller. I was not sure whether you understood that. There is no distinction between purchaser and seller; both offences of soliciting and loitering can be committed by a purchaser or a seller.

**Mike Rumbles:** Section 1(6) clearly says that no offence is committed by an individual if that individual is in a motor vehicle.

**Alison Douglas:** Our lawyers have told us that an offence of loitering cannot be committed by an individual in a private motor vehicle.

**Mike Rumbles:** Soliciting is currently an offence.

**Patrick Down:** Only in relation to the seller.

**Mike Rumbles:** I thought that the bill was meant to address the imbalance and criminalise the purchaser of sexual services as well, but it will not do that if he is in a car.

**Alison Douglas:** It is important to understand that it is possible for a purchaser to solicit. It has often been understood that soliciting is the act of approaching someone in order to sell sexual services, but it is possible to solicit someone to purchase their sexual services.

However, you are correct that under the bill, it will not be possible to prosecute someone in a vehicle for loitering. There is a technical reason for that, but there is also a practical reason, which is that it would be difficult to prove the intent of someone driving round the streets. That was raised as a particular issue in Glasgow, where one of the main areas for soliciting is in an area where people come and go 24 hours a day to work in call centres or to pick family members up from work, for example. Therefore, it would be difficult to prove that people who might be driving around an area slowly or sitting in a stationary car intended to buy sex. There would have to be an approach from somebody in a vehicle—in other words, soliciting behaviour—in order for an offence to be committed.

**Mike Rumbles:** I stress that I am using my imagination here, but I understand from what I have read and seen on television that when prostitution takes place it normally involves a guy in a car going round an area. Is dealing with such behaviour not the whole purpose of the bill?

**Alison Douglas:** The minute that they solicit from the vehicle they are potentially committing an offence.

**Mike Rumbles:** But the bill says that no offence is committed if an individual is in a motor vehicle.

**Alison Douglas:** No offence is committed under section 1(4), which is the loitering offence. The soliciting offence applies to people operating from a motor vehicle; however, on the loitering offence, we decided that it was not really possible to get evidence of somebody in a motor vehicle loitering for the purposes of prostitution.

**Mike Rumbles:** So section 1(1) is not just about the seller of sexual services; it is about the purchaser as well.

**Alison Douglas:** That is the point I was trying to explain. Soliciting can be done by either the purchaser or the seller. Traditionally, people have understood that soliciting meant that the seller was soliciting somebody. However, the definition of “solicit” covers the purchaser as well as the seller.

**Mike Rumbles:** I am pursuing this point because I think that it is important. Section 1(1) is not just about the seller but about the purchaser of sexual services. What you are saying is that somebody can solicit from a car.

**Alison Douglas:** Somebody may solicit to purchase sex or to sell sex.

**Mike Rumbles:** I understand that entirely, which is why I am asking what the point is of section 1(6), on the offence of loitering.

**Alison Douglas:** Because people may be causing a nuisance by loitering on the street or in a relevant place—

**Mike Rumbles:** If you are saying that section 1(1) is sufficient to catch both the purchaser and seller of sexual services, why do you need a further provision?

**Alison Douglas:** There are two different types of behaviour: soliciting and loitering.

**Mike Rumbles:** I am still not clear about that but perhaps I shall come back to it.

**The Convener:** I have a supplementary question that follows on closely from Mike Rumbles’s question. I think that I am clear about the issue of someone being in a motor vehicle—the example that you gave was of someone quite innocently picking up a family member or friend. However, I do not understand section 1(5), which says:

“For the purposes of subsection (4) it is immaterial whether or not B is on public transport.”

I do not quite grasp how someone who is on a bus or a train could be described as loitering. How could you ascertain whether someone was loitering with the intention of purchasing sexual services if they were on a bus or a train?

**Alison Douglas:** We would have to agree that such a scenario would be pretty unlikely, but we did not want to rule it out.

**Michael McMahon:** In all our previous discussions on the issue and Margo MacDonald’s Prostitution Tolerance Zones (Scotland) Bill, the debate tended to focus on the relationship between a man and a woman, with the woman being the prostitute. For clarity, is any distinction made in the bill for male prostitutes?

**Alison Douglas:** None whatever.

**David McLetchie:** To continue Mike Rumbles’s line of questioning, driving round slowly in cars in an area where prostitutes are known to operate is commonly regarded as kerb crawling, and such conduct is regarded as offensive. Correct me if I am wrong but, as I understand it, if someone is simply driving slowly round an area looking at prostitutes and perhaps establishing themselves



as a potential buyer of sexual services, that is not an offence under the bill.

**Alison Douglas:** An offence requires an approach to be made.

**David McLetchie:** Driving around slowly, or kerb crawling, which almost certainly establishes the driver as a potential customer in the eyes of a prostitute, is not an offence.

**Patrick Down:** An offence is committed the moment that the person stops the car and winds down the window or flashes their lights as a signal.

**David McLetchie:** Let us say that a person drives around the block three or four times and establishes himself as a potential customer. Then he pulls over to the kerb adjacent to an apparent prostitute who is on the street and winds down the window. If he says nothing after winding down the window, but the woman approaches him and says, "Are you interested?"—or whatever is said in such transactions—am I right in thinking that he has not done any soliciting? All he has done is wind down the window.

**Patrick Down:** I would not like to give a definitive answer, but it is at least arguable that the act of winding down the window, following which the woman might get into the car, is almost proof that he is soliciting, albeit tacitly.

**David McLetchie:** That seems bizarre. You are saying that there cannot be an offence of loitering when someone drives around in a car because intent cannot be proved, but how can you prove intent from someone pressing a button to wind down their window? The person might be asking for directions. I presume that in such a situation, the soliciting is done by the woman who approaches the driver.

Let me go back to my example. The driver has established himself as a potential customer by crawling round the block a few times. He then pulls in opposite a woman whom he believes to be a prostitute and the soliciting is then done by the woman—assuming that it is a female prostitute rather than a male one. The offence will almost certainly have been committed by her because all the driver has done is wind down the window. If there can be no offence of loitering because intent cannot be proved, why is soliciting an offence when intent cannot be proved?

**Alison Douglas:** We recognise that there are evidential issues. In most situations the person who is selling sexual services is on the street and involved in a greater number of transactions. Therefore, it is inevitable that they are more likely to be prosecuted.

