PROCEDURES COMMITTEE

Tuesday 24 October 2000
(*Morning*)

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PROCEDURES COMMITTEE
10th Meeting 2000, Session 1

CONVENER

*Mr Murray Tosh (South of Scotland) (Con)

DEPUTY CONVENER

*Janis Hughes (Glasgow Rutherglen) (Lab)

COMMITTEE MEMBERS

*Donald Gorrie (Central Scotland) (LD)
*Gordon Jackson (Glasgow Govan) (Lab)
*Mr Andy Kerr (East Kilbride) (Lab)
*Mr Gil Paterson (Central Scotland) (SNP)
Michael Russell (South of Scotland) (SNP)

*attended

WITNESSES

Mr D Stuart Allan (Convention of Scottish Local Authorities)
Mr Eddie Bain (Convention of Scottish Local Authorities)
Gavin Douglas QC (Senior Counsel to the Secretary of State for Scotland)
Joe Durkin (Society of Parliamentary Agents)
Martyn Evans (Scottish Consumer Council)
William Ferrie (Scottish Executive Constitutional Policy Branch)
Colin Miller (Scottish Executive Constitutional Policy Branch)
Sarah O'Neill (Scottish Consumer Council)
Mr Brian Spanswick (Railtrack)

THE FOLLOWING ALSO ATTENDED:

Fergus Cochrane (Chamber Office, Scottish Parliament)
Ian Leitch (Legal Office, Scottish Parliament)
Carol McCracken (Director of Clerking and Reporting, Scottish Parliament)
Bill Thomson (Head of Chamber Office, Scottish Parliament)

CLERK TO THE COMMITTEE

John Patterson

SENIOR ASSISTANT CLERK

Mark MacPherson

ASSISTANT CLERK

Katherine Wright

LOCATION

Committee Room 2

Scottish Parliament

Procedures Committee

Tuesday 24 October 2000

(*Morning*)

[THE CONVENER *opened the meeting at 09:34*]

The Convener (Mr Murray Tosh): Good morning. I call the committee to order. We are slightly late in starting, but the committee is now quorate. We have three items on our agenda, which means that we should be finished in about 15 minutes. [*Laughter.*] Do not get your hopes up.

Item in Private

The Convener: The first item relates to item 3, on the inquiry into the application of the consultative steering group principles. There is a report, which identifies costs and names individuals as potential advisers. Although I am extremely reluctant to take items in private, I am advised that it would be inappropriate to release that information at present and that we ought, therefore, to take the item in private. Does the committee agree?

Members *indicated agreement.*

Private Legislation

The Convener: We move to item 2, which is a witness session on private legislation. I invite all the witnesses who are present and willing to give evidence to come to the table and to take the seat at which their name-plate is displayed.

Donald Gorrie (Central Scotland) (LD): While we wait for the witnesses to take their seats, I could give a tutorial on how not to elect a speaker.

The Convener: We will send members at Westminster some advice on how we do that.

I welcome the witnesses to the session. We look forward to hearing the witnesses' views on private legislation in Scotland. It might help if I set down a few markers at the outset. You have all seen the private bill working group's report on private legislation in Scotland and most of you have responded to it. You are aware that we want to approach the matter through standing orders rather than through legislation. We can therefore dispense with any philosophical discussion on the merits of the two approaches and get on with the principal business.

Witnesses will appreciate that the report is somewhat complex for members, as it is laden with specialist language. We have before us the report, the witnesses' detailed responses to the report and some comments that have been prepared by our officers on the detailed responses, all of which requires a considerable amount of cross-referencing in an area in which none of us is expert.

Rather than going through the questions that have been circulated to the witnesses, I suggest that each witness should make their pitch in turn, bearing in mind the questions and the issues that they feel are of concern. I propose that committee members listen to the evidence and ask for clarification and, if appropriate, ask Carol McCracken to respond to anything that might seem to relate to an area in which we will want to discuss the recommendation that will ultimately be put in the report. I hope that we will be able, thereby, to short-circuit a lot of the specialist stuff that is in the responses and get to the guts of what matters to the witnesses and what they believe to be the difficult issues on which the committee will have to make firm recommendations.

The witnesses might have come expecting a series of questions, but that would not be a particularly fruitful way to proceed. There are nine witnesses—we will get through them more quickly if they say what is important to them.

If everybody is happy to proceed on that basis, we will start. The one thing that I did not think to

work out was a running order, so perhaps the gentleman who is facing me will go first.

Mr Brian Spanswick (Railtrack): I am Brian Spanswick, legal adviser at Railtrack plc. I am standing in for Simon Osborne—the company secretary and solicitor—who is obliged to remain in the office as a result of last week's Hatfield tragedy and its aftermath. I hope that I can assist the committee.

I have here a copy of Mr Osborne's written submission to the committee. In taking account of what the convener has just said, I am not sure whether I should run through the submission. Are members content to rely on the copies that have, no doubt, been circulated?

The Convener: The paper that we have is dated 12 October and is entitled, "Private Legislation in the Scottish Parliament".

Mr Spanswick: That is the one.

The Convener: We have had the opportunity to examine the paper, but it would helpful if you hit what are the headlines as far as you are concerned. What matters are of real concern to you? Which points must the committee take on board?

Mr Spanswick: I see. Would you like me to stand to speak?

The Convener: No, please remain seated. That is preferable, otherwise the microphone will not pick up your voice.

Mr Spanswick: First and foremost, the company secretary and solicitor and—I think—Railtrack welcome warmly the Scottish Parliament's initiative to replace the provisional procedure for private legislation with a private bill procedure that is akin to that of the Westminster Parliament. We also welcome warmly the proposal to make it possible for a bill to be deposited at any time of the year, apart from when Parliament is closed for business. However, on account of costs and to save trouble and abortive time all round, Railtrack feels that a debate to approve the principle of a bill should be advanced, following the preliminary stage of parliamentary proceedings. Otherwise, bills will go some way down the road, only for the principle to be not proven. That would perhaps incur a lot of abortive expense for private individuals who opposed a bill.

We are a little concerned that, if members of the Scottish Parliament could still block a bill to force a debate—despite the previous scrutiny that was afforded to that bill—that device will be used to defeat the bill or used as a delaying tactic.

We are also concerned about whether a closure motion on whether a bill should be passed and sent for royal assent should be determined by a simple majority of MSPs. In the Westminster Parliament, a minimum of 100 members must support a closure motion for it to be carried.

The Convener: Let us clarify that point. Carol McCracken will advise the committee what the proposal is.

Carol McCracken (Director of Clerking and Reporting, Scottish Parliament): We propose that the normal procedures that relate to public bills should also apply to private bills. That would mean that a private bill had to have the support of a majority of those who were voting and that members from a minimum of a quarter of the total number of seats in the Parliament would have to vote. There would have to be a simple majority from at least a quarter of the Parliament.

