PROCEDURES COMMITTEE

Tuesday 15 March 2005

Session 2

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PROCEDURES COMMITTEE
4th Meeting 2005, 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)
Murray Tosh (West of Scotland) (Con)

*attended

THE FOLLOWING GAVE EVIDENCE:

Alistair Carmichael MP
Pauline McNeill (Glasgow Kelvin) (Lab)
Alasdair Morgan (South of Scotland) (SNP)

CLERK TO THE COMMITTEE

Andrew Mylne

SENIOR ASSISTANT CLERK

Jane McEwan

ASSISTANT CLERK

Jonathan Elliott

LOCATION

Committee Room 1

Scottish Parliament

Procedures Committee

Tuesday 15 March 2005

[THE CONVENER *opened the meeting at 10:19*]

Sewel Convention Inquiry

The Convener (Iain Smith): Welcome to the fourth meeting in 2005 of the Procedures Committee. We have a fairly heavy agenda today, so we should make a start. I am pleased to welcome our first panel under item 1, which is our inquiry into the Sewel convention. I welcome Alasdair Morgan MSP, the former convener of the Enterprise and Culture Committee, and Pauline McNeill MSP, the convener of the Justice 1 Committee. Both have made submissions to the committee on how the Sewel convention has affected the work of their committees.

We have also circulated a letter from the current convener of the Enterprise and Culture Committee in which he sets out the current view of that committee, which does not differ greatly from the view that has been expressed by Alasdair Morgan. We also received a letter from the Justice 2 Committee, a copy of which was circulated in the committee papers. Alasdair Morgan and Pauline McNeill may make opening remarks, after which we will move to questions from the committee.

Alasdair Morgan (South of Scotland) (SNP): First, although it may seem obvious, I want to make it clear that I am speaking on behalf of the Enterprise and Culture Committee—I will not discuss my personal opinion of Sewel motions, which is that they are works of the devil. The Enterprise and Culture Committee addressed what I consider to be proper Sewel motions, which are those that are lodged when Westminster legislates on devolved matters. The other two types are used to remove measures from schedule 5 to the Scotland Act 1998 and to pass powers to Scotland or to give additional powers to Scottish ministers. We did not consider those two forms at all. I take the point that Mr Winetrobe made in his submission that such matters should be dealt with by way of orders in council, not by Sewel motions.

The Enterprise and Culture Committee was concerned about the uncertainty that surrounds the timing of procedures in committee in Scotland to deal with Sewel motions and to scrutinise them properly. That is echoed by Alex Neil's comments. From talking to him, I understand his feelings about the lack of time the Enterprise and Culture Committee has had on occasion to call a proper range of witnesses as part of its consideration of a Sewel motion. He also said that there had been a lack of time to report to Parliament. If a committee is to consider a proposal and Parliament has to vote on the matter, it clearly makes sense for a considered committee report to be passed to Parliament.

We have tried to suggest one or two methods by which the problem could be ameliorated. We discussed whether some kind of fixed timetable could be given to committees that consider Sewel motions. We also thought that some kind of early-warning mechanism would be useful in alerting committees to the timing of Sewel motions. Such a mechanism would allow committees to try to fit their consideration of such motions into their schedules.

I am not sure how Sewel motions can be enshrined in the standing orders. How can reference be made to something that is simply a convention and which, of itself, has no legislative framework? That is a difficult question to answer—but that is why we have a Procedures Committee.

The Convener: Thank you.

Pauline McNeill (Glasgow Kelvin) (Lab): I welcome the work that the Procedures Committee has embarked upon with its inquiry into the Sewel process. The Justice 1 Committee's experience suggests that it is important to review constantly the conventions and processes that we adopt.

The Justice 1 Committee has dealt with its fair share of Sewel motions and our view of the convention has changed over time; nowadays, there is better scrutiny in the Sewel process. The process with which we dealt with the Civil Partnership Bill is an example of that better scrutiny. Although the process was not perfect by any manner of means, the committee became much more involved in it. Given that the bill involved Scottish civil matters, it was important that we had input to Westminster.

