PROCEDURES COMMITTEE

Tuesday 9 November 2004

Session 2

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by Astron.

CONTENTS

Tuesday 9 November 2004

PROCEDURES COMMITTEE
14th Meeting 2004, Session 2

CONVENER

*Iain Smith (North East Fife) (LD)

DEPUTY CONVENER

*Karen Gillon (Clydesdale) (Lab)

COMMITTEE MEMBERS

*Richard Baker (North East Scotland) (Lab)
*Mark Ballard (Lothians) (Green)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Mr Bruce McFee (West of Scotland) (SNP)
*Mr Jamie McGrigor (Highlands and Islands) (Con)

COMMITTEE SUBSTITUTES

Robin Harper (Lothians) (Green)
Tricia Marwick (Mid Scotland and Fife) (SNP)
Irene Oldfather (Cunninghame South) (Lab)
Mr Keith Raffan (Mid Scotland and Fife) (LD)
Murray Tosh (West of Scotland) (Con)

*attended

THE FOLLOWING GAVE EVIDENCE:

Rhona Brankin (Midlothian) (Lab)
Bill Butler (Glasgow Anniesland) (Lab)
Paul Lewis (Scottish Natural Heritage)
Lily Linge (Historic Scotland)
John Thomson (Scottish Natural Heritage)

CLERK TO THE COMMITTEE

Andrew Mylne

SENIOR ASSISTANT CLERK

Jane McEwan

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 6

Scottish Parliament

Procedures Committee

Tuesday 9 November 2004

[THE CONVENER *opened the meeting at 10:15*]

Item in Private

The Convener (Iain Smith): Good morning, colleagues. I welcome you to the Procedures Committee's 14th meeting in 2004. We welcome back Richard Baker from his wedding and honeymoon, which I understand went well.

Richard Baker (North East Scotland) (Lab): They did indeed.

The Convener: I am delighted about that.

No apologies have been received. Agenda item 1 is a decision on whether to take item 3 in private. Are members content to discuss that item in private?

Members *indicated agreement*.

Private Bills

10:16

The Convener: Item 2 is our private bills inquiry, for which two panels will give evidence. The first panel comprises John Thomson, who is the west areas director, and Paul Lewis, who is the east areas planning adviser, of Scottish Natural Heritage; and Lily Linge, who is the heritage planning manager, and Mairi Black, who is the senior heritage planning officer, of Historic Scotland. I ask both groups for a few words of introduction, after which we will ask questions. Scottish Natural Heritage has helpfully circulated a summary of its contribution, for which I thank it.

John Thomson (Scottish Natural Heritage): I will keep my comments brief. We have three concerns about the procedures and the way in which they operate. First, they do not ensure that environmental considerations are properly taken into account before projects are approved by a private act.

The second point is linked. We are concerned that private acts could authorise developments that are on or affect Natura 2000 sites, which would breach the habitats directive requirement that an appropriate assessment should precede such decisions. To remedy that, we would subsequently have to advise the Scottish ministers that the private act breached European law, and retrospective action would have to be taken. That is an unsatisfactory state of affairs.

Finally, we would like the existing procedures or any that replace them to be clarified and rationalised. We and most people who have been involved in developments that have proceeded by the private bill route have found the procedures complex to master and understand.

The Convener: Does anyone from Historic Scotland wish to make a few opening remarks?

Lily Linge (Historic Scotland): I have little to add to the views that we have set out in our submission, on which we stand.

Karen Gillon (Clydesdale) (Lab): How does your consultation involvement in the private bill process differ from that in a public inquiry about major roadworks, for example? Are there lessons for the private bill process to be learned from public inquiries, or is neither system very good? How can we produce a system that works much better?

John Thomson: I will refer the question about roads procedures to my colleague Paul Lewis, because he is more familiar with those than I am.

The planning system is the route by which most development is approved. Planning legislation requires bodies such as Scottish Natural Heritage, Historic Scotland and the Scottish Environment Protection Agency to be consulted when certain categories of development affect certain designated sites. We have an opportunity to have input into the process from an early stage. For larger-scale developments, that process is further formalised through the environmental impact assessment procedure.

As we stress in our submission, the purpose of those procedures is not only to ensure that environmental considerations are properly taken into account, but to allow for what we hope is generally constructive dialogue between bodies with responsibilities such as ours, developers and local authorities—the regulators of developers—to find an environmentally satisfactory way in which to proceed with a development. That contrasts with the private bill procedure, which simply involves an environmental statement that does not provide for such a degree of dialogue.

Paul Lewis (Scottish Natural Heritage): The road orders process builds in consultation with us in the same way. For instance, we have been consulted on the road orders for the second Forth crossing at Kincardine, compulsory purchase orders for which are at the public inquiry stage. That process will be delayed because of the need for an appropriate assessment of the impacts on the Firth of Forth special protection area. Built into all sorts of processes, such as those for planning and road orders, are consultation—with SNH, SEPA, Historic Scotland and others—and assessment of any environmental impacts before a decision can be made.

Mr Bruce McFee (West of Scotland) (SNP): You advocate an environmental impact study to accompany an application or a bill. Who would be responsible for undertaking that study and how would you test its robustness?

John Thomson: The responsibility for undertaking an assessment would rest with the promoter—the developer. In advising local authorities in planning cases, we would expect to comment on the adequacy of the assessment that had been undertaken and of the statement that had been prepared. The procedure would be closely analogous.

We have mentioned the habitats directive, for which procedures are slightly different. The competent authority, which is the decision-making body, must ensure that an appropriate assessment has been undertaken. That is a slightly different requirement.

Mr McFee: Given that the onus to provide information and to undertake an assessment lies in different places, how can that all be rolled into one?

John Thomson: The onus to ensure that environmental information is made available is on the developer. We hope that any refinement of procedures would require the developer—the private bill's promoter—to consult us and the other relevant statutory agencies, so that we could have input into the process by which the developer prepared and submitted environmental evidence. All sorts of issues arise about the scope of relevant evidence and we can advise on that. We are accustomed to doing that under normal planning legislation and roads legislation, as Paul Lewis said.