The Convener: Would the decision be taken at decision time or at the end of the debate?

Carol McCracken: I think that it would be taken at the end of the debate.

The Convener: That means that meeting the threshold of a quarter of members could be a difficulty.

Carol McCracken: It should not be—it has not previously been a difficulty for any stage 3 debate. The vote at stage 3 is taken at decision time. Only votes on amendments are taken at any other time, so every member should be there for decision time anyway.

The Convener: That is important. The difference between a private bill and a public bill is that a public bill is a political measure on which members will be whipped. We would expect a minimum of 115 members to be at such a debate anyway. However, without the co-operation of the whips, we might well find that at the end of a debate on a private bill, there was not the required number of members, which would be unfortunate. We must agree that whatever form the final decision takes, it will be taken at a time when members are present, so that the decision is valid. If we find a procedure to do that, that concern will be taken care of.

Mr Spanswick: Under the Parliamentary Costs Act 1865, if the preamble to a private bill in the Westminster Parliament is not proven, or the bill is opposed and a committee to which the bill is referred reports unanimously that the opposition is unfounded, one party may be entitled to recover from the other all or part of the abortive costs that it has incurred. In our experience, that has tended to instil good discipline in parliamentary proceedings and has deterred frivolous or vexatious promotion of and opposition to private bills. We hope that those principles will be extended to the procedures of the Scottish Parliament.

09:45

The Convener: Are there any questions on what we have heard so far? We will reach a recommendation about the award of costs to objectors after the committee has heard everybody's point of view.

Donald Gorrie: Would opposition to a private bill that Railtrack promoted come from local residents—on a NIMBY basis—or from bus companies or other competitors?

Mr Spanswick: Opposition could come from any quarter: a private individual who objects to his or her land being acquired compulsorily; a public utility; another transport undertaker; or a public limited company. The principles of the Parliamentary Costs Act 1865 attach to every class of opponent, not only to private individuals.

The Convener: I will call the six witnesses whose names are listed, but I am conscious that my list is incomplete and that others may wish to speak. The next person on my list is Mr D Stuart Allan of Fife Council, who is here to represent the Convention of Scottish Local Authorities.

Mr D Stuart Allan (Convention of Scottish Local Authorities): I am accompanied by Mr Eddie Bain, who is the solicitor to the City of Edinburgh Council.

I will not go into the submission that the committee has received from COSLA in any detail, but I will expand on one or two issues.

COSLA supports the thrust of the recommendations of the working group, although we have reservations about the procedures. In particular, we agree with the group's analysis of the Private Legislation Procedure (Scotland) Act 1936 and support the proposal for a Parliament-led system, which we consider the right option for the Scottish Parliament.

COSLA perceives that the working group has been constrained to some extent—entirely understandably—by the desirability of discouraging immediate new legislation. The working group would like to have new standing orders or guidance that would not require primary legislation and, in current circumstances, that would be desirable. However, I am glad that the working group has suggested that there should be a medium-term review of the law and of practice in the light of experience. There has been no private legislation since the Scottish Parliament was established. We strongly support the proposal that a review should take place by 2004.

There is no doubt that the Private Legislation Procedure (Scotland) Act 1936 has its detractors, but it has worked reasonably well in practice. However, whether that structure would be suitable for the new Parliament is another matter. Another approach that could be considered is to adopt the formula that is set out in the Transport and Works Act 1992, which applies only to railway and bus undertakings and so on in England and Wales. Under that system an order is made, which is in due course ratified by the secretary of state. Such orders relate to works rather than to more general matters. A works order can go through a fairly expedited form of procedure, except where the works are in the national interest, in which case the secretary of state has to certify that they are such—they are then subject to parliamentary process.

Local authorities have not promoted much private legislation recently. As a result of the reorganisation of local government and the establishment of the Scottish Parliament, local authorities have put to the back of their minds the option of promoting private legislation. Fife Council considered promoting private legislation two years ago, but because the Scottish Parliament was in the throes of being established, it put that idea on the back burner. I suspect that when the new procedures are in place, local authorities will think more purposefully about promoting private legislation.

The Convener: Is that the basis of the statement in your summary paper that

"It is anticipated Councils will make greater use of private legislation"?

Mr Allan: Yes.

On the proposed procedure, I agree with Mr Spanswick that the departure from having two fixed dates for the lodging of bills is to be warmly welcomed. We have reservations about the proposed mechanism for dealing with amendments by either promoters or objectors. As I understand it, it will be for the Scottish Parliament to decide whether to introduce amendments to a bill that is submitted and is subject to debate. COSLA thinks that it is appropriate that there should be an adversarial testing of the evidence that is provided in support of a bill. That is largely what is done by commissioners under the 1936 act. However, it is important that promoters or objectors should have the opportunity at some stage to try to introduce amendments. The lack of a mechanism to allow such amendments to be taken to a vote would detract from the overall structure of the procedures. There should at least be the opportunity for promoters or objectors to petition a private bill committee to select their amendments. The committee might well decide against the amendments, but at least the promoters and objectors should have the capacity to put issues before a committee.

As the committee will have read COSLA's submissions, I will make just a couple of

concluding remarks. It is important that a private bill committee should meet locally to consider private bills. It should not be prescribed that a committee should have to do so, but that consideration should be in the forefront of members' minds. If a bill deals with matters that relate to Inverness, that is where the committee should meet.

The private bill committee should be required to report to the Parliament. I am sure that under best practice that is what such a committee would wish to do, but it would be appropriate to provide for that in standing orders.

One must be guarded about awarding costs, but it seems appropriate that the Scottish Parliament should have some legal power to award costs, for example when objections are frivolous. Equally, costs might be awarded when objectors have successfully opposed an order that was introduced, for example, under compulsory purchase powers. It would be unfair if such objectors were left out of funds after they had spent large sums of money on the objection process.

The Convener: What is your reaction to the suggestion that objectors should have to pay a fee to lodge an objection, to cover the administrative costs that their objection would give rise to?

Mr Allan: On balance, I question whether such a fee—it is proposed that it would be £20—would be worth while. I understand that that would eliminate objections from people who have no great cause to object, but I do not think that that is a major issue. It might be that charging people for lodging an objection is inconsistent with the Human Rights Act 1998, but I will not push that point terribly forcefully. I wonder whether such a charge is in the spirit of openness and accountability and I doubt whether it would bring in much money to the Parliament.

The Convener: We received a submission on harbour revision orders, which would obviously be a matter for local authorities. The suggestion is that procedures should be amended—eventually rather than in this review—to provide, in effect, for harbour revision orders to come under the planning system rather than the private bill system. What is COSLA's view on that?

Mr Allan: We agree with that. Although private legislation has been drying up, harbour revision orders are still being promoted—I think that seven such orders were promoted in 1999 and two have already been promoted this year.