However, an important purpose of the legislation is to send a deterrent message to individuals who go out to purchase sex. For the first time, we are

trying to bring the purchaser into the picture, notwithstanding that there might be challenges in proving a case.

**David McLetchie:** You say that there are evidential issues with soliciting from a car, although that is to be an offence. There are also evidential issues to do with loitering in a car, but that will not be an offence. Is that not what you are saying?

**Patrick Down:** The evidential issues in relation to loitering are greater. It is worth bearing in mind that although the term "kerb crawling" is used colloquially, the English kerb-crawling legislation criminalises soliciting from a motor vehicle for the purposes of obtaining the services of a prostitute. I dare say that there are frequent evidential difficulties, but convictions are obtained under that legislation.

**David McLetchie:** But if you want to go around sending messages rather than having properly framed laws, would it not send a better message to the public about the unacceptability of kerb-crawling if, notwithstanding the evidential difficulties, you said that loitering from a car was an offence? That might be evidentially difficult to prove in the same way as proving soliciting from a car might be evidentially difficult, but surely the message should be that, in Scotland, we disapprove of kerb-crawling. We could make loitering illegal in the same way as soliciting and then deal with the evidential problems according to the circumstances of the offence.

15:30

**Alison Douglas:** There is a significant difference in contact between loitering and soliciting. Contact must be made for soliciting to be proven. You are saying that simply driving slowly around an area could be tantamount to the commission of an offence.

**David McLetchie:** What about loitering by the seller? You say that walking slowly up and down a street for an hour or so is tantamount to committing an offence. Is that not what loitering is?

**Alison Douglas:** A person must be causing nuisance—that is the public order element that is relevant to individuals who are on the street.

**David McLetchie:** So you would say that a greater nuisance is caused to the public by a prostitute—male or female—walking slowly up and down a street for an hour or so than by somebody cruising around the block four or five times in a car.

**Alison Douglas:** A combination of factors is involved. The bill uses the phrase "in such a manner or in such circumstances",

which might bring in evidence about the purpose of somebody's activity. Evidentially, it is easier to prove the intent when somebody is on the street.

**David McLetchie:** I do not doubt for a moment that intent in such circumstances might be easier to prove evidentially, but the point that Mr Rumbles and I are getting at is that the bill is supposed to be neutral and balanced, so it is curious that it says that one of the activities that people complain about most, which kerb-crawling undoubtedly is, is not an offence. Does not the bill say in effect that what we commonly regard as kerb-crawling is not an offence?

**Alison Douglas:** Kerb-crawling could be taken to mean approaching people or calling out to them from a vehicle.

**David McLetchie:** Most people regard it as cruising around rather than calling out, because most cruisers know that the minute they slow down, they will have all the solicitations they need and will therefore not commit an offence.

**The Convener:** I understand the point about excluding loitering if someone is in a car, because somebody who is perfectly innocent might be picking up a family member, for example. However, could not the offence be worded such that a person's defence could be that they were picking up a family member from a call centre, for example? The police could check whether that person was related to them, was working in that call centre and was due to finish work.

**Alison Douglas:** We considered that option, but we were advised that it might have European convention on human rights implications.

**Paul Martin:** Margo MacDonald's member's bill would have introduced tolerance zones. Has any of its provisions on tolerance zones been incorporated in the Prostitution (Public Places) (Scotland) Bill?

**Alison Douglas:** The offences in the Prostitution (Public Places) (Scotland) Bill apply anywhere and their application is not intended to be suspended in tolerance zones or other areas.

**Paul Martin:** So we can be unequivocal that no element of tolerance zones is included in the bill and that the Executive has no plans to introduce proposals on tolerance zones.

**Alison Douglas:** That is correct.

**Paul Martin:** For clarity, the Executive has rejected any idea of tolerance zones.

**Alison Douglas:** The expert group concluded that tolerance zones were not the appropriate route to go down. That was reflected in the consultation and the Executive was unequivocal on that point.

**Paul Martin:** The bill proposes imposing a fine that does not exceed level 2. How was level 2 chosen?

**Patrick Down:** That is simply the same fine level as applies to the soliciting offence at section 46 of the 1982 act.

**Paul Martin:** Should the buyer be subject to a separate tariff that is higher than that for the seller?

**Alison Douglas:** The fine is a maximum, so there is some discretion for the courts.

**Paul Martin:** The Executive has said clearly that it will introduce an element of enforcement for buyers. Why is the fine set at the same level as for sellers? Was that decision made simply to ensure parity? How did you go about making it? Why should the fine not be set at level 3 or above?

**Alison Douglas:** We thought that level 2 was appropriate because we are dealing with a low-level public order offence. Patrick Down alluded to the fact that we will encourage the courts to consider alternative disposals, where available. We want to address the underlying issues for sellers, such as drug addiction. There are also diversions from prosecution. A Sacro project in Edinburgh is trying to divert women away from prosecution. Kerb-crawler diversion schemes have been set up by police forces in England and Wales to re-educate men who have been caught kerb-crawling, instead of prosecuting them.

**Paul Martin:** The point that I am trying to make is that we are dealing with two different offender profiles. A significant percentage of sellers are likely to have problems with drug addiction. I argue that the profile of buyers is different. Why is the tariff for both buyers and sellers the same? Should not buyers be subject to a different tariff, to send out a message and to ensure that there is no market for sellers? If we want to send out that message, should not we ramp up the tariff that is imposed on buyers?

**Alison Douglas:** This is a public order offence. The aim is to protect communities from the nuisance that is associated with prostitution-related behaviour. The intention is to strike a balance for the first time between purchasers and sellers. The Crown Office and the courts will deal with individual cases on their merits.

**Paul Martin:** How will repeated offenders be dealt with? If someone commits 10 offences, will they just come back to court repeatedly to be fined? I am talking about buyers, rather than sellers.

**Alison Douglas:** I am not sure how the courts will deal with repeat offenders. The only disposal that is available is a fine.

**Paul Martin:** So someone with a significant income could have to pay 10 fines of up to £500, but there would be no other deterrent. Is there no possibility of imprisonment or something similar for persistent offenders?

**Alison Douglas:** The deterrent for the purchaser is not the fine per se but the stigma that is associated with being convicted of an offence of this nature. Prosecutors take into consideration the impact on individuals' families of their having been convicted of purchasing the services of a prostitute and the fact that some people have lost their jobs as a result.