On whether there is room for improvement, I have some suggestions to make. First, as Alasdair Morgan pointed out, we need firm timetables for Sewel motions. As far as possible, we need an early warning from Westminster as to what its timetable is because the reality of Sewel motions is that we are forced to match Westminster's timetabling; Westminster has had to deal quickly with matters, so we have been forced into working to its timetable and we cannot set our own timetable.

It is important that there is an end process. At the end of the Civil Partnership Bill process, we received letters from Westminster ministers advising us of the outcome. That said, the process is not established as yet. Having passed a Sewel motion in the Scottish Parliament that gives Westminster the right to legislate, it is important

that we are satisfied that we know what the act looks like at the end of the process.

The Convener: Thank you. I open up the debate for questions.

Mr Bruce McFee (West of Scotland) (SNP): I thank both witnesses for coming along. First, let us turn to timetabling, which was mentioned in Alasdair Morgan's letter and Pauline McNeill's comments. You both seem to say that, although it would be nice for the Scottish Parliament to have a fixed timetable, that probably will not be practical, because it would be somebody else's timetable. I am not sure how a fixed timetable could be established, or whether to ask for one is the way ahead. Perhaps there should be a general procedure, part of which would have to be earlier indication that a Sewel motion was likely. Is that a fair summation?

Secondly, Pauline McNeill suggested that we might establish some form of signing-off procedure to ensure that what Parliament agrees to is what Parliament gets. What role do you foresee for on-going scrutiny to ensure that we get what we think we are getting? Who should perform that scrutiny, and what would the role of committees be in scrutiny of legislation as it progresses? A bill can change over several stages and at short notice.

Alasdair Morgan: The timetabling issue will be difficult to resolve. From what I recall from Westminster, timetabling there is not as clear as it is up here. For example, for stage 2 consideration of a bill, we set a deadline by which a committee must report back to Parliament. At Westminster, although committee consideration is subject to a timetabling motion, the timetable is not necessarily known far in advance, and neither are the arrangements for third reading and the House of Lords procedures. It is difficult for us to set a timetable for something that we do not really know about.

A couple of days ago, I was reading Robin Cook's book. He cites one of his achievements as being able—for the first time—as Leader of the House in 2002 to tell members in which house bills were to be introduced when the list of bills was introduced in the Queen's speech. The lack of foreknowledge at Westminster is a problem that transfers to our timetable.

I do not see how a signing-off procedure would work unless Westminster was prepared to change its procedures radically. Once a bill has been through both houses, has been agreed and is awaiting royal assent, it cannot be changed if a committee of the Scottish Parliament decides that a bill is not what had been first agreed. The only sensible action would be to examine the bill after the event. A committee could decide that the legislation was not what had been agreed and propose that the Scottish Parliament pass a bill to alter the provisions that are within our competence. That is the only mechanism that would work.

Pauline McNeill: I accept that it is impossible to set a fixed timetable, but improvements could probably be made. Because of the way in which the justice committees deal with business, the first indication that we have of Sewel motions is when the clerks tell us at one of our regular meetings with them that there are, for example, three Sewel motions forthcoming and ask us which the committee will be able to consider. Consideration of which justice committee will consider a Sewel motion focuses primarily on which committee has the time to look at it. We have some flexibility in that regard.

I believe that we could know earlier that a Sewel motion was in the system and begin to plan for it. As the convener of the Justice 1 Committee, I know first that there is a Sewel motion when I am asked to decide whether the committee can consider it and we need sometimes to be flexible about our other work in order to fit a Sewel motion into our timetable. I realise that that is difficult, too. If a committee is already involved in the legislative process at the Scottish Parliament, flexibility will be limited.

Also, on tracking, it is important that we know at what stage legislation is at Westminster and what has happened to it. I understand that a committee must seek out that information or get its clerks or individual researchers to do that. There is no system that can be tapped into that tells us at what stage a bill is that we have allowed Westminster to proceed with. I believe that there should be a framework for that.