Local authorities try to move heaven and earth to avoid special parliamentary procedure. I do not know what additional scrutiny that brings to the legislative process—that is a question that should be considered in the medium-term review. I am not persuaded that any special scrutiny is needed beyond what is proposed in the working group's report.

Carol McCracken: It is intended that the next review will consider special parliamentary procedure, once we know how the private bill procedure has worked. We will then try to bring the two procedures together.

On a related point, we did not look hard at the orders under the Transport and Works Act 1992 because that act refers only to one type of private legislation. We were trying to introduce a procedure that would work from November and that would apply to everything. I understand that once the orders under that act are made and are ratified by the secretary of state, they are tied into the special parliamentary procedure. We will therefore consider such orders, although they will be additional and will represent only one category.

I will comment on some of the other points that Mr Allan raised. The question of who introduces amendments was a difficult one for the group. Our advice is that under the current legislation only members can formally move amendments.

To be as pragmatic as possible, a two-stage procedure is proposed. Promoters and objectors could bring amendments to a private bill committee for detailed discussion and all the issues surrounding the amendments would be aired when the promoters and objectors had made their cases. Much of the procedure has to be teased out in relation to the standing orders, but once the committee had discussed the issues in the round and decided which amendments were worth pursuing and which were not, the convener would formally move the amendments that were worth pursuing during section-by-section consideration of the bill. Even at that stage, however, if it became apparent that the promoter needed to make amendments, they could be brought to the committee for discussion, as what might be called draft amendments. Such amendments would have to be formally moved by a member of the committee. That is the best that we can do, given the constraints under which we are working.

10:00

The Convener: Stuart Allan, you were looking for a mechanism by which the promoters or the objectors could bring amendments to the committee's notice. Does what Carol McCracken has said meet that wish?

Mr Allan: It goes a long way towards doing so. I anticipated that that type of procedure would be used. However, it relies on informality and does not give the promoter a right to petition for the amendment to be considered. There is a case for

including such provision in the standing orders—the committee need not be required to take the amendment, but it should be required to consider whether it should be voted on. That would be an important safeguard for promoters and objectors.

Carol McCracken: I think that we could accommodate something like that in the standing orders.

Mr Allan: I would be much obliged.

Carol McCracken: Another point that was raised was where the inquiry should be held. It is for the committee to decide whether it would want to impose a requirement on the private bills committee to sit in the area that would be affected by the private legislation, but there is nothing in the standing orders to prevent a committee going to the area.

Donald Gorrie: I had assumed that, as with every bill, every amendment that was lodged by a member would be considered. Am I right?

Carol McCracken: Yes.

Donald Gorrie: In that case, it seems reasonable that the proposer of the bill should have the right to introduce an amendment. The Executive could lodge amendments through a minister who was a member of the committee.

I apologise for not having brought all the correct papers. You can blame the gentleman from Railtrack for that, as my sleeper was an hour and a half late. In the submission, there is a slightly cryptic remark that probably refers to a paper that I do not have. It reads:

"Counsel is cautioned against making party balance for a Private bills committee a pre-eminent consideration."

I wondered what the story was behind that.

Mr Eddie Bain (Convention of Scottish Local Authorities): What I say on that matter might be slightly controversial. Local government's thinking is coloured by the Nolan report and the debate around the ethical framework for local government. Local authorities have been cautioned against having regard to party political considerations in relation to committees that deal with quasi-judicial and adversarial matters. We thought that it was questionable whether there was a need for party political balance in the composition of the private bills committee, given the fact that the committee would probably be considering issues about individuals' rights and quasi-judicial matters that are without significant party political content.

The Convener: However, would it be the case that the political balance of the council would be replicated broadly on a licensing board, a planning applications committee or an employment tribunal?

Mr Bain: In practice, yes. In Scotland, the legislation has never required political balance, although it does in England. Members of some local authorities now accept that political balance is not essential for some committees in local authorities, given the new structures. Several councils have deliberately departed from party political balance when setting up standards committees.

The Convener: We would not consider party political balance to be the be-all and end-all—apart from everything else, it would be difficult to achieve on a committee with five members. However, we would want to have a political spread on a private bills committee, although that would not be the overriding consideration.

Carol McCracken: Under the standing orders, the Parliamentary Bureau is required, when recommending the establishment of any committee, to have regard to the committee's political balance. If the Procedures Committee wanted to change that requirement with regard to a private bills committee, a specific exception would have to be made.

The point about the difficulty of achieving party political balance in a committee with five members is important. We envisaged that, over a period of time—say, three or four private bills committees—the Parliamentary Bureau would be expected to achieve a rough balance.

The Convener: How would the convenership be determined? That is also subject to a requirement for balance.

Carol McCracken: At the moment, the convener must be elected from a party that is specified by the Parliamentary Bureau. We would have to come back to the committee with other proposals if it was decided that party political balance would not apply to the private bills committee.

The Convener: Will we have to say that in the report that goes to the Parliament?

Carol McCracken: In general, where we have not made proposals, the assumption is that the procedures for other committees would apply. We have made proposals only when it seemed to us that there was good reason for departing from established procedures.

The Convener: Would the private bills committee be added to the pot with all the other committees in order for the convenership to be worked out proportionately, or would the first two convenerships be given to Labour, the next one to the SNP and so on?

Carol McCracken: The latter option is possibly what the business managers on the Parliamentary Bureau would do.

Donald Gorrie: It is likely that, perhaps in a year's time, a local government bill could give councils powers of general competence—there is a more trendy phrase, but that is what the issue is about. Would it be possible to word that bill to reduce the number of times that councils had to introduce special private bills? I am thinking of a situation in which a deal might have been struck between two local authorities to build a rail or bus way, for example.

Mr Allan: As a broad answer to a broad question, I would not expect a local government bill or the powers of community or general competence initiative to give local authorities powers that were extensive enough to allow them to do works that, at present, must be taken before Parliament.

Donald Gorrie: I was trying to find a way to reduce our work load.

Mr Bain: I agree with what Stuart Allan has said. Much depends on how much power of general competence the Scottish Parliament is prepared to give local authorities. In addition to the point that Stuart Allan made, there are financial constraints.

The other issue that might still point to the need for local authorities to promote private legislation relates to the fairly common situation that has occurred with recent bills when we have wanted to disapply or modify general legislation in a specific local authority area. Private legislation to give power to disapply the national speed limits was required for the Jim Clark memorial rally, which was promoted by Scottish Borders Council. It was also necessary to give the council the power to close roads totally to pedestrians.

For the central Edinburgh rapid transport project in my council area, private legislation was necessary to disapply the provisions of the Transport Act 1985, which requires the council to act even-handedly in relation to all bus operators—of course, central to the CERT concept is the need to guarantee someone the use of the guided bus system.