**Patrick Down:** The courts have a general power, in addition to any other punishment that they impose, to disqualify from driving any convicted offender where the use of a vehicle is in some way connected to the crime. In England and Wales, that power has been used for repeat offenders in relation to kerb-crawling. I see no reason in principle for the same not to be done here, if the bill is passed and there is a specific offence that criminalises kerb-crawling.

**Fergus Ewing:** I want to pursue the line of questioning that Mr Rumbles and Mr McLetchie embarked upon. I return to the example of the kerb-crawling man, circling in his car. Characteristically, such a man circles around town late at night; the pattern is one of slowing down before circling again. Surely the bill could provide for that. Let us say that someone is charged for driving a car in that way, goes before the court, and is found, on evidence, to be guilty. That person will have a bit of explaining to do, as that is not the way in which someone normally drives a car. I can see no innocent purpose that is readily consistent with driving a vehicle in that way, late at night. The convener mentioned the example of someone saying that they had been picking up a family member. In those circumstances, the family member could easily support the driver's version of events.

I suggest that it may be possible to use the rebuttable presumption standard, the usage of which is quite common in statutory offences such as bankruptcy offences, which I used to deal with in the courts. If that standard were used, a driver who was charged with kerb crawling because he had been circling around and slowing down—in other words, there was evidence that met the standard of proof that is required in criminal cases—would be presumed to be guilty of the crime unless he was able to rebut the presumption by transference of the burden of proof. His defence would be that he was picking up his granny or whoever and he would have to rebut the presumption by proving that that was the case.

I am familiar with the rebuttable presumption method, which is applied routinely to behaviour

that most ordinary people would perceive to be consistent with guilt. We are talking about behaviour that would be described as being consistent with innocence only in circumstances that most people would consider to be pretty unlikely. Have you considered that method of draftsmanship? If you have discarded the concept, why did you do so?

**Alison Douglas:** As I think I mentioned, we explored whether we could place a reverse burden of proof. We were advised that that could raise ECHR implications.

**Fergus Ewing:** What implications?

**Alison Douglas:** We were advised of the potential, by requiring someone to prove that they were there for a legitimate purpose, for compromising their right of being innocent until proven guilty.

**Fergus Ewing:** That is merely a restatement of what you said previously; it does not answer the question. If the European convention on human rights states that this device cannot be used, it would not be used in other areas of criminal law. In bankruptcy law, someone who does not disclose his assets to his trustee will be found guilty of an offence unless he can prove that there was a reasonable excuse for not doing so. Why is the device acceptable for some criminal statutory offences but not for this one? I cannot understand how it can contravene the ECHR.

**The Convener:** In rejecting Fergus Ewing's proposal, your defence seems to be the reverse of the position the Government takes with regard to people who are caught by speed cameras: someone will be convicted of an offence if they do not disclose who the driver of the car was at the time the car was caught on camera.

**Alison Douglas:** I am not an expert on ECHR; we can return to the committee with a more detailed explanation. My understanding is that questions of proportionality are involved, in that whereas it might be judged appropriate to require a reverse burden of proof for a more serious offence, the offence under the bill is a low-level public order offence. The advice that we have been given is that, on balance, what has been suggested would not be appropriate for the bill.

15:45

**Fergus Ewing:** Saying that a person who wants to buy sex from a prostitute commits a low-level offence whereas a person who is speeding commits, presumably, a high-level offence seems a very strange value judgment. It seems plain wrong, but I appreciate that you have not come here as a lawyer. Frankly, we have not had anything remotely approaching a proper

explanation of the matter. Although that is not your fault, the legal advisers who drafted the bill have lamentably failed to create a balance between the prostitute and the buyer. It seems to me that the punter will escape scot-free time and again. That is not what we want. As a committee we want—perhaps I am speaking prematurely; it is what I want—the punter to be made a criminal and stopped. The bill would not do that.

I also want to raise a general point of principle. It has been suggested that the offence under section 1 relates to public disorder. That does not seem appropriate. In many cases, a transaction is undertaken of which the public will know nothing. If there is a disorder, the public are not aware of it. In some cases a great deal of nuisance might be experienced by people if the transaction takes place in a residential area, but in many cases the problem is not that there will be a breach of the peace, a nuisance or a disorder but that a transaction will take place in which a man buys sex. From that point of view, is not the whole concept of the bill misconstrued?

You said that the bill's aim is to change the balance between the prostitute and the punter, but it will not do that because the Executive has approached the matter from the wrong standpoint. If we are to create that balance, surely we must make it absolutely clear that the crime is a man buying sex from a prostitute. Forget the disorder—it may, or may not, be a component of the offence. The offence should be simple: the punter who crawls around in his car and acts in a way that, in the vast majority of cases, is inconsistent with any explanation other than that of seeking to buy sex should be criminalised. Would it not be better for the Executive to redraft in that way the whole basis of the offence?

**Alison Douglas:** The question raises a profound issue of policy. I will give a factual response: the expert group did not recommend that the purchase of sex should be criminalised, it was not the majority opinion among respondents to the consultation exercise, and it is not the Executive's policy. That is all I can say on that point.

**The Convener:** Fergus Ewing might want to pursue the issue with the minister.

**Mike Rumbles:** I want to focus on the balance between purchaser and seller, which is the Executive's policy objective in the bill and which I believe is absolutely the correct approach. As far as I can see, the bill redresses the balance, in practice and in theory, on the offence of soliciting. Anyone—whether man or woman—who solicits in a public place will be guilty of an offence. That is clear. However, although it is clear that, in both practice and theory, it will be an offence for a seller to loiter with intent in a public place, there

will not be a similar balance for the purchaser because of section 1(6). In practice—so we are told—such people go around in a motor vehicle. As David McLetchie said, if we want to end kerb crawling, which is what I thought we wanted to do, section 1(6) should be removed from the bill. If that subsection was removed, we would have balance in both theory and practice.

**Alison Douglas:** I am in danger of repeating the points that I made earlier. I am not sure that I have anything useful to add.

**The Convener:** We can put the point to the minister.

**Ms Watt:** The bill focuses on prostitution in public places but the offences are defined as being in relation to any relevant place. What is your understanding of the limits of that definition? I am thinking about the nuisance that can be caused to the public by so-called massage parlours and other sorts of brothels. Are they covered by the bill?

**Alison Douglas:** They are not covered by the bill. The expert group's report specifically looked at street prostitution. The intention was to take a phased approach to the wider issue of prostitution. We wanted to make the first phase manageable, which is why we focused on street activity. There is further work to be done with regard to indoor prostitution and trafficking.