On establishing an end process, we should know the outcome of a bill. We should know whether what we intended, or what we thought was going to happen, has happened. We should be able to see the Civil Partnership Bill, for example, in its final form and know that it conforms to Scots law. If it does not, all that we have said through the convention is that in this case we believe that Westminster is justified in legislating for the Scottish Parliament. We do not lose our right to legislate in that area. We must consider that as a possibility, as it might be a check and balance to ensure that the inputs that we make in the discussions that we have with Westminster force Westminster to co-operate with us a wee bit more, so that we know how the legislation has ended up.

In the case of the Civil Partnership Bill, I received a letter from the UK minister on the outstanding issue of pensions, which was of concern to the committee. That was just a courtesy, but I would like the end process to be a

convention. It has been suggested that there should be a Sewel motion committee. I am not convinced by that, but I am convinced that we must know how a bill has ended up. It is our job to know that.

10:30

Alasdair Morgan: If the Administration at Westminster was benevolently disposed to the relationship between the two Parliaments, there would be no barrier to our getting advance information about the timetabling of a bill that was likely to legislate on devolved issues, even before the bill was published. Unless the legislation on devolved issues is inadvertent and has happened by mistake, the minister at Westminster must know that such issues are going to be in a bill before it is published. There would be nothing to stop their tipping the wink to us up here so that a committee could at least mark the bill in its schedule.

Karen Gillon (Clydesdale) (Lab): I could be wrong, but I understand that there is an inspired parliamentary question in Scotland on the day of the Queen's speech, the answer to which indicates the bills that the Westminster Parliament believes will require to be Sewelled. I suppose that that is tipping the wink to us. Perhaps MSPs and committees need to be a wee bit smarter in looking at such bills before the Sewel motions come to the committees. Perhaps we need to develop a process here whereby, when it becomes clear that it is going to happen, committees begin consideration of bills before the Sewel procedure begins. That may be worth considering.

Mr McFee: Karen Gillon is right. I do not know whether she has any views on who would do that, but she is part of the way there.

What Pauline McNeill said is clear, but I would like clarification from Alasdair Morgan. First, do you foresee a system of on-going monitoring by a committee of a bill as it goes through Westminster, or do you think that we should examine the end product and dissect it to see whether it will achieve what we wanted? Secondly, I do not know whether you have had the opportunity to read the paper on qualified commencement or enactment provisions, but, as you have been a member of the Westminster Parliament, I am interested to know what you reckon the view may be at Westminster of the possibility of such provisions.

Alasdair Morgan: It would be quite difficult for a committee to follow the progress of a bill at Westminster. That would take up a lot of time, given the complexities of that procedure. A standing committee can have lots of meetings—as can the committees of the Scottish Parliament—and a great amount of effort could be involved in our watching every move of a bill at Westminster, especially if it was a controversial bill. For example, the Prevention of Terrorism Bill was recently amended in the House of Lords and then re-amended in the House of Commons. If we had followed every movement of that bill, we would have been meeting on nothing else, and I am not quite sure what the point of that would have been.

The other issue was commencement provisions. A reasonable point has been made. I do not see why such provisions could not come into force—I do not think that there is any legislative bar to that happening. Such an approach would have the same effect that the Administration at Westminster not legislating in a devolved area would have, which is clearly an option that is always open to that Administration. The option has some attractions.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): I have a question for Pauline McNeill. You mentioned your experience of dealing with Sewel motions as a committee member and as a convener. The Parliamentary Under-Secretary of State for Scotland, Anne McGuire MP, gave evidence to the committee a fortnight ago and held up as good practice the relationship and the dialogue that were built up between the Justice 1 Committee and Westminster—and probably with her in particular—on the Civil Partnership Bill. You mentioned the letter that you received. Do you agree that an informal practice developed during consideration of that Sewel motion? Would something along those lines be a better way to proceed?

Pauline McNeill: What happened with that bill is worth considering. We pushed the boundaries of what was possible during the Sewel process, which is what we should do. We took evidence for the first time—prior to that, we would not have taken time out. We thought that it was important to do so because there were specific Scottish provisions in the bill on which we thought it important that Parliament comment.