An issue arises in relation to the habitats directive. If the Parliament takes the decision on a private bill and in effect grants consent, the logic is that it would be the competent authority, so it would require an assessment to be prepared. As with a local authority or any other competent authority in that situation, the Parliament would look to statutory advisers such as SNH to guide it on what it should look for in that assessment. The decisions would be the Parliament's, but we would act as its expert advisers, just as we would to the Executive or to local authorities.

Karen Gillon: So, in essence, you are suggesting a procedure similar to what currently exists in the planning system. You would be the statutory consultees, we would take on the role of the local authority in relation to the habitats directive and the developer would have to prepare an EIA, which you would then assess on behalf of the Parliament.

John Thomson: That is broadly what we are suggesting. It would rationalise the procedure and ensure that the environmental aspects were teased out adequately, but it would in no way derogate from the Parliament's decision-making power.

The Convener: One of your suggestions is that SNH, Historic Scotland and other statutory bodies should be involved at an earlier stage and be consulted by the developer. At a later stage in the process, bodies such as yours would act as advisers to the parliamentary committee. How would you ensure that there was no conflict between those two roles and that you were able to give independent advice to the Parliament despite having given advice to the developer in an earlier consultation?

John Thomson: We can fairly claim that we are familiar with that double role—exactly the same arrangement applies under planning legislation. We have to be careful in our dealings with developers so that we are not seen to be actively associating with them and promoting a particular

development. We have to try to maintain an objectivity and professionalism when dealing with developers, as we do when dealing with the local authority or another ultimate decision maker. That can be a little tricky but, as I say, we are used to distinguishing between giving advice to a developer and giving advice to a decision maker. There are occasions when we have to say to developers, "Sorry, we can't go that far in helping you in this particular case, because that would prejudice our position in relation to the decision maker."

I am not sure how much of a parallel there is; that would be for members to consider. We often find that the advice that we give to developers is relatively informal in the initial stages. As we get into the process, our advice probably comes to the developers indirectly through the local authorities. We advise the local authority on situations that it should look out for and the planning officer in the local authority—or whoever deals with the developer about its planning application—then relays that advice back to the developer.

On occasion, we are involved in tripartite or multipartite discussions. However, the sort of developments with which the Parliament would be involved through private bills would probably be rather different; they would have a higher profile and the arrangements would not be exactly analogous.

The Convener: If Mairi Black and Lily Linge want to add anything at any point, they should just chip in. Are there any other questions from members?

Richard Baker: Obviously, the process is different in England, where there is no such private bill procedure. Are you aware of any satisfactory process south of the border for consulting the appropriate agencies?

John Thomson: Again, I will refer that question to Paul Lewis. He has been in touch with our sister agencies to find out what has happened in England, because one of our first questions was whether there is a better arrangement there. My understanding of, for example, the channel tunnel rail link proposal, which is analogous in some respects, was that our sister agencies were fully involved in the process and were happy with both the process and the outcome. However, Paul Lewis might be able to expand on that.

10:30

Paul Lewis: There is not much to add to that. Certainly, English Nature and the Countryside Agency felt that they were thoroughly engaged. For such a considerable engineering operation, English Nature's interests were protected and the agency was happy with the process.

Richard Baker: So the fact that the process changed from being a parliamentary one to a planning one did not lead to a diminution of consultation with those agencies.

John Thomson: I am not fully familiar with the nature of the process in England; you are probably better informed about it than I am. However, the need for adequate environmental information seems to have been fully addressed.

Lily Linge: Having glanced through the legislation, I think that there seem to be adequate technical provisions in the Transport and Works Act 1992 for consultation with the statutory bodies prior to an order being laid. Those are in addition to the integration into the procedure of a full EIA.

Mr Jamie McGrigor (Highlands and Islands) (Con): You mentioned the possibility of things being overlooked because of a lack of consultation. Can you give any practical examples of where that might have happened so that we can understand what you are getting at?

John Thomson: Again, I refer that question to Paul Lewis, who has had more detailed involvement with the schemes that have followed the procedure than I have.

Paul Lewis: The problems tend to be twofold. One problem is a lack of detail about what is proposed and a lack of an adequate assessment of that detail. For example, one of the Edinburgh tramlines will run along the shore, which is both a special protection area under the habitats directive and a significant geological site of special scientific interest. The details of the tramline proposal do not make clear the extent to which the SPA and the SSSI will be impacted—whether the site will be built on or whatever—and there is no clear assessment of that. All that detail will have to be thrashed out afterwards, but the legislation will have been passed before that happens, so any mitigation will have to be effected in retrospect if possible.

John Thomson: Our experience with other major road development schemes, such as the M74 upgrade, suggests that issues often arise about the way in which activities are undertaken. The impacts are often incidental to the way in which something is done. In some cases, decisions have to be taken on the spot in the light of circumstances at the time, which makes it almost impossible to predict exactly how every operation will be undertaken.

Nonetheless, we now have a lot of experience on the basis of which we can at least say, "If you've got to do X"—remove something or whatever—"you should be aware that, in order to do so, it is likely that you will have to bring in heavy machinery, which may impact on boggy ground nearby." Those are the sort of issues that

we face. Although one cannot always pin them down, if we are involved at an early stage we can at least say, "Well, have you thought about the fact that you might have to bring in your heavy machinery over soft ground?" or whatever the question is.

Lily Linge: We appreciate that private bills establish the principle of a development and that consequently there is a limit to how much detail about costly work the promoter will want to go into. A balance must be reached between having enough detail to determine the environmental impacts and having a general outline of the development.

That issue becomes significant in the planning process and there is quite a lot of case law from the English courts about the level of detail that is required to determine the impacts. In the planning system, there is almost a two-stage process. For a very large-scale development, there will first be outline planning to establish the principle. All the detail may not be included in that planning. Nevertheless, the courts have found that it must contain sufficient detail to make it possible to determine the environmental impacts. At the end of the process, the planning conditions on the outline consents tie the need for further detail into the consents, so that the details at the next stage of consents must be in line with the consents that were granted previously. One problem with the current bill process is that there is no way of tying into the bill the environmental requirements that flow from the environmental statement, to ensure that they are met at the end of the day.

The Convener: Can you expand slightly on that important point? What exactly do you mean? What is the difference between the bill process and the planning process for a road scheme?