The Convener: The next witness on my list is Martyn Evans, from the Scottish Consumer Council. He is supported by Sarah O'Neill, which is why there are more people here than we had allowed for.

Martyn Evans (Scottish Consumer Council): I am the director of the Scottish Consumer Council and Sarah O'Neill is our legal officer, who is working with us on this matter.

We are pleased to have the opportunity to give evidence on the matter that is being discussed today. We sought the views of a number of consumer associations in England and Scotland. While we were not overwhelmed with responses, we have included in our submission the ones that we received.

We have arranged our evidence under several headings: access; information; fairness; representation; and redress. We welcome broadly the recommendations of the private bill working group. In particular, we welcome the conclusion that a Parliament-led system should be adopted for processing private bills in Scotland.

There are two main thrusts to the changes that we propose. First, the full procedural costs, and therefore the risks, of promoting a private bill should be shifted squarely onto the proposer of a private bill. Secondly, there should be increased ease of access for objectors. If the adversarial system is to be adopted, the interests of proposers and objectors need to be balanced with great care.

We have three main concerns about the proposals. The Human Rights Act 1998 is likely to play a role in any system in which private rights can be overturned. We have mentioned the impact of that act on a number of occasions in our evidence to this committee, particularly with regard to objectors' rights to a fair hearing.

In an adversarial system, the skills that will be required by a member of a private bills committee will be different from the skills that they are used to exercising. From our experience of other areas of judicial proceedings, we believe that training and a skills audit should be offered to those members.

We have also made representations to the committee about pro bono representation for objectors, to balance the interests of objectors and promoters.

Our final concern is that the system would not allow objectors or proposers to lodge amendments at consideration stage. We understand the reasons for the working party's recommendations and we believe that the solution that has been arrived at—of having a two-stage procedure—is quite elegant. However, we believe that, in the interests of transparency, objectors should be able to lodge amendments. If that does not happen, there might not be a clear public record of consideration of objectors' detailed proposals to mitigate the effects of a bill.

The Convener: A number of points have been raised on which Carol McCracken might usefully guide us. We would be grateful for assurance on the question of compliance with the ECHR and any other human rights legislation. The comments about the delaying of amendments and the elegant solution are important. The Scottish Consumer Council fears that it would not be possible for amendments to be placed on the record if there were not a formal way for objectors to lodge them. Will you pick up on those, and other, points?

Carol McCracken: The last point is the easiest to deal with, so I will do that first. Even if the amendments have not formally been moved, the substance of the amendments and draft amendments that have been introduced will appear in the evidence that has been brought to the committee. The issues that objectors raise should go on the record when the committee considers those issues.

The human rights aspect is more difficult to deal with. Our legal services directorate is still considering that issue.

10:15

The question about legal representation to help objectors to present their case was raised in the Scottish Consumer Council submission. The question of whether it is a problem if the promoter has legal representation but the objector does not is still being considered by the lawyers. The issue arose in the context of the Parliament's consideration of expenses for witnesses appearing before committees. At that time, the view was taken that the Parliament is there to listen to witnesses and that the Parliament should not be expected to pay for counsel to help witnesses come and give evidence to committees. However, private legislation is a slightly different matter, especially if we are suggesting that promoters and objectors have the right to cross-examination. There is an issue about what the Parliament should be expected to fund and provide, and that must be teased out. When we report to the committee on the standing orders, the lawyers should have had a good look at that.

Gordon Jackson (Glasgow Govan) (Lab): I wonder whether the point about legal payment is connected to the point about the European convention on human rights—there must be what is called "equality of arms" under any system. There may be a problem if Railtrack has limitless funds and senior counsel by the barrowload, whereas objectors with legitimate points in an adversarial system do not. The two issues—legal representation and the European convention on human rights—are connected.

Carol McCracken: Yes, they are.

Ian Leitch (Legal Office, Scottish Parliament): We have considered that question and we examined the method for adducing and testing evidence. The legal office is satisfied that it would not be necessary to have adversarial proceedings—such as cross-examination—because the committee could interrogate, with the help of advisers. That would have rendered unnecessary the attendance of lawyers. In our opinion, that would have satisfied the human rights test, because, after all, in most local government matters, such as licensing committees, it is not necessary to have lawyers—they have a right to be there, but we do not have to have them. In many cases, local authorities conduct their inquiries through their committees.

The working group took the view that, to test the evidence properly, there should be adversarial proceedings—where necessary. When that becomes the case, as Mr Jackson pointed out, there is a potential inequality of arms because those who can afford it will bring along the best lawyers that they can. That might raise a spectre of inequality, which would need to be redressed and we would have to decide on a method to do that.

As Carol McCracken pointed out, there is a difficulty here. If the Parliament summoned witnesses, as opposed to inviting them, and people were not obliged to answer questions that they would not be obliged to answer in court, without advice, how would they know what not to answer? That issue was explored in relation to the witness allowance scheme and it was felt that as people could take advice before they came to the Parliament, no provision needed to be made. Given that that is the general position in respect of witnesses, there is a potential difficulty with any funding arrangement—including which fund it would be drawn from—that were to be provided in relation to private legislation.

If we provide legal representation, how would that be independent of the tribunal that appointed it? That is another potential difficulty. There is no easy solution, but we have given the matter much thought. If people want to object and to bring their own lawyers, they can do so. Arguably, the matter relates to the general provision of funds for legal aid rather than to a particular aspect of parliamentary procedure.

That is the position we have reached so far. We acknowledge that those are difficult problems.

Gordon Jackson: I do not know whether legal aid would cover that. What would happen if an objector with a serious objection applied to Parliament and said, "You are conducting an adversarial system, the promoters have 25 senior counsel, so who is paying for mine?" It is a very serious problem.

Ian Leitch: We will have to investigate that and find out whether there are funds. That would spill into the general area of witnesses coming before Parliament—not when they have been asked to come, but when they have been summonsed, which has not happened so far.

The Convener: Can we really leave it at that and say that it is a real difficulty that will have to be considered? Surely we must take a decision. If we build up adversarial proceedings as the

quintessence of the procedure, bearing in mind the concern to be ECHR compliant, which means having equal arms—[*Interruption.*] Is that the quaint legal expression?

Gordon Jackson: The phrase is "equality of arms."

The Convener: A phrase that drips from the lips of most of us several times a day.

If we proceed on that basis, can we really walk away and say, "Yeah, that is a problem"? Somebody will have to bite the bullet and provide for equality of arms or not, which might cause problems. If we are prepared to introduce equality of arms into the system, someone will have to decide who will pay for it. Does the promoter who has given rise to the issue have an obligation to meet all the costs or should the public purse pay for it? Perhaps it is just tough luck if someone wants to acquire a person's land by compulsory purchase: they will just have to hire their own Queen's counsel. That is a bit heavy altogether.