We had a meeting with Anne McGuire, which was my first experience of meeting a minister during the Sewel process. That meeting is not on the record—it was a private meeting—but it was helpful and gave us a real insight into issues of concern. The big issue was pensions. The meeting was helpful for committee members, who heard directly from the minister.

That might be one model of good practice, but I would like a more systematic process to be adopted under the Sewel convention, particularly for lengthy or detailed Westminster bills in which there are a number of Scottish provisions. Such a process would not be used in every case. There was a Sewel motion on the Gender Recognition

Bill, which was relatively short but quite complex, and I would like to have seen such a model being used when that Sewel motion was considered. It is everybody's job to push the boundaries of scrutiny until we satisfy ourselves that when we use the Sewel convention in respect of legislation, we know exactly what is happening and we are satisfied that we have made an input. I would like that to continue in Parliament.

Cathie Craigie: Did the Justice 1 Committee have any contact either at member level or civil servant level with members of the Westminster committee who were dealing with the bill?

Pauline McNeill: I was aware that Scottish Executive officials in the bill team were liaising closely with officials in Westminster, but we did not receive a systematic report about that. It would be good to be aware of the other levels of discussion. Consideration of the detail in provisions that relate to Scottish divorce law or succession law requires expertise, and the interaction between officials in Scotland and Westminster probably made a big difference to the bill's Scottish provisions. A more systematic report on such interaction to the relevant committee would be helpful because it would reassure committees that discussions are happening at the levels at which they should happen.

Alasdair Morgan: Whatever mechanisms people come up with must be robust enough to stand up under all circumstances. It is okay when the relationships between Westminster and Scotland are quite calm and we have in both places Governments that have roughly the same political complexion. However, if that changes, we will need a procedure that works under different circumstances. Of course, it might well be that under such circumstances the Administration here might not be prepared to lodge Sewel motions at all, but the procedure would still have to cope with the possibility.

The Convener: The problem appears to be that the liaison on Sewel motions is between Executives but the convention is, technically, between Parliaments. Is there anything we can do to improve the links? Does Pauline McNeill consider that the views of the Justice 1 Committee on the Civil Partnership Bill were adequately expressed to parliamentary committees of the House of Commons and House of Lords that dealt with the bill? My understanding is that Parliament relies on the Executive to do that rather than directly communicating its views.

Pauline McNeill: I can give you only a general answer. I was aware that our detailed report was useful and was taken on board following interaction with officials. However, there is no system to tell me that that is the case, which is what I would argue for. I had a good feeling about what was happening in relation to the bill, but that is all that I was able to judge the situation by. It was possible to read *Hansard* to see that things were going fine, of course, but I feel that there should be a more systematic approach. Our committee should be informed that our report has been fed into the relevant committee and that Scottish Executive officials are talking to Westminster officials. There should also be a response from the responsible minister at the end of the process.

The process is evolving in a positive way and it is up to us to push it forward. However, it is important that we establish a more systematic approach. Simply to rely on hearsay and what people are able to pick up about what is happening will not be good enough.

Mark Ballard (Lothians) (Green): On timetables of Sewel motions, you both said that you would like the Executive to have a better early-warning system. I would like to find out a bit more about the timescale of committee scrutiny and how that feeds into parliamentary scrutiny. That is more to do with the role of the Parliamentary Bureau than the Executive.

In his letter to the committee, Alex Neil mentioned an incident in January in which there was not enough time between committee consideration of evidence about a Sewel motion and the debate on the motion in Parliament. Do you have thoughts about the possibility of a more systematic approach being taken to the presentation of Sewel motions and their associated timetables? Have you anything to say about the relationship between the committee consideration and the consideration that takes place in the chamber?

Alasdair Morgan: I understand why Alex Neil was unhappy. In the situation to which he referred, the committee was able to take evidence from the minister only on the Tuesday and the motion was debated on Thursday. Clearly, if the concept of committee consultation is to have value and committees are to be able to do their job properly in relation to areas of controversy that might arise, they would want to take evidence from other people and be able to make that available to Parliament in a report. Clearly, that will be difficult if the Sewel motion has to be passed prior to second reading at Westminster, because the bill might be published only a fortnight or less prior to the second reading debate. With the best will in the world, how is a committee of the Scottish Parliament going to be able to examine the bill, summon people to give evidence, prepare a report and deliver it to Parliament in the two weeks between publication of a bill and its second reading? That is a real problem. Perhaps we could decide that the third reading rather than the

second reading is the important point. I do not know.