Lily Linge: Generally speaking, the planning authority will attach a set of conditions to the consent for a planning project and the development will have to take place in line with those conditions. The conditions will relate back to the outline planning consent, when the principle was first established, and will feed through into the detail of design at the second stage. Throughout, the project will comply with the environmental statement and the requirements that it sets to mitigate adverse impacts. That is part of the decision-making process. The requirement to carry out mitigation is covered by conditions. In carrying out his development, the developer must comply with the conditions in order to accord with the law.

Mr McGrigor: You gave the example of the way in which a development may be carried out. Surely impacts such as damage to boggy ground would be covered by the impositions that are placed on the contractor in the contract, which require him to leave the site in a satisfactory condition after he has completed the job.

John Thomson: The promoter of a scheme may not realise that impacts may arise, especially when a development is promoted by someone other than a regular developer. The contractor may say that it is not possible to undertake the development without environmental impacts. It is necessary to be alert beforehand. The impacts may be judged necessarily incidental to the development and we may have to accept them. However, when we are considering whether the overall development is acceptable, we should at least be aware that they are likely to arise.

I agree with Lily Linge that enforceability is important. Local authorities have clear responsibilities not just to attach conditions but to enforce them. In theory and in principle, they have the capacity to do that, although sometimes they do not have it in practice. The situation is different with a private bill. We have already encountered that issue in relation to the Stirling-Alloa-Kincardine railway line. It is necessary to resort to convoluted arrangements to ensure that conditions are adhered to. From an environmental perspective, conditions are often the key to making a development acceptable. Much of SNH's effort as an environmental adviser goes into identifying the strings that need to be attached to things to make them environmentally acceptable. We are always looking out for ways of saying that a development can go ahead only if certain safeguards are put into place. That is why the ability to enforce conditions is important.

Mr McFee: That is why I began by asking about the robustness of environmental impact assessments. Having spent 15 years on planning committees, I can assure you that enforcement of conditions does not happen as often as we might like. Often, as Jamie McGrigor said, we find ourselves negotiating with the contractor on site about how we can enforce and, in many circumstances, move away from conditions.

Given what Lily Linge said about the cost to a bill's promoter of the assessment that is submitted with the bill, at what level should that assessment be carried out? Should there be the opportunity to consider further conditions? In the local authority planning process, it is not necessary for promoters to submit an EIA unless local authorities require them to do so. We are proposing something different and suggesting that such an assessment should be made at the start of the process. Should there be a method of revisiting conditions? We should consider carefully the question of enforcement. I am concerned that we are seeing an EIA in the very early stages of the process as some sort of panacea. I suspect that that would not be the case.

Lily Linge: That is correct, if there is not sufficient information to allow impacts to be identified and set out. I draw an analogy with the trunk roads programme. Trunk roads projects are brought forward by the Scottish Executive and are subject to environmental assessment. That assessment is made on the basis of a sample scheme—the Executive's suggested solution for the trunk road. However, when the design-and-build contract is let, the contractor can propose changes. He can say that he does not like a particular bridge or wants a different kind of junction. If he departs from the scheme that was subject to the full Scottish Executive environmental assessment, he must carry out a further assessment of the changes that he is proposing. I am aware that that happens. I was involved with the A1 scheme, to which a number of changes were made. The contractor who eventually won the contract wanted to change some details and further environmental assessment was carried out on those changes.

John Thomson: We agree that it is impossible to assume that what is eventually built will be exactly the same as the scheme that was subjected to the initial EIA and agreed. There must be a process for subsequent adaptation that takes place for one reason or another. In principle, we are happy to be involved in that process on an on-going basis. That has been the case with some major road schemes; I am most familiar with the M74 scheme. We have developed a good working relationship with the contractors for such schemes that allows them to have some flexibility, in agreement with us. However, that does not remove the need for a thorough examination of the scheme when it is initially approved. By making the scheme as right as possible at the start, we create a context within which subsequent modification and adaptation can take place in the right spirit.

The Convener: Given that EIAs are technical, lengthy documents, would it be preferable for them to be dealt with by specialist inquiries and by a reporter who understands the system, rather than by the present private bill procedure? With the best intentions towards my colleagues, I point out that that procedure involves non-expert MSPs on a committee trying to grapple with huge amounts of technical information. Would it be better for us to take a different route, to enable proper scrutiny of EIAs to take place?

10:45

John Thomson: I can certainly see an argument for that. It might be appropriate to deploy that degree of expertise in support of the ultimate decision that you might make. The option to use a combination of a parliamentary committee and an expert inquiry procedure seems to make a lot of sense.

Lily Linge: I agree with the suggested system whereby a reporter reports back to a parliamentary committee on the findings of an inquiry into the EIA.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): John Thomson said in his evidence that the Transport and Works Act 1992, which is United Kingdom legislation, appears to work quite satisfactorily. It allows organisations such as SNH the opportunity to have their say and perhaps even to shape things. He also said that road orders might be an acceptable route to take. From the evidence that Lily Linge gave, I am a wee bit worried about the further environmental assessments that are required. When a contractor has to do a further environmental impact assessment, do organisations such as yours have an opportunity to comment and influence that assessment? Is the procedure in the 1992 act the same as the procedure that we have for trunk road orders?

Lily Linge: I will comment on the point about supplementary environmental statements for current road order schemes, based on the ones in which I have been involved. Anything that requires an environmental impact assessment has to go through the full process of the regulations, which includes full consultation. We have been fully consulted on all the amendments that have been made by contractors to trunk road schemes, so I do not have a problem with that.

I have forgotten the second part of your question.

Cathie Craigie: Do you have any knowledge of the Transport and Works Act 1992? What are its requirements if there are any amendments?

Lily Linge: I am aware that there is a full set of environmental impact assessment regulations that apply to the Transport and Works Act 1992. I have not read them in detail, but I know that they are in place and I imagine that they set out the detail. One of the problems with the private bill process in Scotland is that there is no equivalent set of environmental impact assessment regulations to state how the environmental impact assessment is to be carried out for the purposes of private bills. All that the promoter is required to do is to produce an environmental statement. Nothing more is said about what the statement should cover, except that it should cover all the things in schedule 4. It seems to me that there is a bit of ambiguity about how that fits in with the need for environmental impact assessments and what they mean in terms of the regulations and the procedures that apply, such as scoping, consultation and the tying in of

the end product into the design and the permission that is granted for the scheme.