Gordon Jackson: It is difficult. I would not recommend that we make an immediate decision because it must be thought through. Declaring a slight personal interest, I should say that it would be seriously expensive if we were to declare that we would provide for that. We would have to think twice before going down that route.

Donald Gorrie: I have no solution to the problem. I approach it from a different angle. Colleagues probably have much experience of being local representatives on planning inquiries, as I do. My impression is that the reporter at such inquiries takes seriously only those organisations that are represented by advocates. The residents group or the local councillor is allowed to come along, gets patted on the head and is sent away. It is important that we do not do that. We must ensure that people who have a good cause but not a good advocate—perhaps because they cannot afford it—get a fair shout.

Are we hooked on the adversarial, as opposed to the inquisitorial, approach?

The Convener: That is the issue. The feeling seems to be that committee interrogation would obviate the need for full legal representation but that committee interrogation might not do a thorough job. Not having sharp, trained legal minds and not being familiar with expressions such as "equality of arms", members of the committee might fail to do an adequate job.

Gordon Jackson: Do I detect a note of sarcasm?

Donald Gorrie: I am not a Catholic so I do not fully understand, but they have a devil's advocate if somebody is being sanctified or whatever. Rather than everyone having QCs, we could take an inquisitorial approach and hire someone like Gordon Jackson to ask all the right questions—the ones that we are not bright enough to ask.

Gordon Jackson: Now you are talking.

The Convener: I do not know the answer to that.

Carol McCracken: The difficulty is that we are introducing a new system against the background of human rights legislation that has not been tested. We need to put something in place that conforms to that legislation. The current inquiries that we have mentioned, such as planning inquiries and tribunals, even the existing private legislation under the 1936 legislation, has the same problem—current objectors appear with or without counsel. It may be that between now and the next meeting we can explore with the Executive whether it is examining planning inquiries and legal aid in relation to the impact of the new human rights legislation. It is not a matter that can be taken in isolation; it must be consistent across the board. The Executive might already be considering the matter.

The matter might also be considered in the House of Commons in relation to the current private bill procedure at Westminster. The issue has come to the fore as a result of the new human rights legislation.

Gordon Jackson: That is a fair point. There is a strong school of thought that suggests that our whole planning inquiry system is a dud in terms of human rights legislation. Whether that turns out to be the case remains to be seen. Some very big players will argue that that is the case, and it is a hugely complex problem.

Mr Allan: The working group's proposal is not purely adversarially driven. The new element is parliamentary scrutiny. That is an important foundation, which will give additional protection to objectors who do not have legal representation. COSLA sees that as very important. I would counsel against considering it essential to have some funding mechanism for legal representation for objectors. I suggest that the committee waits and sees how the system operates, given the new element of parliamentary scrutiny.

The Convener: Perhaps Martyn Evans would like to comment on the discussion that addressed the points that he raised. He might not be entirely thrilled at the suggestions.

Martyn Evans: The conclusion that I draw from discussions with Sarah O'Neill and others is that the impact of the legislation on a range of procedures is unclear. We raise the issue because, as we said in our submission, any proposed bill must include a statement on its general impact on human rights. The unknown

impacts in relation to fair hearings would also have to be addressed. The discussion has confirmed that it is a serious issue and that is why we raised it. I regret that we do not have a solution.

The Convener: There seem to be more questions than answers.

Martyn Evans: I want to clarify what we mean when we talk about the full procedural costs falling on the promoter. The risks of promotion should lie with the promoter and there should be an incentive to reduce the time of a hearing of a private bill committee. We are in favour of an initial fee, followed by a daily rate to be met by the promoter—that would incorporate the rates that the working group discussed—so that the promoter might have to reach a compromise if the committee sat for a shorter period. That seems to be a reasonable solution. A combination of an initial fee and full procedural costs on a daily basis would be allocated to the promoter. We anticipate that the first few days—perhaps two or three—would be included in the initial fee. If compromise is to be reached, we want to ensure that that responsibility is not thrust on to the committee, but that the promoter must try to reach agreement—outside the committee hearing—on legitimate opposition to their ideas. A financial incentive to foreshorten the process might be appropriate.

The Convener: Thank you.

Our next witness is Gavin Douglas QC, senior counsel to the Secretary of State for Scotland.

Gavin Douglas QC (Senior Counsel to the Secretary of State for Scotland): The committee has read my submission, which dealt mainly with the procedure under the Private Legislation Procedure (Scotland) Act 1936. Under that system, the commissioners sit in the vicinity of the subject of the inquiry. That is very useful, bearing in mind that individual objectors and people who wish to give evidence might be put off by the potential costs of travelling to Edinburgh or some other centre.

The Parliamentary Costs Act 1865 currently applies in relation to private legislation procedure. If there is held to be or has been frivolous or vexatious conduct on the part of either party, it can be reflected in an award of costs. However, that power is rarely exercised or found to be necessary. Under the present system, objectors are eligible to pay one half of the shorthand writers' fees and transcription costs, which can be quite high. Those costs apply daily and any objector is liable pro rata on the days on which they appear at the inquiry.

10:30

That is the strict position. It is very rare, however, for individual objectors to suffer any such cost. Either the promoters voluntarily accept the burden of making such a payment or it is open to the commissioners to recommend to the secretary of state that the individual objectors should not pay those costs and that the promoters should pay them instead. That will happen if the commissioners take that view, if the secretary of state agrees and, strange to say, if there is consent by the Treasury. I cannot recall any recent case in which individual objectors have been left to make any such payment. In cases of larger corporate objectors, it is fair enough but, in practice, individual objectors do not suffer that liability. At the moment, they only have to pay an initial fee of £20.

The question of whether procedure should be adversarial or otherwise has been raised. It is currently a matter for the parties concerned to decide for themselves whether to have representation. If the right of representation were to be denied, I would think that that would be grounds for a legitimate objection on the part of the person whose rights have been so cast aside. In those circumstances, either party may feel that, if it were left to the committee to do all the questioning, the issues would not be dealt with adequately, which could give rise to an equally important complaint.

In recent cases, quite a few individual objectors have represented themselves, and they have done that very well. It would be wrong to think that the commissioners are in any way unsympathetic or unhelpful to such individual objectors. It does not seem that individual objectors who have not been represented by people—legally qualified or not—have suffered at all. I have heard no expressions of discontent in that regard from any of them.

Most harbour revision orders now proceed not under private legislation proper, but under the system that was set up in England by the Transport and Works Act 1992. The only such orders that would come near commissioners under the Private Legislation Procedure (Scotland) Act 1936 would be those involving the compulsory purchase of land belonging to the National Trust for Scotland or which is part of common or open space. The category of harbour revision orders is therefore very rare. There has been no case of a harbour revision order under the procedure of the 1936 act for some years.