I do not want to be partisan, but Sewel motions can get us into tremendous problems that it might be impossible to get out of. It might be that there will always be an unsatisfactory situation in that regard.

10:45

Pauline McNeill: Ideally, in the legislation that we deal with, there should be fixed time periods between stages, but we would not necessarily be able to change that; it would depend on the Westminster timetable. It is important to have a forward look. Karen Gillon has said that the trigger for the process might be an inspired parliamentary question; I have no idea what triggers the process for us. It is worth exploring whether we can have a forward look and try to plan for all the stages—for committee input and for the debate in the Parliament.

To compensate for a short timetable, time has to be set aside in the chamber. We are getting better; we are devoting more time to Sewel motions, but a debate with only one speaker per party on a Sewel motion that is controversial is clearly too short. I attempted to speak in the debate on the bill on the supreme court and was told that we had only 0.4 of a speech. That was unsatisfactory, given the seriousness of the issue. Important concessions were made in the bill and we should have taken time to debate it. If we cannot fix the timetable, the compensation has to be that there is more time to debate the issues on the motion in the chamber.

Mark Ballard: Would it be appropriate to have standing orders that deal with Sewel motions as a different beast from regular motions and that set in stone some of the minimums, which we hope would be exceeded?

Pauline McNeill: Until we are sure that we have a process that we are satisfied with, it will be difficult to regulate procedures in the standing orders. We have to see how far we can push what is in essence a convention into a more systematic process so that we are satisfied that there is time to consider the issues. If we make changes and improve the process, perhaps we could consider enshrining what we can within the standing orders. That is something for far into the future. We can change things that do not need to be in the standing orders. We might get them wrong, but we can then reverse the decision and do things in another way. When we are surer about the process and have improved it, perhaps some of those changes could be incorporated into the standing orders.

The Convener: Before I ask Jamie McGrigor to come in, it is worth noting that the current convention in the Scottish Parliament is that Sewel motions are considered before the last amending stage in the first house, rather than before second reading.

Mr Jamie McGrigor (Highlands and Islands) (Con): The Justice 1 Committee's seventh report of 2004 states:

> "The Committee is aware that the Procedures Committee intends to carry out an inquiry into the Sewel motion procedure and believes that such a review should result in clear procedures to ensure that Committees of the Scottish Parliament can contribute to the scrutiny process at Westminster."

Will you expand on that? Would there be joint committee discussion? How do you see such a contribution being made?

Pauline McNeill: I do not think that there should be any barrier to increasing the interaction between the Scottish Parliament and Westminster. For me, that is what this discussion is all about. We have to see what will work. If a committee goes to the bother of producing a report, we should know that something has been done with it—that it has been considered in some way and perhaps appeared on an order paper. If we go to the bother of producing a report, we should know that it is not just lying on a table somewhere.

There might be further developments in certain cases; I suppose that that would depend on the nature of the legislation. I do not see why there could not be interaction or even informal discussion between the relevant Westminster committee and Scottish Parliament committee. I cannot think of a reason, other than timetabling practicalities, why that could not happen in principle. Most of the Westminster politicians to whom I speak think that that would be a good thing. The problem is that committees at Westminster and here are always short of time to do something systematic. We should be thinking all the time about ways in which we can make the Sewel process more dynamic.

Mr McGrigor: The Sewel process was originally meant to deal with minor matters. If your suggestion were implemented, committees of this Parliament would meet committees of the Westminster Parliament. As you say, that would take up much time. How could that happen?

Pauline McNeill: It would be up to the committee that was responsible for dealing with the issue raised by the Sewel motion to explore ways of inputting what it wants to say to Westminster. That is what we have tried to do. There are ways in which to communicate other than meeting formally. You are right to suggest that that is impractical.