**The Convener:** Margo Macdonald might want to comment at this point. I ask you not to say too much, Margo, as we will be hearing from you in a second.

**Margo MacDonald (Lothians) (Ind):** Earlier, you said that you were influenced by the response to the consultation on the report that was produced by the expert—I hope you will excuse that expression—group and that your response was to change what had been a main plank of that report, which was that the new offence should be complaint led. Why did you make that change? From where I am sitting, that was an essential part of the dovetailing of the advice that was given to local authorities with the change in the law.

**Alison Douglas:** The expert group's report talks about a complaint-led offence, but it acknowledges that there are arguments on both sides about whether the test should be objective. In fact, of the three options that were identified, one has an explicitly objective test, one is based on a complaint with the courts being able to introduce an objective test and the third is based on an objective test. The expert group seemed more in favour of a complaint-led approach than having an objective test, although it recognised the merits of having an objective test. The group suggested that the issue could be explored in the consultation. Of those who expressed a preference for a particular

model during the consultation process, the majority were in favour of the Scottish Law Commission's codification route, which uses an objective test. On balance, the Executive has been persuaded that the arguments that are in favour of an objective test are greater than the ones that are in favour of a complaint-led approach.

**Margo MacDonald:** Convener, I seek your guidance, as I think you might prefer to question me on this point rather than have me question the officials. I can refer to the report that the expert group produced in order to explain why the complaint-led approach was decided on.

**The Convener:** It would be best to deal with that when you are the witness.

**Margo MacDonald:** That is what I thought.

Ms Douglas, would you agree that, in some ways, the lawyers have tried to come up with something that is perfect law—I say that with all due respect to the lawyers because, were I a lawyer, that is what I would try to do—whereas what we are trying to do is come up with a pragmatic response to a defined situation?

In Aberdeen, you do not find many complaints about kerb crawling, because of the location where sexual services are bought and sold; in Dundee, you do not find any problem with kerb crawling; in Edinburgh, you do not—or you did not—find that there were many complaints; but in Glasgow, because of the locations, there is a real problem. The bill has perhaps fallen between the two stools of creating perfect law and trying to find the solution to a real problem.

**Alison Douglas:** Is there something specific that you would like me to respond to?

**Margo MacDonald:** Yes. As long as the convener does not mind, I would like you to talk about what happens in Glasgow. Two areas of Glasgow are affected. The east end concerns Michael Martin. I am sorry—I meant Paul, who does not look a bit like his father.

There is definite kerb crawling in the east end, and it is often kerb crawling of the tourist variety. People do not mean to purchase a service; they just want to be offensive or funny. According to the bill, if they are cruising along shouting obscenities—or what they would regard as great witticisms—they are not creating a nuisance unless they stop their car and approach a prostitute. But they do create a nuisance, and the bill was meant to tackle the nuisance that is experienced by the general public.

The Glasgow police are complaining that the bill would be very difficult to enforce. If it were enforced, it would be the seller—who is usually the female prostitute—who would be criminalised and who would bear the penalty. However, the

situation I describe applies only in Glasgow. You have to take that into account when you try to come up with a perfect solution that fits all four cities. Do you agree?

**Alison Douglas:** Legislation is a tool; it would be up to local police to decide how to enforce it. In doing so, they would clearly take account of local circumstances. They have told us that the bill will provide them with another tool in the toolkit, to allow them to combat the nuisance associated with prostitution.

You spoke about people in vehicles who cause a nuisance but who do not intend to purchase sex. Even if the loitering component of the bill extended to people in cars, it would not extend to people who were, if you like, joy-riding. You might be talking about a more general driving offence.

**Margo MacDonald:** I wonder how the measure would be implemented. If someone were cruising around in a car and then stopped for someone to get out, a policeman might come along and say, "You're nicked." But the driver could say, "Why? I was only letting him out of the car. Prove otherwise."

**David McLetchie:** If someone is driving around as Ms MacDonald describes—slowing down and shouting obscenities to people in the street—surely that is prosecutable as a breach of the peace, under common law. No new act would be needed.

**Margo MacDonald:** I agree with David McLetchie. The issue came up at the expert group. The majority opinion was that, to send out a message, we have to have a specific law. I do not think that that is a reason for having a law at all, but it was the majority opinion.

**Paul Martin:** The power on dispersal zones can be used to prevent certain individuals from being in a vicinity for a certain period. Given that most of the issues are site specific, has the use of a measure to prevent individuals from being in an area at certain times been considered?

16:00

**Patrick Down:** We did not consider including such a power in the bill, but the draft guidance on street prostitution that was published alongside the bill considers whether measures such as acceptable behaviour contracts could be used against people who have been identified as kerb crawlers, to prevent them from entering areas that are known for prostitution.

**Margo MacDonald:** Would a conviction be needed to establish that a person was kerb crawling?

**Patrick Down:** I cannot answer that off the top of my head.

**The Convener:** We are starting to get into issues of policy, which may be best addressed to the minister, but I have one final question. Members of the committee are unclear about exactly what somebody would have to do to commit an offence under the bill, particularly if they intended to purchase sexual services. In your discussions with the police, have they been clear about what the intended law is and what someone would have to do to be arrestable, or have they raised concerns about how they will implement the proposed law?

**Alison Douglas:** We held a joint meeting with the police—including some with day-to-day responsibility on the matter and members of the Association of Chief Police Officers in Scotland—and the Crown Office to consider some of the issues. As I mentioned earlier, issues about evidencing arise. Ultimately, what is regarded as nuisance will be for the courts to decide, but we can reasonably assume that persistent disruptive behaviour will be considered to be causing a nuisance. As I said, the bill uses the phrase

“in such a manner or in such circumstances”,

which gives a reasonably wide net for evidencing. However, we accept that issues arise about proving the purposes for which somebody was soliciting or loitering. Some of those issues are inherent to the nature of the activity. We have tried to create an offence that will be as effective as possible in providing a means of tackling those nuisance behaviours.

**The Convener:** That brings us to the end of our questions at this stage. I thank Alison Douglas and Patrick Down for their evidence. Some of the questions were getting a bit intense, but they were probably on issues that we will want to raise with the minister.