The Convener: The committee has a number of options for how such schemes should be considered in future. One option is the status quo with some amendments to the private bill procedure. Another option for such bills is to go along the route of the Transport and Works Act 1992, and another is to base the procedure on the Private Legislation Procedure (Scotland) Act 1936, in which there was an extra parliamentary part and a confirmation act. A fourth option that has been suggested is that a committee should consider the issues in principle at the preliminary stage but that the detailed consideration stage should go out to an inquiry rather than being done by the committee. Do any of those options strike your organisations as the preferred route that we should consider? Do you have any comments on the advantages or disadvantages of the options?

Lily Linge: I do not have sufficient details on the processes to be able to say, "Yes—that is our preferred route." All the options are worth consideration. From my limited knowledge of the 1992 act, and from our perspective as statutory consultees and environmental bodies, it seems to work.

In preparing for this meeting, I was dredging my mind about how we were consulted under the 1936 act. I failed miserably to find any papers that related to the cases that I remember—I suspect that the papers have been thrown away because the cases were so long ago—but my recollection is that we did not have any problems with consultation. We were fully consulted on environmental impact assessments and, in line with the circular that came out, they were fully transposed into the process. I also have a vague recollection of having written communication and telephone conversations with, I presume, civil servants at Westminster who were dealing with the bill, to ensure that issues that we had raised were taken on board and worked through so that some environmental safeguards were built into the process.

I recall that everything worked out fine and that we did not have any problems with the process, but when I see the 1936 process on paper it gives me slight qualms. It does not seem to be quite as clear as the 1992 act is on consultation and on how things are worked forward. The route of the 1992 act is perhaps slightly superior in terms of consultation, although I do not have any clear preference. We would not have any problems with the current process being adapted to include a reporter system, provided that the environmental impact assessment regulations were fully integrated into the system and that there was full consultation.

John Thomson: I endorse that. We do not have a firm preference at the moment—indeed, I am not sure that we are fully familiar with all the options that you described. If you would like us to comment further on them, we are happy to put in a further representation. Our starting position is that much could be done by amending existing procedures without changing the legislation. I can see that there are practical advantages in doing that, at least as a first step, even if ultimately you want a more radical revision of the procedure. You could usefully start by building more consultation into the existing procedures. We are happy to comment on the legislative possibilities if you would like us to do so.

The Convener: Given your experience of dealing with the Stirling-Alloa-Kincardine Railway and Linked Improvements Bill, the private bills that are going through Parliament and some of the major road schemes, such as the M74 extension, do you see any reason why the process for major road schemes should be different from that for rail or tram schemes?

John Thomson: Not immediately. I do not know whether Paul Lewis takes a different view, but I can see some logic in dealing with them in the same way. I am pretty sure that we could improve on the roads procedures just as we can improve on the private bill procedures. In many ways it makes a lot of sense to do that, given that we talk about integrated transport systems and planning. The issue affects all modes of transport—for example, there are issues with the runway extension at Edinburgh airport.

Lily Linge: I agree with that in principle. Historic Scotland has a slight technical difficulty in that it matters to us who the developer is. Because we are part of the Scottish Executive, slightly different procedures apply to how we are consulted on trunk roads and what we can and cannot say, given our relationship to ministers.

Mr McFee: I want to take that a bit further. In summary, you do not have a particular view on which mechanism should apply, as long as there is a requirement to consult, clear lines of communication and responsibility and clear timing. I am keen on having one system for all. I am concerned that because of the way in which the system is structured the people who are assessing particular proposals might be prohibited or dissuaded from commenting if the project is sponsored by the Scottish Executive; if the same project were sponsored by someone else, they would not feel quite so prohibited from commenting. How do we get round that conflict of interests?

Lily Linge: On Historic Scotland's role in relation to Scottish ministers, we are responsible for care of the historic environment and we will

meet that responsibility to the best of our ability. When ministers are promoting a road scheme, another Executive department is involved. We are subject to an internal consultation arrangement. We will pursue our interests to the best of our ability in internal discussions. If we cannot reach agreement and there is a conflict between us and those who are promoting a scheme, we will send a report to ministers about that conflict and it will be for them to determine where the public interest lies. Once they have made that decision, Historic Scotland will support them—that is our role. We have given evidence to a public inquiry on a trunk road scheme in Fochabers, which touches on all these issues, including our relationship to ministers.

Mr McFee: Perhaps that is something for us to consider. Whatever device is used for determining these matters—it might be a committee of the Parliament—I would be concerned if, when we sought advice from a professional body that the promoter was asked to consult, we received ministers' advice rather than the advice of the people of whom we asked it. Perhaps we should consider that further.

John Thomson: We are in a slightly different position as a non-departmental public body. We are not internal to the Executive in the way that Historic Scotland is, but we are answerable to the Parliament through ministers. That is the formal position, but it does not affect the advice that we give. Inherent in some of the discussion is the question to what extent you as the Parliament view us as your statutory advisers on the issues on which we are formally the Executive's statutory advisers. On private bills, we are happy to act as your statutory advisers on the natural heritage impacts of schemes and, as far as we are aware, the Executive has no difficulty with our playing that role as an NDPB.

The Convener: There are no more questions, so I thank John Thomson, Paul Lewis, Lily Linge and Mairi Black for their evidence, which has been very helpful indeed—I am sure that it has given us even more questions to consider when we come to produce our report. If we would like your advice on other issues, we will write to you.

We will take a short break to change over our witnesses.

10:59

Meeting suspended.

11:01

On resuming—

The Convener: We come to our second panel of witnesses. I am pleased to welcome Rhona Brankin, who was the convener of the National Galleries of Scotland Bill Committee, and Bill Butler, who was the convener of the Stirling-Alloa-Kincardine Railway and Linked Improvements Bill Committee. We had asked Tom McCabe, who was the convener of the Robin Rigg Offshore Wind Farm (Navigation and Fishing) (Scotland) Bill Committee, to give evidence, but he is unable to attend this morning, although he is willing to send us written comments if his colleagues miss anything in their evidence. I am happy to hear opening remarks from the witnesses before we open up the meeting to questions.