Our first duty is to ensure that, if Scots law provisions are different from English provisions,

that is understood. Secondly, if we have a view on the law, we must find ways in which to input that into the process.

The Sewel process is a convention. As the Parliament progresses through its early stages of life, it is up to us to determine whether we want that process to evolve. In that spirit, we should explore all the opportunities. We would not agree to Westminster legislating for the Scottish Parliament unless we were satisfied that the outcome would be positive for Scotland.

Alasdair Morgan: The only point that I make is that the committee that considers a bill at Westminster—certainly in the House of Commons—is an ephemeral beast that exists only for the duration of the committee stage, after which it disappears. The committee goes through the bill clause by clause, so any interaction with it—which I suspect would have to be informal—would have to take place before it reached the clauses that affected devolved issues; otherwise, there would be no point in meeting the committee.

The Convener: That point is valid.

Richard Baker (North East Scotland) (Lab): I was interested in the point about committees receiving formal notice of what has been enacted at the end of the process in Westminster. Debate has taken place about how commencement orders could play a role in a new convention. Would those always be appropriate? If some provisions had a different commencement date in Scotland, the position could be problematic. Activities could be made illegal south of the border and people might fly north of the border to evade arrest because those activities remained legal in Scotland, as the commencement date was different. Should that be a fixed part of a new convention or should it depend on what the legislation is about? I understand that such arrangements have been used previously.

Alasdair Morgan: I do not accept the example of going north of the border to avoid arrest, because if an act was commenced in England and the offence was committed in England, the offence would have been committed, whether the offender was now in Scotland or anywhere else. I do not see that as a problem, because that happens in other areas. We legislate differently on many matters in Scotland and have different legal provisions north and south of the border. What is an offence north of the border may not be an offence south of the border and vice versa.

Fox hunting provides an interesting example. One issue in that debate was what would happen if a fox ran across the border and the pack of hounds followed it. Who would be guilty, and where? Whether matters that are devolved to the Parliament under the Scotland Act 1998 are legislated for in Westminster is a political choice. The argument that the world would stop if provisions were not enacted in Scotland is not valid.

The use of commencement orders could enable the Scottish ministers to say that what we thought we had given our consent to had changed so radically that we did not want to implement it in Scotland or that we at least wanted the Parliament to have a chance to debate it before we implemented it and, until that happened, we would not commence the provisions in Scotland. That is a perfectly reasonable proposition.

Richard Baker: I will press you a bit further on that. I will be corrected by the committee if I am wrong, but I think that some legislation on cruelty to animals was dealt with through the Sewel convention. Under what you suggest, somebody who commits offences in England would be able to move to Scotland once certain activities were made illegal down south and carry on committing those offences here. Should the use of a commencement order not depend on the type of legislation rather than the fact that the issue has been dealt with through the Sewel convention?

Alasdair Morgan: I do not understand why it should be a problem that, north of the border, we make our own judgments about cruelty to animals. During the foot-and-mouth crisis, the regulations in Scotland were different from those south of the border. Farmers were treating their herds differently and the Scottish Executive Environment and Rural Affairs Department was doing different things from the Department for Environment, Food and Rural Affairs. That was not a major problem; it was just something that was being done differently. You cannot seriously be suggesting that a serial persecutor of animals would flee north of the border so that he could pursue his hobby; that is not a credible argument.

Richard Baker: It is possible. That is all that I am saying.

Alasdair Morgan: Until recently, the penalties for wildlife crime were different south and north of the border—in fact, I think that the legislation is still different. That has not been an insuperable problem. In fact, many of us argued that the penalties in Scotland should be stronger and, eventually, that came to pass. Nobody said that the constitution was breaking down because those provisions were different.

The Convener: Pauline, do you have anything to add to that?

Pauline McNeill: Only to repeat that there should be an end process. We should know whether what we thought we had agreed to is what actually results from the process. It is therefore important to explore ways in which that

can be determined. The use of commencement orders is one option, although it is quite a dramatic option.