We continue our consideration of the Prostitution (Public Places) (Scotland) Bill by taking evidence from Margo MacDonald, who, up until this point, has been a visiting member, but whom we now welcome as our final witness today. We have invited her to give evidence because she introduced a member's bill on prostitution and participated in the expert group. I should advise the committee that the chair of the expert group, Sandra Hood, was invited to attend as a witness, but she did not feel that, at this stage, she could represent the expert group's overall views on the bill, given that it has not met for some time.

Margo MacDonald is supported by her personal assistant, Mary Blackford, whom we welcome. I invite Margo to make some introductory remarks on the bill, which will be followed by questions and answers.

**Margo MacDonald:** I think that the committee has already spotted the legal mistakes surrounding the Executive's desire to tackle prostitution. The notes that I have given the committee are brief because the introduction of the bill, which took place in the past few weeks, happened suddenly.

I feel that the bill and, to a greater extent, the policy memorandum depart from the spirit of what the expert group recommended, in that the group was conscious of the need to reconcile the duty of care that exists to two quite different groups—prostitutes and the general community. The general community has rights in that it should not have to put up with the nuisance that can be caused by prostitution, but prostitutes have rights as citizens in that they should not have to be put up with being abused and beaten up because they are prostitutes. I do not feel that the fact that the expert group tried to reconcile those two duties is reflected in the papers that accompany the bill.

Although the policy memorandum is not a legal document, it will be issued to local authorities and local agency partnerships on whom the Executive depends to implement the thrust of its strategy. I feel that it has not got it quite right in reconciling the two duties of care. Members of the committee may disagree, but I think that it is judgmental and punitive.

It is important to understand that two philosophies or ideologies operate in Scotland in relation to the treatment and care of prostitutes and the management of prostitution. Street prostitution exists only in the four main cities, but a different approach is adopted in each city. We are told that, in theory, there is a basic divide between a zero tolerance approach to prostitution and a more pragmatic view, the advocates of which argue that although they would like prostitution to end, until that comes about, they would like the same approach to be adopted to it as is adopted to drugs, which is that we should seek to reduce the harm that is done by the users of drugs and the effects that drug use has on the wider community.

My personal opinion—as I say, I cannot speak for the expert group—is that the Executive has been bedevilled by the attempt to recognise both those philosophical starting points. As a result, we have the sort of legal quagmire that the committee has highlighted. I hope that the main thrust of the expert group's recommendations become law. I leave it to the committee to decide whether the bill can be amended. There are amendments that I can imagine, but that is for the committee to decide having listened to the minister.

I want there to be a complaint-led procedure. The reason for that is more practical than philosophical. I will give an example. There are

people who believe that the bill should send out a message that we disapprove of prostitution. If we want prostitution to be less intrusive on people's lives, we must consider how it would work if there was a non-complaint-led procedure. If that were the case, prostitutes would be able to ply their trade anywhere, as they would be treated by the law in exactly the same way as if they stood discreetly in a dark corner.

As the committee has shown, it is difficult to reconcile the one item of legal censure being used against prostitute and client; nevertheless, that is what the expert group tried to do. Without a complaint-led procedure, any prostitute standing anywhere could be arrested if the arresting officer decided that, if a member of the public had witnessed the prostitute simply standing there, that member of the public would have been alarmed, offended or have had a nuisance caused to them. That is what the bill says. That sends absolutely no message to the prostitute that she should be discreet about doing what she does.

If street prostitution is to continue, although we might not want it to continue, it requires to be managed in the interests of the wider community and the prostitutes themselves. However, the bill's provisions cannot dovetail with the way in which the four cities currently manage prostitution, by having acknowledged areas in which prostitution takes place. If the prostitute can be lifted anywhere, why would she go to a particular area? I see that as a disincentive to the better and safer management of prostitution.

I believe that street prostitution will continue residually for some time. You might ask why, as the evidence shows that, in Edinburgh and Dundee, the number of street prostitutes is falling and that, in Aberdeen, the number is either static or falling—it is only in Glasgow that the number of women on the streets appears to be increasing. I do not pretend to know all the reasons why there is street prostitution, but I am told that the anonymity and the thrill that are associated with it mean that there will continue to be a residue of street prostitution. If we do not have a recognised area in which those women work, and if we believe that there will be a residue of street prostitution, the women will find a place to hide in order to escape the new law. If they hide away, they are at much greater risk. There is also a much greater risk of add-on criminality associated with prostitution.

16:15

That is not theory; it has all been proved, and there is documentation of the tolerance zone in Edinburgh covering almost 20 years. We have only learned from that period; no one is seeking to recreate it. The tolerance zone sought to allow

leeway within the existing law for a specific place and to suspend the law within that place. Managed zones, which the expert group recognised as having a great deal of merit, would not suspend the law at all; they would simply reflect the reality that there is street prostitution and it is easier to control and manage in everyone's interests if it takes place in a given area.

The issue is not just the nuisance to the general public, but the services that the Executive, in the policy memorandum, urges local authorities and local partnerships to supply. I am thinking of the provision of condoms, a needle exchange service if that is needed, and counselling. Those are services that we need to be able to take to where the women are, perhaps to persuade them, over a period of time, to exit prostitution. Everyone agrees that, unless we supply those services where the women are, we will not get to the women. If there are no recognised areas, how will we reach the women and take those services to them? If there are no recognised areas, how will the police have the sort of intelligence that they had in Edinburgh, that they have in Aberdeen and that they still did not have in Glasgow the last time we spoke to them? The situation is different in Dundee, as the number of women involved is so small.

The expert group saw the two aspects of the situation that are set out in the papers dovetailing. First, the change in the law would mean that both buyer and seller could be arrested and charged with an offence if, in the course of trying to buy and sell, they offended someone or caused a nuisance. However, if that procedure was not complaint led, no offence would be committed. A complaint-led system was the incentive to ensure that the activities were contained—but that has gone. Secondly, if there was an area inside which it was most unlikely that someone could commit the offence, that would make it much easier for the local partnership of the police, the health authority, the local council, voluntary organisations and so on to reach the prostitutes. The two aspects were meant to dovetail, but they do not dovetail in the bill and the policy memorandum that we now have. I sincerely hope that that can be changed and that the committee will be able to amend the bill.

**The Convener:** Thanks for those remarks, Margo.

**Michael McMahon:** That was an interesting analysis of the situation. In advocating a complaint-led procedure, you made a comparison with the misuse of drugs. Both are criminal offences and the partners in any given area must work together to reduce the harm that is caused to the people who are engaged in those practices. If there is no complaint-led procedure, the situation is comparable to that of a drug dealer. He sells a

drug to someone and that person goes away to use the drug, but if there is no complaint about that transaction, the police have no right to act. Surely you do not think that that is a good way of pursuing harm reduction.