I am not sure that the report before us is altogether clear about amendments. Objectors' objections currently have to be set out in their petition against. Under the proposed system, an objection still needs to be submitted in writing by the objector, setting out what the objector thinks and what he wants the committee to do. Such objections can be ventilated at any subsequent

inquiry. Under present rules, the objector is not allowed to go beyond what he has stated in his opening petition against or written objection.

That brings us to amendments. As far as I understand it, the draft report suggests that amendments should be lodged at the outset, and that they should be followed by evidence and submissions. I can see that, under present arrangements, promoters of a measure may wish to submit amendments before the inquiry begins, because it is their proposal, and because, having thought about it, they have realised that some amendment may be necessary. It is therefore completely helpful that, before the inquiry starts, they may put amendments in front of everybody. I can see that that would be good from their point of view.

I do not see the necessity for the objectors to be able to lodge amendments before the stage of the inquiry at which evidence is led by all parties and at which, if necessary, those parties are cross-examined. Submissions are then made, after which the commissioners, under the present system, adjourn and consider their decision in private, having heard the evidence and the submissions. When they come to a view as to whether the need for the order has been established, in whole or in part, proceedings are reconvened and the commissioners announce their decisions. Under the 1936 act, that is the stage when further amendments may be lodged by the various parties. All the parties are entitled to suggest amendments to the text.

To recap, it is unrealistic to suggest that individual objectors can submit the text of legally watertight amendments at the outset, in what may be a complex field. After the evidence, submissions and decisions of the committee—or of the commissioners, under the 1936 act—amendments could be suggested. It is then up to the commissioners to decide which, if any, of the objectors' amendments are acceptable. The object of the amendments is not to overturn the decision of the commissioners; it is to implement it, in a whole or qualified form.

The commissioners having accepted certain amendments and rejected others, the order would be reprinted in amended or modified form, and would then be passed to the Parliament. Ideally, that is what we are also trying to do in the proceedings under the proposed new system.

The Convener: I should invite Mr Leitch and Ms McCracken to respond to some of the things that Mr Douglas has said about the handling of amendments.

Carol McCracken: I do not think that what Gavin Douglas describes is far off what is recommended in the private bill working group's report. We may have tried to simplify some of the language: that has been to avoid objectors petitioning the committee and instead to have objectors simply lodging their objections.

The process that we propose is similar. The promoter will be able to put his case to the committee. At that stage, if he wants to make any amendments to the legislation, and if he has agreed with objectors in advance of the inquiry, he can do so, and they will be presented to the committee.

The objectors can lodge their objections. We are proposing that, while the objectors may include in those objections suggested amendments to the bill to cover areas to which they object, they may be objecting to the bill itself. They may not prepare an amendment, simply thinking that the bill should not proceed. They would put that view in their written submission.

We are suggesting that the format of such objection be prescribed or determined by the Presiding Officer under standing orders. There would be a format under which objectors could work. The points made by the promoter and by the objector and any amendments would be considered by the committee, which would deliberate and come to some views.

The second part of the consideration stage would begin at a later meeting, when members of the committee would lodge amendments to the bill. As I explained earlier, that is a formality intended to get round the requirements of the Scotland Act 1998 and of the standing orders for it to be members, and no one else, who lodge amendments to legislation. We would expect a number of the amendments to have been prepared by the promoters. Similarly, the objectors may speak to the clerks and consider with them how to draft amendments that they can then lobby members of the committee to lodge on their behalf.

That is a pragmatic way of achieving what we want to achieve within the constraints of the legislation under which we are working. I think that the working group has managed to come up with a procedure that will work. We are quite open to admitting that it may need to be reviewed and refined. No doubt it will be refined on having a go at the procedure once it has been introduced, but we have managed to get there.

Gordon Jackson: I want to talk about Mr Douglas's view on a specific matter that we dealt with earlier, on legal representation. I heard what he said about the fact that objectors who are not represented do not suffer—they do not need a lawyer and it does not matter. I am sceptical about it, but I assume that that is right for the moment.

However, that does not help us with instances

where an objector says, "Thank you very much, that is all very nice, but I wish to be represented equally." They are in an adversarial system that might affect their property or their rights, and they may wish the same level of representation as the other people involved. Do you have a view as to whether we need to deal with that issue in terms of falling foul of modern-day legislation?

Gavin Douglas: This seems no different from other cases in which parties find themselves involved in court proceedings with no legal aid, or in which there is legal aid but they are not eligible for it as they are just over the financial limit. We are not discussing a particularly different category of case. One possible slight difference, however, is that the parties may be in front of a committee that is more sympathetic than some courts tend to be.

10:45

Sarah O'Neill (Scottish Consumer Council): Convener, may I pick up on a point that Mr Douglas made about representation?

The Convener: Of course—as long as it is not adversarial.

Sarah O'Neill: Mr Douglas says that, under the existing procedure, many people are able to represent themselves and do so very well. That is probably true; it is certainly true in a lot of court cases such as small claims procedures. However, we do not know how many people fail to get that far because they are deterred by the adversarial nature of the proceedings. A lot of people may have valid objections, but do not take things as far as they might. The people who are able to represent themselves will be the ones who will get to that stage.

Mr Douglas makes a fair point about legal aid in court cases; but the point is surely that this is a new procedure. The Human Rights Act 1998 is now in place and the committee should be doing everything that it can to ensure that it complies with that act. As yet, that has not necessarily been tested in terms of legal aid in civil cases.

The Convener: Mr Douglas, would you like to respond to that?

Gavin Douglas: I would be surprised if the Human Rights Act 1998 were to be interpreted as saying that people must have representation that is paid for by someone else. I do not think that that will happen.

Donald Gorrie: In addition to the issue of advocacy, there is the issue of professional witnesses. The layman can often argue his or her case quite well. There might be a traffic issue—for example, somebody might say that the traffic through Auchtermuchty is hellish, but the other side might produce a professional who has 99 letters after his name who could prove that there was actually no traffic in Auchtermuchty at all. In my experience, people tend to go for the guy with all the letters after his name but who does not actually know anything about the local situation. Local people would then have to hire another of those pundits. Issues arise around professional advice on technical aspects. Members of this committee would, I think, want a level playing field, so that each side had one of those pundits who claimed to know about traffic. That leads to expense.

Gavin Douglas: Yes, but it would be wrong to think that a committee of MSPs is naive and would just accept what a professional with strings of letters after his name says. I do not think that that would be the case at all.

The Convener: You are appealing to our vanity, so you are probably winning on that point.

We will move on to hear from Joe Durkin, who is the president of the Society of Parliamentary Agents and who has been sitting very patiently.

Joe Durkin (Society of Parliamentary Agents): Good morning. I will be brief. I have been a member of the working group since it was set up. I have diligently attended all its meetings; and I have consulted with my parliamentary agent colleagues on all aspects of the report. I am pleased to say that the society broadly supports the report. I say "broadly" because, as has been mentioned this morning, sometimes the devil is in the detail. The society would therefore welcome an opportunity to consider the draft standing orders when they become available.