Rhona Brankin (Midlothian) (Lab): I am delighted to be here and will do all that I can to assist you. However, I have to tell you that I think I drew the long straw in that the bill with which I was involved was relatively simple; it involved taking a small amount of land from Princes Street gardens to incorporate into the Playfair project of the National Galleries of Scotland. A private bill was required because there was legislation protecting Princes Street gardens. The time for which I was involved with the bill was relatively short. The bill was introduced on 28 October 2002 and the final stage debate took place on 27 March 2003. What might be of more interest to the committee is the 20 months leading up to the introduction of the bill, when the private bills unit did a lot of work to ensure that the bill was right. There was a lot of to-ing and fro-ing, but I was not involved at that stage. Although I am happy to answer questions, I am probably of rather limited use to you.

Bill Butler (Glasgow Anniesland) (Lab): I am equally happy to be here. I suppose that I drew a medium-sized straw in that the SAK bill took just about a year to deal with—a bit longer than the time that Rhona Brankin's committee took to deal with its bill and considerably shorter than the time that the Waverley Railway (Scotland) Bill Committee, for example, is taking to deal with its bill.

As colleagues will know, the SAK bill was the first works bill to be introduced in the Parliament. The SAK bill committee was concerned that the amount of work involved placed a strain on not only members but the resources of the Parliament. So concerned was the committee that all members—Richard Baker was one of them—agreed that I as the convener should write to the Presiding Officer expressing our concerns. The final paragraph of my letter of 17 June says:

"the whole procedure (including whether to go down a Transport and Works Act type route) needs to be re-

examined with a view to a new procedure being established that achieves proper scrutiny of complex projects without overloading the work of the Parliament and its members."

Given that that was the considered view of the committee, I am delighted that the Procedures Committee has decided to scrutinise the private bill procedure to see whether there is another way of dealing with private bills.

The Convener: I thank both of you for your opening remarks. Before I open up the questioning to members, I want to say how pleased I am to see both of you before the committee today. As Rhona Brankin said, her committee dealt with a relatively minor bill. Perhaps the main issue for her is whether, for such bills, the present procedure is a sledgehammer to crack a nut. Obviously, the procedure was designed to deal with the type of bill that Bill Butler's committee was set up to consider and it might be over-complex in its application to other types of private bills. Can improvements be made to the system that deals with less complex bills? I am thinking of, for example, the Baird Trust Reorganisation Bill, which is now before the Parliament. Although we are also considering today the separate issues to do with transport and works bills, can you suggest any changes to the private bill process that would make it easier to deal with less complex bills?

Rhona Brankin: It is slightly difficult for me to comment. As I said, I was involved in the process only for a brief period of time. Although our consideration of the National Galleries of Scotland Bill was absolutely straightforward, I am sure that the committee would find it interesting to look at the process that led to the introduction of the bill. In the 20-month period before its introduction, a lot of discussion took place and the drafting and redrafting of the bill was undertaken. Given the size and simplicity of the bill, the process that led up to its introduction was complex.

As I said, the National Galleries of Scotland Bill arose only because of a particular legislative quirk. It took a long time and a lot of work on the part of officials to do something that should have been relatively straightforward and which attracted no objections. It is also important to note that, by the time that the bill was introduced, the City of Edinburgh Council had granted planning permission for the works.

Cathie Craigie: Although you undertook a small piece of work, it was important work nonetheless. Could the decision on the small piece of ground that was the subject of the bill have been taken by Scottish Executive ministers? The proposal had gone through the City of Edinburgh Council planning process and had been given planning approval.

Rhona Brankin: As I said, the bill was required because of existing legislation governing Princes Street gardens, which ensured that there was to be no incursion into the gardens. Therefore permission for the work had to be gained by way of a Scottish Parliament private bill.

Mr McFee: Just to finish the point, I assume that a minister could not take a decision on the work because a change in the law was required?

Rhona Brankin: Yes. That is exactly right.

Mr McFee: I would not want to go down the road of ministers being able to make changes in the law on the nod.

Rhona Brankin: Absolutely.

Mr McFee: Not that I am suggesting that that is what Cathie Craigie was suggesting.

Cathie Craigie: My question assumed that we had decided to change the law. In that case, would a minister have been able to take the decision on the work? Surely the City of Edinburgh Council's planning process would have allowed members of the public the opportunity to have their say—to object or otherwise.

Rhona Brankin: Yes. Of the people who came forward as witnesses, four sets represented heritage associations. Clearly, Princes Street gardens are hugely important—they are part of a world heritage site—and ministers would have to be satisfied that adequate protection was in place for such an important piece of ground. As I said, the work had to be granted by way of a private bill purely because legislation governing the gardens was in place.

Mr McFee: Given your experience of taking through a private bill, do you believe that we should put in place one procedure that is flexible enough to be truncated if a bill attracts no objections? If not, should we be looking at putting in place more than one procedure so that we have a Transport and Works Act 1992-type procedure for certain projects and another procedure for other private bills? I am also thinking of the volume of bills that go through the private bills unit.

Bill Butler: My view is that there should be one approach to the process. I believe, as did the SAK bill committee, that the Transport and Works Act 1992 in England and Wales sets out the way in which detailed scrutiny of infrastructure projects of all types, varieties and sizes should take place. That involves a public planning inquiry, which allows objectors the right to object and which is run by an inspector who has detailed technical knowledge and who then reports to the relevant secretary of state. The inquiry process strikes a balance between the elements of proper scrutiny, technical expertise, advice to the minister and decision making. That process would work for all types of proposals whether they were relatively narrow in scope or large in size. If the Parliament

went down the road of having all sorts of different approaches, the procedures would not be as coherent as we would wish them to be. There should be one process, as the procedures have to be coherent.

Mr McGrigor: I had hoped that Tom McCabe was going to be before the committee this morning. Given that he is not—

Bill Butler: We will have to do.