**Margo MacDonald:** No. The only parallel is in the need to accept that we cannot immediately eliminate the practice of prostitution. Therefore, for as long as it is with us, we must try to reduce the harm that is done by it.

**Michael McMahon:** You say that the police should not act until there is a complaint, but harm is being done where the transaction takes place.

**Margo MacDonald:** That is where the importance of the policy memorandum comes in. If the behaviour takes place within a managed area, such as there is in Aberdeen, it is true that no offence is committed. The harm done to the public is not all that great. The health services can get to the women to help to prevent the transmission of diseases and so on. If you want to get to them, you have to get to them where they work. The add-on criminality is likely to be diminished because the police know where they are and they know who should not be there—drug dealers and so on. I hate to use the word “minimise”, because that is too grand a word, but that is how the harmful effects of a trade that nobody likes but which has persisted for a very long time can be reduced.

**Michael McMahon:** But you are advocating a complaint-led procedure only in relation to prostitution. You used the analogy of harm reduction, which is comparable with harm reduction in relation to drugs, which is what I did not understand.

**Margo MacDonald:** Nobody wants people to use drugs that abuse their body and destroy them, but neither does anybody expect drug use to end tomorrow, so there is a programme of harm reduction.

**Michael McMahon:** I just do not see the comparison.

**Paul Martin:** Margo Macdonald talked about tolerance zones. In Glasgow there have been high-profile cases in which one girl lost her life and another was severely injured. What kind of message would we send out with tolerance zones? Are you saying that if a tolerance zone had operated in Glasgow, what happened to those young women would not have happened?

**Margo MacDonald:** I would never make such a claim. However, there is some sort of record of the security offered by working inside a managed area—do not call it a tolerance zone—such as the one that is still operational in Aberdeen. You must look at what happens there. The word “tolerate”

might suggest approval of or going soft on prostitution, but it has nothing to do with that; it is about trying to ensure that the harm that can be done is minimised and that we look to the security of the prostitutes and the comfort, security and privacy of the general public. That is not to send the message that we approve of prostitution, but to admit that prostitution is there and to work out a way of dealing with it.

In 10 or 12 years there were two murders in Edinburgh and, I think, eight in Glasgow. The people who murdered in Edinburgh were caught within 24 hours and at the time the police said that that was because of the intelligence that they had from managing street prostitution in a different way that suited them. Perhaps the Glasgow police manage street prostitution in Glasgow in the only way that it can be managed—I do not know and I would not dare to say. I do not think that the two cities should be compared, because their geography is so different that the policing and management of prostitution are different.

**Paul Martin:** You would have said to the young woman who was tragically murdered, “You continue with this very dangerous practice and we will support and manage you.” The word you used was “manage”; I will move away from saying “tolerate”. Should we not have moved that young woman away from the practices that she was involved in to the Routes Out processes that have formed? That is not about the management of areas; it is about processes.

**Margo MacDonald:** No—that is to assume that, by adopting the Routes Out programme, prostitution can be eliminated. It does not happen like that. For a start, women go in and out of prostitution. It is a long process. Secondly, it is not about saying to a woman that she should carry on with her lifestyle. In each city, women are told, “Come in and see us.” They are shown the support group that will ensure that they go in for safer sex; that if they meet an overly abusive client, they can come to the group and report him, getting him on to the ugly mug scheme, which the Scottish prostitutes education project—SCOT-PEP—in Edinburgh ran; and that they get help in obtaining some educational qualifications.

The reality is that it is not Julia Roberts going into the drop-in centre; it will often be people with really sad personal histories, who are ill equipped to compete in today’s labour market. That is what we are referring to when we talk about managing prostitution—this time, from the point of view of the prostitute. How can that be done if the services cannot be provided where the prostitutes are working? As you will remember, I said that the women do not simply stop working. It is a long process. We must be able to reach them.



**Paul Martin:** I asked the previous panel about the parity of fine level between the seller and the buyer. Would you support the fine level being increased for the buyer, taking into account their different profiles?

**Margo MacDonald:** The absolute truth is that I do not know. I have not given it all that much thought. I was worried that the bill had not managed to achieve what the expert group had wanted: an equalisation of the penalty for offending. We wanted it to be made as difficult as possible to commit the offence. We wanted to avoid people commencing the offence. Standing and watching somebody circling round Cadogan Street and Bothwell Street and that area involves a lot of police hours, and to what effect? Is that a good use of public resources? I was worried that the bill had not managed to capture what the expert group wanted in principle: an equalisation of treatment. If there is to be stigma, there should be equal stigma.

**Paul Martin:** But should the level be different for the buyer?

**Margo MacDonald:** As I said, I do not know. I will think about it, talk to folk about it and tell you sometime.

**Paul Martin:** You accept that the respective profiles are very different, with the buyer normally having a higher economic profile. The economic and social profiles are different—albeit not on all occasions.

**Margo MacDonald:** That is the trouble—we are trying to make law. I do not know how such qualitative judgments should be made.

**Mike Rumbles:** I draw your attention to paragraph 18 of the policy memorandum, which says:

“Consideration was also given to the broad approach proposed in Margo MacDonald MSP’s Prostitution Tolerance Zones (Scotland) Bill ... However, the Expert Group found little evidence that prostitution tolerance zones helped to protect women involved in prostitution, or that they protect communities from the nuisance associated with it.”

Therefore, the Executive has adopted the approach in the bill. It is about reducing the demand for prostitution, keeping the offence for soliciting and loitering by the prostitute, but changing the whole approach so that we create a new offence to attempt to reduce the demand. My criticism of the bill is that it fails on the issue of motor cars that we considered, but do you not accept that the key to making progress is to reduce demand?

16:30

**Margo MacDonald:** Once again, I am too impatient for that. I do not think that we would manage that by next week. Obviously we want to do that, but it involves a much wider process of education and changing public attitudes. That was gone into in great detail in the expert group’s report, backed up by loads of research on the work that we would need to do.