I do not want to spend a lot of time on the other matters that have been raised, but one point on equality of arms that the people who draft the standing orders might wish to consider is that it helps all parties if they have advance notice of the evidence that is to be given. There will be written precognitions, and it might be useful if the standing orders provided that all parties had to deliver them to the other parties, say, 21 days before the committee sits to consider them, so that there would be no surprises.

Carol McCracken: I do not see any difficulty in including something like that, if the committee is happy to do so.

The Convener: It seems to be a way of ensuring that the rights of objectors are protected to a degree: if they saw the basis of the case, they might then decide that they wished to seek legal representation and either pay for it or apply for legal aid.

Thank you for your brief presentation, Mr Durkin. As there seem to be no questions, we will go on to

hear from Mr Colin Miller, who is the head of the constitutional policy branch with the Scottish Executive.

Colin Miller (Scottish Executive Constitutional Policy Branch): I think that I can also be brief. The Executive was also represented on the private bill working group and is happy to endorse the general approach and conclusions of its report. In particular, the Executive supports the approach to private legislation, which is described in paragraphs 4.3 and 4.4 of the report. The approach envisages a parliament-led system, which would be set out in standing orders and guidance, would be based on the key features of the 1936 act, but would not need Executive involvement in the process of promoting a private bill. One important advantage of proceeding in that way would be that the new arrangements would be up and running as quickly as possible.

The only question that occurred to us before today's meeting and that may be worth flagging up for further consideration is whether it will be possible to put all the necessary arrangements in place using standing orders, without the need for any sort of statutory provision. That may be an issue when we consider the recovery of costs and the imposition of charges.

Legal representation and equality of arms have been discussed today. I did not come to today's meeting with any particular thoughts to offer on those topics, but we would be happy to go away and find out what is going on elsewhere in the forest—both in the Executive and at Whitehall—and to feed in any thoughts to the committee's officials.

We are happy to endorse the propositions in the report. The Executive is perfectly content for procedural responsibility for private bills to be transferred to the Parliament and, in relation to any particular bills, for the Executive to have the same opportunity as any other interested party to offer evidence to the committee.

The Convener: Thank you—but you now have me worrying what the catch is, when you accept things with such equanimity.

The point was made that the allocation and award of costs may require legislation and could not be fully dealt with through standing orders.

Carol McCracken: We think that the imposition of costs can be tackled through standing orders, simply by making it a requirement that a bill be accompanied by a payment of some sort. The report makes clear that we cannot deal with the award of costs through standing orders. If the procedure were introduced as it stands at the moment, any claims would have to be pursued through the courts. If the award of costs became a big issue, we would have to consider that in the review, and bring forward proposals for legislation.

The Convener: Mr Miller, there seem to be no questions for you—that is your reward for brevity.

Everyone who came to give evidence has had the opportunity to speak. Carol, would you like to summarise the discussion and, in particular, to highlight any issues on which the committee would require to give you a steer.

Carol McCracken: It is pleasing that the report has been broadly welcomed and that there seems to be agreement that there should be a Parliament-led system. There was a particular welcome for the dropping of the two dates so that legislation can be introduced at any time.

The main issues raised in the written evidence seemed to concern how a bill would be amended and whether objectors and promoters would have a right to introduce amendments. In today's discussion, we have tried to clarify how we envisage a system for amendments working. We have adopted a pragmatic approach; we think, with the good will of the promoters, objectors and committee members, that we can make this work. We would need to keep an eye on how a system for amendments would work, and keep it under review.

The Railtrack representative raised the issue of the initial consideration and general principles of a bill. The points were valid; we will consider them and report back to the committee when we produce draft standing orders for the committee to consider.

The following point is probably not clear in the report: we said that the committee, at stage 1, would consider whether the bill should proceed as a private bill, but there are some technical aspects that the committee would have to consider. For example, is the bill appropriate for private legislation in the first place, or should it be a public bill? The question then arises whether the committee should, at that stage, take a view on whether the bill should proceed at all. Issues arise from that. Can the committee properly take a view at that stage, before it has heard any evidence? The time that will be spent on the bill in the Parliament has also to be considered. Should there be an opportunity, early in the proceedings, to say, "No, we really don't think that this bill should proceed at all"?

The Convener: What would be the mechanism for that? Would it be for the committee to resolve, or would the Parliament require to approve the principles, as for a public bill at stage 1?

Carol McCracken: A number of submissions raised that question. At the moment, the only proposal is that, when the committee wants to recommend that a bill should not proceed as a

private bill, that decision should go to the Parliament for ratification. This committee could therefore proceed with a private bill, but that could mean that, if the Parliament decided at stage 3 that the bill should not proceed at all, a lot of parliamentary and committee time would have been wasted. We may have to consider that, and say that a bill should automatically be referred at stage 1. We are trying to balance the time that is spent in committee with the imposition on Parliament's time. We may have gone too far in trying to take things away from the Parliament; a simple ratification at stage 1 may be justifiable. If the committee is happy, we will work on some advice as to how that should be done.

Members *indicated agreement.*

Janis Hughes (Rutherglen) (Lab): Can you clarify your earlier point about dates for lodging bills?

Carol McCracken: At the moment, under standing orders, there are two dates in the year when a bill can be lodged. The report recommends that bills should be able to be lodged at any time in the year. That seems to have been broadly welcomed.

The Convener: This is when COSLA strikes with lots of bills, which they will be able to lodge smoothly throughout the year.

Carol McCracken: The big issue is legal representation for objectors. Should they have a right to such representation and, if so, who should pay? It is fair to say that we have not had time to give full consideration to that issue. I would be happy to follow up Colin Miller's offer and examine the way that the Executive is considering the issue, because it must be relevant to planning inquiries and other inquiries too.

There seems to be an assumption that human rights legislation will require a right to representation, but I do not think that that assumption has been tested yet, or that the legal office has come to a view on whether private legislation procedures will be affected. We will have to come back to the committee with a separate note on that. I am not sure that we can take the issue much further today.

The Convener: One issue that was not raised, but on which I would appreciate your views, is the stage 3 procedure. As I understand it—but please tell me if I am wrong—the procedure would be the same as for a public bill, and it would be perfectly possible for members who had not been part of the process to come in at stage 3 with amendments and blow the bill to smithereens, whether accidentally or deliberately.

Am I right? Is that what would happen? Should we permit that? Could not one argue that, after the committee had considered all the issues and made all the desired amendments and rejected others, the bill should be approved or disapproved like a statutory instrument, rather than being further amended? If that were the system, further amendment would require MSPs who were not on the committee—perhaps those with a local interest—to participate by becoming witnesses or making submissions to the committee, rather than bringing a wrecking amendment, or even a substantive and legitimate amendment that had not been adequately considered or had been decided against by the committee as a result of its inquiry.