Mr McGrigor: I declare an interest as a former member of the Robin Rigg Offshore Wind Farm (Navigation and Fishing) (Scotland) Bill Committee. At the time, it was obvious that the bill was about two small things: the question of navigation rights and the possible effect of the proposal on local fisheries. However, most of the objections focused on whether the wind farm should be built. Do you agree that we should specify the subject of the consultation so that responses relate to the object of the bill and not to what will be created as a result of the proposal? Quite a lot of evidence that we sat through was quite irrelevant in terms of what the bill could or could not do.

Bill Butler: In terms of what the bill could or could not do, I can set out the process that the SAK bill committee went through. The principles of the bill were established by the Parliament in the preliminary stage and, during the consideration stage, I ensured that people did not stray outwith those parameters. Although I felt that it was logical to do that, I also felt that a lot of latitude should be given, particularly to those who were unrepresented in the process. People have to be given their say and they have to be seen to be given their say. The present preliminary stage is handy, as it allows the Parliament to say, "These are the parameters." If we were to move away from present procedures to a procedure like that under the Transport and Works Act 1992, I suspect that the parameters would be set by the inquiry inspector, as they are the expert in the field. It is essential to be clear about what private bill committees discuss.

Mr McGrigor: That was the point that I was trying to make. Thank you.

Mark Ballard (Lothians) (Green): Jamie McGrigor talked about the Robin rigg bill being about navigation rights. I want to return to Bill Butler's reply to the point that Bruce McFee raised. Given that the purpose of the Transport and Works Act 1992 is to allow orders to be made

"relating to … the construction or operation of railways, tramways, trolley vehicle systems, other guided transport systems and inland waterways, and orders relating to … works interfering with rights of navigation",

the Robin rigg and SAK bills would come within the scope of the act. Those kinds of private bills seem to be very different beasts from the kind of private bill that amends a piece of existing legislation, such as the National Galleries of Scotland Bill. They seem to be almost totally different things. I cannot see why Bill Butler is so keen on having a single procedure that covers two very different kinds of things, especially as Westminster has chosen to separate those out into transport and works orders and private bills.

11:15

Bill Butler: There should be a single procedure, whenever possible. Most of the private bills that we will look at will concern infrastructure. I take the member's point, but I think that, although the process should include an element of scrutiny for the type of bill with which Rhona Brankin was involved, the less time that members have to spend on that, the better. There should be a way of expediting the matter while maintaining the same level of scrutiny. I do not know the best way of doing that or how it was done for the bill with which Rhona Brankin was involved—perhaps she knows or the committee knows, or perhaps we are all striving to find that process. However, in matters of major infrastructure, the Transport and Works Act 1992 is the way to go.

Mr McFee: I agree that members should set the principles and the policy and that it should be for other professionals to consider the technical and legal aspects and to advise members accordingly. That would be one way of clearing up much of the clutter in the system.

I seek your view on publicly funded legal representation, not for professionals and trade interests, but for voluntary groups and individuals who do not have the means to secure professional advice. Do you believe that such support should be provided to those individuals and groups? What would be your view on the removal of the objection fee, which is set at £20? Do you think that that would encourage frivolous objections? Is there another method of dealing with that issue?

Bill Butler: Legal representation for individuals and private objectors should be considered in the context of the provision of legal aid—I have no objection to that. All committee conveners would give the maximum latitude to individuals who are not represented. The SAK bill committee was concerned to ensure that, even if a private individual was saying too much and going on a little longer than was absolutely necessary, they should be allowed to do that—not only must they have the feeling that they are being listened to, but they must actually be listened to. However, if a professional Queen's counsel was going over his or her time, the convener would bring down the guillotine promptly. The question of legal aid could be looked into.

I would keep the £20 objection fee and the procedure that we have at the moment. The fee is intended to deter vexatious and frivolous objections. We would hope that, if there were 100 objectors to a proposed railway line living in houses that abutted the line, they would get together and present one group or a couple of groups of objections. The objections would be similar—the last thing that we want is 100 separate objections that are similar or exactly the same. The objection fee encourages people to be rational about the way in which they object. It is also a deterrent—although not a huge deterrent—to those who would be vexatious and/or frivolous. I would keep the fee and I see no argument against keeping it.

Mr McFee: We are considering processes to externalise much of the sifting of the evidence. Conveners would not have the same latitude to exercise their judgment if they had not heard some of the evidence that had been put together by private individuals; they would deal with matters a lot further down the line. In that context, I suspect that legal or expert representation would be required. The prospect of the committee hearing every bit of the evidence if part of the process were carried out externally would be far more remote than it is in the present situation.

Bill Butler: Sure, but a lot of the sifting goes on behind the scenes anyway and is preparatory to the committee discussing the evidence. At one meeting at the consideration stage—Richard Baker will remember it—we had 89 papers to look through even after sifting. I want to be up front about the reality of the situation.

Richard Baker: You mention the amount of evidence that we all had to endure, which led to solidarity among the committee members. On the face of it, the current procedure looks good and inclusive, because is allows objectors to cross-examine the promoter. However, as the convener, you had to give quite a lot of leeway. Moreover, there is not really a level playing field when a QC is there to cross-examine the objectors and they have to cross-examine a promoter who is supported by a QC. That does not necessarily allow for the kind of scrutiny that people might benefit from. However, if legal representation is provided for the objectors, too, we will simply watch battles between two people who are being paid very well to be there. There is no easy way under the current process of getting the kind of scrutiny that people might expect.

Bill Butler: I agree. The procedure that Bruce McFee described would lead to that situation between two well-paid sets of individuals. There is no real level playing field. I and the rest of the SAK bill committee members were impressed by at least one or two of the objectors, who gave as good as they got. However, although most objectors are sincere in their objections and put their case as forcefully as they can, that is not their area of expertise. In a sense, the situation is artificial; it is a bit of a fiction even with the best efforts of the convener and the committee. Therefore, I would not hold up our current procedure as an example of best possible practice in terms of scrutiny and transparency.

If we went down the path of the Transport and Works Act 1992, we would have a much more level playing field. Somebody would be appointed who had the technical expertise to be objective in considering both sides of the case. That is rational and objective and would provide a much more level playing field. What the committees do at the moment under the current procedure can be improved on.