Can I draw your attention to what the expert group actually said? It said:

“The management of street prostitution in the locality where it is occurring offers a number of advantages which are evidenced from Scottish and international experience. It:

- confines the public nuisance...to a specified area;
- allows the enforcement authorities to set up rules for operating in the location, particularly for those involved in prostitution, e.g. only to operate within specified hours;
- facilitates the exchange of intelligence between those involved in prostitution and the police e.g. through reports of incidents with clients involving violence or risk of harm;
- concentrates those involved in prostitution in a particular area where they can look out for each other, e.g. by noting descriptions of clients and their car numbers;
- discourages under-age girls from operating in an area, since they will be readily visible and will be discouraged or reported upon by adults involved in prostitution” —

that would now also include foreign people who come here illegally in one way or another.

The report continues to say that management

“• assists with the safety of women involved in prostitution by means of reducing the areas in which unobserved violence might take place;

- facilitates the provision of surveillance by C.C.T.V. and police patrols;
- protects the women involved in prostitution from a repeated cycle of arrest, prosecution, unpaid penalties, short sentences of imprisonment and re-offending;
- facilitates the provision of outreach services, such as needle exchange, condoms, health checks, drug services and advice, including assistance to exit prostitution, subject to resources”.

Will I go on? There is more.

**Mike Rumbles:** I have not got that material in front of me, but I have got the Executive’s policy memorandum.

**Margo MacDonald:** But it is wrong.

**Mike Rumbles:** Are you saying that the Executive is wrong in its interpretation of the expert group’s report?

**Margo MacDonald:** The policy memorandum is wrong in that it makes the assumption and draws the conclusion that the expert group saw no advantages. I have just read you some of the advantages, and the report concludes that

"the designation of a particular area for management of street prostitution will act as a step towards significant reduction of levels of harm, and perhaps total numbers involved in prostitution, and thereby a diminution of need for such localities in the long term."

**Mike Rumbles:** So the policy memorandum is wrong in saying that the expert group

"considered that the creation of tolerance zones would send out the wrong message about the acceptability of street prostitution more generally, and might be seen to run counter to the Executive's longer term objective of reducing and...eradicating street prostitution. On a practical level, it was thought that local authorities would be likely to have great difficulty in identifying suitable locations for tolerance zones."

**Margo MacDonald:** No, that was said too. There is an argument and a counter-argument. I said that there were two ways of approaching the issue, and the memorandum tries to bridge the gap. The idea of tolerance zones has been overtaken by events. The proposed change in the law was for a tolerance zone—an area inside which illegality would be tolerated; a suspension of the law inside a specified geographical area—but that has been overtaken by events. Forget tolerance zones: that is why I said that it is important to think of managing prostitution.

**Mike Rumbles:** The bill does not do that. As far as I can see, the purpose of the bill is to remove the demand for prostitution. If the bill is passed, do you believe that the Executive will be successful in reducing demand by focusing a new criminal offence on people who want to engage prostitutes?

**Margo MacDonald:** I think that the demand for prostitutes' services may—I stress "may"—diminish, but I certainly do not think that there will be a speedy change in the sheer presence of prostitution in communities.

Since we started work on a bill, the whole business of prostitution has moved on apace and that is what worries me. The kind of prostitution to which the bill refers is only one small part of what is happening in prostitution—for example, there is much more indoor prostitution now. Since the discontinuation in Edinburgh of what was called the non-harassment or tolerance zone, which was different from what the bill seeks to establish, some women in Edinburgh have been working indoors. No one knows where they are doing so or under what conditions, or whether they are working for themselves. I believe that some are doing so, but others may not be and may be being exploited in a way in which they were not when they worked within the known parameters of the zone.

Reports and a lot of evidence from the women are available and they said themselves that once they were in the zone they did not need to have there the boyfriend, partner, minder, pimp or

whatever you want to call him because rules had been agreed about how the zone would operate. Provided there was no add-on criminality—drug trafficking and so on—the women would probably not be lifted. The zone was a much safer environment.

**Mike Rumbles:** I have a final point on what you just said. You firmly believe that prostitutes were not exploited when working in the zone. That is what you just said.

**Margo MacDonald:** No, I did not say that.

**Mike Rumbles:** You did. I wrote it down.

**Margo MacDonald:** I think that some prostitutes are exploited—some may be exploited all the time. However, some of the prostitutes who are not found hanging around street corners are not exploited much, though some are.

**Mike Rumbles:** The whole point is that prostitution involves exploitation.

**Margo MacDonald:** Of course it does. I do not deny that. However, it is too simple to say that that is all prostitution is.

**Ms Watt:** What are the implications of not needing a complaint to be made by a member of the public for it to be deemed that an offence has been committed?

**Margo MacDonald:** I think that that puts police officers in a bad position because they must be judge and jury. In Aberdeen, the women stand around the closed-up factories and storage buildings in the docks area; I am not exaggerating when I say that only about six houses at the most can see anything of that area. It is remote from most of Aberdeen. Who are such women alarming or causing a nuisance or offence to, if nobody can see what they are doing? Who are the guys who go down there in cars alarming, offending or causing a nuisance to? It is really only prostitutes who are down there. It cannot be good law for a policeman to come along and say to them, "If somebody was here or if somebody saw you, they would be alarmed or offended." That is why I am saying that, rather than thinking theoretically, you should think in practical terms.

Glasgow is a bit different. The area that Paul Martin is particularly concerned about—his area—is overlooked by lots of houses.

**Paul Martin:** Convener, can I just confirm for the record that it is Frank McAveety's area that is involved?

**Margo MacDonald:** I was not blaming you.

**Paul Martin:** I have a very small part of the area in question. I was going to call you Jim, there.

**Margo MacDonald:** That is just because I get you mixed up with your father.

The situation is completely different in Glasgow because of the geography of the place. I described what the Aberdeen docks area is like and I did not exaggerate. In Aberdeen, there is now a drop-in centre, which is located as close as possible to the area. No matter what law the Parliament passes, Aberdeen will—very sensibly—carry on with what it is doing.

**Ms Watt:** Margo MacDonald has hit the nail on the head. Unless there are very strict guidelines, how the law is enforced will depend on the police constable who is patrolling the area or the patrol car that is going round. The door will be left wide open to—God forbid—police harassment and so on.

**Margo MacDonald:** That does not happen at the moment, because everyone knows what the rules are inside the area.

**David McLetchie:** We are talking only about street prostitution, not about prostitution generally.

**Margo MacDonald:** We think that under the bill there may also be scope for test cases for indoor prostitution. That was not meant to be the case, because indoor prostitution is a completely different scene.