11:00

Carol McCracken: When the group considered the matter, it had to perform a balancing act with a number of issues. If you want to steer us away to consider another way of doing things, we would be happy to work up some proposals.

The first thing to consider in the balancing act was the rights of members. What we are proposing is quite different from a public bill in that, at the committee consideration stage, only those MSPs who are members of the committee and the promoters and objectors would be involved in amending the bill.

We thought it fair to allow all members of the Parliament to propose amendments to the bill at some stage. That is similar to what happens at Westminster, but it seems to protect the rights of members. To take that away would be quite significant, because it would mean that the Parliament was passing legislation that only a small number of members had been able to affect.

We also thought that it was useful to have the possibility at stage 3 of amending the bill, in case something had been missed or the promoter came up with something at the last minute that required an amendment to be made. The promoters and objectors would be able to lobby all MSPs and introduce amendments.

As for wrecking amendments that would blow the bill to smithereens, we propose a procedure similar to that for public bills. The Presiding Officer would have the power to select amendments to be taken at stage 3, so not all amendments would automatically be taken at stage 3. That would reduce the risk of objectors and promoters who had already had an issue well aired in a committee, with the committee having come down quite clearly on one side or the other, lobbying a local MSP to lodge an amendment that would give them a second bite at the cherry. If the Presiding Officer was of the view that the issue had already been well aired and was not contentious, he could choose not to select such an amendment at stage

3.

There are also rules about what amendments can be taken at stage 3. We discussed whether the general principles of the bill should be approved by the Parliament at stage 1, but there is a further argument for introducing such a rule, as agreeing the general principles at stage 1 would limit the types of amendments that can be selected at stage 3. If those amendments were designed simply to wreck the bill, they would not be selected, as the Parliament would already have approved the general principles of the bill.

One of the concerns that was raised in Railtrack's evidence was that there could be a delaying tactic to put off stage 3 consideration. We do not have such a mechanism in the Scottish Parliament. Some of Railtrack's concerns about stage 3 consideration were based on Westminster procedures that are not mirrored in the Scottish Parliament.

I think that that answers your questions. If you would like us to pursue any other way of doing things, we will be happy to consider matters in detail and come back with some proposals.

The Convener: Do committee members have any other points that they want to raise with the legal officers?

Members *indicated disagreement.*

The Convener: Do witnesses feel that anything that has been said in the past few minutes gives them sudden cause for concern? Are there any dramatic additional points that they would like to make?

Joe Durkin: I refer the committee to paragraph 6.40, at the foot of page 24 of the report, which suggests that the consideration stage should consist of two parts. It says:

"The first would involve the Committee hearing oral submissions from the promoter and objectors on the principle of the Bill and on any proposals to amend the Bill."

I thought that, at that stage, committee members would have two bites at the cherry. They could decide whether the bill is fit or is not fit to proceed as a private bill. That is referred to in paragraph 6.37. They might decide that the bill dealt with matters of public policy and that it was therefore unfit to proceed as a private bill, and they could throw it out.

If committee members consider that the matter is properly the subject of a private bill, they would go on to hear arguments from the promoters of the bill and from its opponents. Some of those opponents may be interested only in amendments and others may be root-and-branch opponents. The committee should have the opportunity, when considering the principles of the bill, to say whether the bill should proceed or not and decide whether to throw it out. That equates to the current procedure under the 1936 act, in which the commissioners at an inquiry can reject a provisional order so that it goes no further. I think that the group intended that the committee should have that power at that stage.

Carol McCracken: The working group envisaged that, if the committee decided that the bill should fall at the first stage, it should go to Parliament for ratification. The issue now is whether, even if the committee concludes that the bill should proceed, it should go for formal ratification at that stage. Otherwise, it would not reach Parliament until stage 3. We were trying to keep pressure off the parliamentary timetable, but we may have gone too far that way. Perhaps we should go for automatic referral at stage 1, as is the case for public bills.

Mr Spanswick: I want to mention a point that I should perhaps have raised in my submission. Planning consent for the works that a works bill authorises is something to which Railtrack attaches great importance, as indeed would any promoter of a works bill.

Under the present system, the granting of a confirmation act with a provisional order annexed to it confers upon the promoter permitted development rights under the Town and Country Planning (General Permitted Development) (Scotland) Order 1992. We are anxious to see a similar principle apply to a private bill under the new system.

In England and Wales, under the Transport and Works Act 1992, planning is a separate issue from the promotion of the order and we have to apply for a deemed planning consent. Coupled with the application for the order, we find that that can be fraught with difficulty. We would certainly like a continuation of the traditional, time-honoured system of the enabling act attracting permitted development to the works authorised by it.

Carol McCracken: I understand that, if private legislation is passed under the 1936 act, something in the town and country planning legislation automatically gives that planning consent. If we wanted to apply that to Scottish private legislation, it would require an amendment to town and country planning legislation. That is something that the Executive might want to comment on or take forward. I do not think that it has been done automatically under the transitional arrangements under the Scotland Act 1998.

William Ferrie (Scottish Executive Constitutional Policy Branch): I would like to comment on that. I should mention that I am from the office of the solicitor to the Scottish Executive. It is true that this is a point for the Executive to

consider as part of the planning system. I know that one consequential modification was made recently to the general development order relating to deemed planning consent. I think, although I would have to check, that it had the effect that Mr Spanswick was looking for. The Executive would have to deal with that issue as part of the legislation on planning.

The Convener: Would it require primary legislation or could it be dealt with through secondary legislation?

William Ferrie: It should be possible to deal with it through secondary legislation, because the Town and Country Planning (General Permitted Development) (Scotland) Order 1992 is itself secondary legislation. However, that is a matter for the Executive to consider.

The Convener: Is it part of the recommendation of the working group's report that the Executive should consider and give effect to the necessary changes so that planning permission automatically follows the passage of private legislation?

Carol McCracken: Yes.

The Convener: In that case, I think that we have done all that we can by saying that we would want that to happen.

Joe Durkin: It is a sin of omission on my part, because I agree fully with what Mr Spanswick said, but I should mention that it would not be worth promoting a works bill unless the bill also conferred planning consent. To have to go through the planning procedure separately would be a huge waste of time and money, for objectors as well as for promoters.

The Convener: We understand and accept that point. The matter will return to the committee in a couple of weeks with a finalised report for approval, which will then become the basis of the report that will go before the Parliament. That will incorporate the necessary changes to the standing orders and I hope that we will be able to resolve this matter to everyone's satisfaction within the indicated time scale.

I thank all witnesses for attending and contributing to a reasonably smooth discussion of a complex issue. I also thank the Parliament's officers who have been present this morning to respond and to assist the committee in dealing with this matter.

11:11

Meeting continued in private until 11:42.

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