The Convener: An alternative route that is somewhere between the present system and the Transport and Works Act 1992 would be for the Parliament to continue to perform the preliminary stage scrutiny—that is, to look at the general principles of a major scheme and determine whether to approve it—and for the detailed consideration, at the consideration stage, to be conducted externally through a public inquiry or a reporter system. Do you think that there would be any merit in that, or would it cause more confusion?

Bill Butler: That would be my second preference. If the Procedures Committee was minded to pursue that option, I would not be wholly averse to it. There is a possible advantage to it in the fact that the Parliament would set the parameters; I accept that. However, going down the path of the Transport and Works Act 1992 would give absolute coherence to the process. Experience of the system down south gives the lie to the suggestion that an appointed inspector would not be objective and could not set parameters. If the committee were minded to go that way, I believe that that would be an improvement. However, I have to ensure that I speak on behalf of my former committee, which wants the Procedures Committee to give careful consideration to the Transport and Works Act 1992 route.

The Convener: How much of the work load on members falls in the preliminary stage and how much in the consideration stage? Would it make a significant difference to members' work load if the consideration stage was external to the Parliament?

Bill Butler: Yes, there is absolutely no doubt about that. Although a considerable amount of work takes place at the preliminary stage, the consideration stage is much more onerous on members. I think that I am right in saying that we

had four evidence-taking sessions at the consideration stage, all of which lasted at least three and a half hours and one of which lasted about five hours. The preparation for the meetings, not only for members but for the clerking team, was onerous.

I want to put on record the fact that the SAK bill committee team was absolutely magnificent in the support that it gave to committee members. I am sure that that is the case with all the bills. However, even with all that support, there were times at which—to quote the letter that I sent to the Presiding Officer on behalf of the committee—

"The workload … was only barely manageable".

The whole process is cumbersome and needs to be changed. Although I said that the consideration stage was the more onerous stage, I do not want to take away from the fact that the whole process was onerous. Moreover, despite the fact that it appeared to be transparent and coherent, it lacked real coherence—I think that the coherence was artificial.

The Convener: Does the fact that committees meet only once a week result in the consideration stage being a broken-up process? If so, does that make it difficult for objectors fully to participate in the process?

Bill Butler: That could have been the case. However, what we tried to do—indeed, it worked for all but one of the sessions—was to split the objectors into groups and say to them, for example, "You are in group 1 and will be taken in the first evidence-taking session with groups 2, 3 and 4." We then told objectors in groups 5, 6, 7 and 8 that they would be heard in our second evidence-taking session and so on until all objector groups were included.

Of course, we all know what is said about the best-laid plans. On one occasion at least, objectors were unable to give evidence on the allotted day and their evidence giving had to be carried over. However, we made a real attempt to ensure that the process was as coherent as possible. Objectors were given the best possible advice about when they would be heard.

Karen Gillon: How easy, or realistic, is it to amend a private bill?

Bill Butler: That depends on the parameters that the Parliament has set for the principles of the bill. It would be fine for someone to amend a bill if they could convince the committee that the amendment was appropriate and within the parameters of the general principles of the bill. If the amendment would have no clear adverse effect or if the effect would be marginal, the committee's duty would be to say that it was within the parameters that the Parliament had set. After listening to advice from the clerks and to technical advice, the committee would find deciding whether the effect was adverse a straightforward matter.

Karen Gillon: One problem that we have heard about—although the evidence might be anecdotal—is that it is difficult to amend a private bill. Promoters are resistant to change; they do not want to see their bills amended. If the Parliament is not as fully aware as it could be of the difficulties that it might be creating for the bill committee when it sets the parameters, that makes amendment at a later stage more difficult.

11:30

Bill Butler: The promoter would be averse to change, because it wants to promote the infrastructure development in question. However, I do not think that change is impossible.

For example, if there are new objectors, who had not been identified because, for example, the promoter had not told them that it wanted to cut off a level-crossing—that happened with the Balfour Street crossing in the SAK bill—the bill has to go out again and the objectors have to be given time to object. We were lucky in the sense that that process ran in tandem with the consideration stage. Richard Baker will correct me if I am wrong, but my recollection is that that had no adverse effect. Although a few new objectors were identified, that did not significantly affect what had gone before.

I would not change my previous answer. If, at the preliminary stage, the Parliament was unaware of a significant issue that arose later on, there might have to be a way of rectifying such a situation; I do not know what that way would be. We tried to ensure that all the salient and significant points that would be discussed at the consideration stage were examined when the parameters were set. A bill committee has to be very careful in what it does at the preliminary stage. That is why it is not just the consideration stage that is onerous.

The Convener: You were present for much of the evidence that we took from Historic Scotland and Scottish Natural Heritage. From your experience of the SAK bill, do you have any comments on that evidence, especially what was said about the requirements on environmental statements and on how the conditions imposed on the developer can be enforced?

Bill Butler: I was not present for all the evidence; I heard only the tail-end of it. Promoters should be required to consult those environmental bodies—it is my information that they are not formally obliged to do so at the moment. That is good practice and promoters who are serious

consult. I beg your pardon—what was the second part of your question?

The Convener: With a planning decision, conditions may be imposed on the developer. There was some concern about whether that process was working effectively with the private bill procedure—for example, in relation to conditions that might be imposed to protect environmental interests.

Bill Butler: I think that the process worked reasonably well. There was the opportunity to impose certain conditions—on noise mitigation and on other specific aspects that were particularly important to people whose property abutted the line. I am no expert, but my view is that such matters were given due consideration.

The Convener: As there are no other questions, I thank Bill Butler and Rhona Brankin for their helpful contributions to our deliberations.

I draw members' attention to the paper on the provision of advice to the committee by Parliament and Executive officials, a subject that we discussed at our last meeting. The paper gives a suggested membership and proposes a remit for the officials who would provide us with advice on some of the technical, procedural and practical implications of any proposals with which we might come forward. Are members content with the proposals in the paper? Are there any questions?

Mark Ballard: Is that the paper headed "Inquiry on Private Bills: Advice to the Committee by Parliament and Executive officials"?

The Convener: Yes.