**David McLetchie:** Yes, but we are talking about counteracting street prostitution. By its nature, that activity is highly visible. We know who is committing the offence, where it is being committed and when it is being committed. From the evidence that you and others have given, the background papers and the policy memorandum, we know that 150 to 200 women in four areas in four cities may be involved in street prostitution. Why is an offence that is so highly visible not being eradicated under the present law?

**Margo MacDonald:** As I tried to explain, the expert group considered that question. The majority view was that an offence of breach of the peace did not send out a sufficiently strong message. I disagreed with that line of reasoning. I thought—and still think—that it is more important for us to allow local authorities, together with health boards, the police and so on to decide how best to manage a potential problem. In Edinburgh, it has certainly proved to be a problem and a nuisance. For that reason, I did not object strongly to the creation of a specific offence.

**David McLetchie:** I am talking about the present law. Section 46 of the Civic Government (Scotland) Act 1982 refers to soliciting, importuning and loitering for the purpose of prostitution. That is pretty clear. As I said, we know who is committing the offence, where it is being committed and when it is being committed.

Why is the present law not enforced, so that the practice is eradicated?

**Margo MacDonald:** The present law is enforced in different ways in the different cities. The committee will need to check this, but when the expert group met and took evidence, it discovered that the procurator fiscal in Aberdeen had decided that there would not be prosecutions for soliciting there, because the offence is subject to a fine and people are back out on the streets once they have paid it. The procurator fiscal in Aberdeen did not want to get back into that cycle. In Glasgow, there are prosecutions.

**David McLetchie:** But not everyone who purchases street prostitution on a given night of the week is arrested.

**Margo MacDonald:** No. Would you want them to be arrested every night of the week?

**David McLetchie:** In the case of every other offence of which we express disapproval, if we knew who was perpetrating the offence, when it was being perpetrated and where it was being perpetrated, offenders would be arrested and locked up and the offence would be eradicated. I am suggesting that we do not enforce existing laws. In fact, we have always had a rather capricious form of tolerance, or management, which has basically been a combination of the police and the prosecution services generally turning a blind eye to prostitution but, occasionally, for the sake of public consumption, having a campaign to clean it up and arresting and prosecuting the whole lot. Would you agree that we have a capricious, tolerated system of street prostitution at the moment?

16:45

**Margo MacDonald:** I object to the stigma and penalty being applied only to the prostitutes. Under the present law, the client is not stigmatised or prosecuted. It was not a blind eye. There were thought-out local strategies for dealing with the situation. When Edinburgh's de facto non-harassment zone or tolerance zone—whatever you want to call it—in Leith became impossible to operate because too many residents complained, the police decided arbitrarily to move the zone from Coburg Street, where it had been reasonably successful for a good number of years, to Salamander Street.

The police told me that if they were to take the same decision now, they would not do it in the same way. They did not consult the local people. There was such a to-do and so much opposition that the council just said, "Right, that's it. We want a legal basis from which to manage what we see as an Edinburgh problem." I introduced the bill for that reason. Aberdeen was ticking along fine;

Dundee was fine; and Glasgow had a different way of going about it. To summarise briefly, Glasgow said that it diffused the services required by prostitutes through all its services for women in the city, whereas in Edinburgh and Aberdeen, services had been concentrated.

**David McLetchie:** Where in Edinburgh does street prostitution happen?

**Margo MacDonald:** It is difficult to say. SCOT-PEP had its funding cut when the women disappeared from the area in which it was located. SCOT-PEP is out only two nights a week for about four hours a night but, in the past year, it has contacted nearly 90 women. It estimates that about 100 women in Edinburgh are still involved in street prostitution. They will not all be out on the one night—they will be out on different nights.

**David McLetchie:** In a variety of locations.

**Margo MacDonald:** They are all over the place, so it is very much more dangerous. In statistics for the first year following the discontinuation of the tolerance zone, the reported gratuitous attacks—let us call them that—on women were up by about 1,000 per cent. That is because the women are scattered and the police and SCOT-PEP do not know where they are. There is a big danger in thinking that if we do not have an area that is acknowledged to be where prostitution is practised, we somehow disperse and minimise the problem. We do not—we probably spread the problem.

**David McLetchie:** But if the police do not know where they are, how do the clients know where they are?

**Margo MacDonald:** Mobile phones. That is what I am telling you—everything has moved on.

**David McLetchie:** If someone can order a service by mobile phone, the old system will not apply anyway, will it?

**Margo MacDonald:** It has changed. A lot of the women—remember the numbers I have just given you—congregated around Leith Links. They could run and hide if there was a problem with the police or residents—I think that is why they congregated there. If Mary Blackford or I were out and about in Edinburgh of an evening, we would go down to the Links to see how many women were there. There are very few women there; they are scattered. I have heard—

**David McLetchie:** You said that contact is predominantly made by mobile phone. Such contact constitutes neither soliciting nor loitering.

**Margo MacDonald:** Do not be difficult.

**David McLetchie:** I am genuinely interested in what you are saying. If that is the case, there is no soliciting and loitering.

**Margo MacDonald:** There is residual street prostitution, as we understand it, but the numbers are nothing like they used to be. Women can use their mobile phones to make arrangements with clients on their lists, so they do not need to stand in one spot. However, there are still the odd one or two women who use Leith Links and—as far as the residents are concerned—create a nuisance. I would not deny that the detritus associated with prostitution is a nuisance.

**David McLetchie:** I agree.

**The Convener:** Does Margo MacDonald support the bill's attempt to create equality of illegality for purchasers and sellers of sex? Is such an approach workable? On the basis of the evidence from Executive officials, do you think that the bill will achieve what it is trying to achieve? Will the stigma of purchasing sex ever be equivalent to the stigma of selling sex? Will the seller continue to be more likely than the purchaser to be criminalised?

**Margo MacDonald:** Yes—to all your questions. The bill will treat the purchase and sale of sex equivalently, which I strongly support. However, your question-and-answer session with the officials who drafted the bill confirmed what policemen—from senior policemen to the guys and women on the beat—have told me. Most of the younger police officers do not want to have to apply an objective test on the spot. It was intended that the objective test should be applied by the procurator fiscal or by the court, not by the policeman.

**The Convener:** Members have no more questions, so I thank you for giving up your time and contributing to the debate.

**Margo MacDonald:** Thank you; it did not hurt a bit—well, McLetchie did.

16:53

*Meeting continued in private until 17:18.*

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