Mark Ballard: I am looking at paragraph 1 under the heading "Remit". Should we say something about investigating whether it is worth having two different systems for transport and works and other private bills? Some of the options that we have heard about are not mentioned in the three bullet points in that paragraph. I am thinking about the reporter model, which SNH and Historic Scotland mentioned, and the option of reforming the existing system in relation to private bills that are coming up in the short term and to those private bills along the lines of the National Galleries of Scotland Bill rather than the transport and public works bills.

Andrew Mylne (Clerk): The draft that members have is meant to indicate some of the main models that we might be asked to consider. The list was not meant to be exclusive. The wording "including in particular" is meant to make that clear. We can keep those comments in mind.

As for the point about a separate process for works bills, that is implicit in the choice of models. The Transport and Works Act 1992 model makes such a distinction; the Private Legislation Procedure (Scotland) Act 1936 does not. That is one of the differences between the two models.

Mark Ballard: Bill Butler seemed to be arguing for a Transport and Works Act 1992 model for all bills and he was against the idea of separating out—

The Convener: I am not sure that he was. His letter to the Presiding Officer is in favour of a Transport and Works Act 1992 model, but obviously that model would not be appropriate for dealing with the legislative issues around the recently introduced Baird Trust Reorganisation Bill, for example, which would need a separate procedure.

Mark Ballard: Bill Butler was, however, very keen on having—

The Convener: My interpretation—I am sorry to interrupt—of what he was saying is that, if we are to retain the private bill procedure, we should have a single procedure. That is not to say that we would not necessarily move some of the work that private bill committees currently do to a different procedure altogether. I think that that is what he was saying. That is my interpretation, anyway.

Cathie Craigie: Bill Butler clarified the position. He felt that major transport infrastructure bills should be dealt with under a Transport and Works Act 1992 model.

Mr McFee: I took a slightly different view. I thought that Bill Butler was saying that there should be one procedure that could accommodate the two different types of private bills.

The Convener: We will have to read what he said.

Mr McFee: His answer to the question whether there should be one system was yes.

The Convener: His letter suggests that major works bills should come out of the private bills system altogether.

Cathie Craigie: We can read what Bill Butler said in the *Official Report* and we can use that when we are reporting on the matter. The question is whether the Transport and Works Act 1992 model in the first bullet point covers the issue that Mark Ballard identified. If so, I am happy enough with the paper. We could adopt it and we could examine in detail the procedure that operates at Westminster.

The Convener: That is certainly one of the options that we have been considering.

Mark Ballard: I cannot remember which body produced a report on the operation of the 1992 act. I think that Westminster had a consultant. Certainly, a paper that we looked at previously,

which came from Westminster, dealt with the operation of the act.

The Convener: I think that it was a departmental review of the operation of the act in England, which suggested amendments to the procedures, to be made either by order or through legislative changes. I cannot remember the name of the report.

Andrew Mylne: I believe that the Department for Transport is working on possible developments and changes to the act. I envisage our taking full account of that in any recommendations that we bring forward.

Karen Gillon: On that final comment, I am not looking for recommendations; I am looking for a paper that tells me what the options are, so that I can make recommendations—or the committee can make recommendations. I want all the options to be spelled out clearly. This is a technical exercise and I do not want anyone to come back and say, "We think that you should follow this route."

The Convener: I agree absolutely. That is why the paper on advice to the committee by Parliament and Executive officials uses the phrase "technical implications" rather than recommendations. That is all that we are looking for. Are members happy to accept the recommendation that the officials go away and do the hard work?

Members *indicated agreement*.

The Convener: That concludes item 2. Before we go into private session, I remind members that on Thursday there will be two Procedures Committee debates in the chamber, which I am sure we are all looking forward to. We have a debate on the report on members' bills and, given that we will not have another slot before Christmas, we are adding into our time a debate on the timescales and stages of bills. The debates will last roughly an hour each, although the Presiding Officer can exercise some flexibility, taking account of the demand to speak.

Mr McFee: Or otherwise.

The Convener: Yes. I think that there will be quite a bit of demand to speak in the debate on members' bills. A few people have things to say that we might not necessarily agree with. Members are encouraged to attend and to speak in the debates.

Mark Ballard: I give my apologies. I will not be able to attend, because I have to go to a meeting of the European Green party in Brussels.

Karen Gillon: Really, Mark. We have to question your commitment to the committee.

Mr McFee: How are you travelling?

Mark Ballard: I am travelling on the Caledonian sleeper and Eurostar.

Karen Gillon: Who is paying for it?

Mark Ballard: I am.

Karen Gillon: That is all right then.

The Convener: I do not think that that is relevant to the public part of the meeting. The motion for the members' bills debate has already been lodged; the one for the debate on bill timescales will be lodged later today—that was to allow time for discussion with Executive and Parliamentary Bureau officials about the implementation date. The motion will recommend that the implementation date for the proposed changes to the timescales of bills be 10 January. That is in line with our initial recommendation, which we made when we expected the debate to come a little later in the session. Are members content with that?

Members *indicated agreement*.

11:42

Meeting continued in private until 12:59.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, Scottish Parliament, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Tuesday 16 November 2004

Members who want reprints of their speeches (within one month of the date of publication) may obtain request forms and further details from the Astron Print Room, the Document Supply Centre or the Official Report.

PRICES AND SUBSCRIPTION RATES

OFFICIAL REPORT daily editions

Single copies: £5.00
Meetings of the Parliament and annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committes will be published on CD-ROM.

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75
Annual subscriptions: £150.00

Standing orders will be accepted at the Astron Print Room.

Published in Edinburgh by Astron and available from:

Blackwell's Bookshop
53 South Bridge
Edinburgh EH1 1YS
0131 622 8222

Blackwell's Bookshops:
243-244 High Holborn
London WC1 7DZ
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell's Edinburgh

Blackwell's Scottish Parliament Documentation Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries
0131 622 8283 or
0131 622 8258

Fax orders
0131 557 8149

E-mail orders
business.edinburgh@blackwell.co.uk

Subscriptions & Standing Orders
business.edinburgh@blackwell.co.uk

RNID Typetalk calls welcome on
18001 0131 348 5412
Textphone 0845 270 0152

sp.info@scottish.parliament.uk

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

Printed in Scotland by Astron