We have agreed to Sewel motions on different kinds of bills, some of which have had heavier content than others. The type of legislation that is being dealt with should be taken into consideration. I would not like to think that the Civil Partnership Act 2004 would have had a different commencement date in Scotland. I could not have agreed to that and could see no reason for it. However, it is also important that we have an end process, whatever it is, because it would be irresponsible of us as legislators to say to Westminster, "On you go, legislate for Scotland," and not do anything to check whether the end result is what we thought it would be.

With a Sewel motion, we have only temporarily, not permanently, given up our powers. If we decided that an act was not what we had agreed to, the ultimate sanction would be to legislate ourselves. That has not happened yet, but if it were to happen, we would be forced into that position.

Mr McFee: I want to clear up a few things. If we took Richard Baker's point to its ultimate conclusion, we would not have devolved powers unless both Parliaments agreed to pass the same legislation at the same time. I do not think that he would want to take his argument to that conclusion.

Richard Baker: I did not mean to take it to that conclusion.

Mr McFee: I was listening to what you were saying.

Alasdair Morgan and Pauline McNeill are saying that an early-warning system is desirable; that the timing of the consideration of the Sewel motion in the Scottish Parliament requires some examination and should be more systematic than at the moment; and that there is some merit in considering how commencement orders or other enactment provisions would work and whether they would be feasible, as their use could require the Westminster Parliament to do certain things.

I have two other matters to ask about. First, should the deliberations on a bill be Parliament-to-Parliament—which has some superficial attraction—or Executive-to-Executive discussions? If they should be Parliament-to-Parliament discussions, how should that be achieved?

My second question is about the third paragraph in Alex Neil's letter on the wording of the Sewel motion. One wording is that the Parliament agrees that

"a particular area should be considered by the UK Parliament"

whereas the other wording is

"to approve the principle of the Bill in question"

at the Westminster Parliament. What is the best way of wording a Sewel motion and would that affect the timing of the Sewel motion?

11:00

Alasdair Morgan: I will address the first point first. Discussions should occur between the Executive and the Executive and the Parliament and the Parliament. Under current circumstances, communication has to happen between both because the bill has its genesis with the Executive south of the border. Unless it happens accidentally, which I suspect it sometimes does, the English Executive will not legislate for Scotland unless it says to Scottish ministers, "Look, we think that it would be sensible for the bill to apply to both countries." Clearly, there must be some communication between the Executives first of all and that obviously leads to the Parliaments communicating with each other. What was the second question?

Mr McFee: I asked about the point in Alex Neil's letter about the two types of wording used in Sewel motions—one that says that we agree that the UK Parliament should consider the matter and the second that asks us to approve the principle of the bill. What is the best way of wording the motion and would that affect when we would consider a Sewel motion in Scotland?

Alasdair Morgan: The first wording is so broad as to be pretty meaningless. It would give Westminster carte blanche; it would send the message that we are not interested in the details and that we are happy in principle for Westminster to legislate. With that phraseology, it really would not matter when the motion was passed.

Talking about agreeing to the principle of the UK bill is not necessarily correct either, because it might be that only parts of the bill refer to Scotland. We should not necessarily express any point of view on the generality of the UK bill; we should be more specific about the parts of the bill that refer to Scotland as they stand at a particular time.

The Sewel motion has to be considered, as the convener said, before the last amending stage in the first house. I would prefer consideration of the motion to be earlier in the process—at the last amending stage in committee in the first house rather than at the report stage—but it certainly has to come before the bits that affect Scotland are talked about in detail.

The Convener: Would it be of benefit if the wording of the motion made more specific

reference to the memorandum, which outlines what the Sewel motion is about?

Alasdair Morgan: Yes, that would be sensible.

Pauline McNeill: In relation to Bruce McFee's first question, we should be looking at an early-warning system, taking a more systematic approach, achieving more of a dynamic where that is possible, pushing at the boundaries, making more time for debate, particularly when there is a shortened timetable, and ensuring that there is an end process.

As for the wording, I agree with Alasdair Morgan that the Sewel motion should reflect what we are doing. In some cases, we should not be agreeing to the general principles of a bill for which we have not yet seen the full text. It would be sensible for the committee to look at the wording of Sewel motions so that they reflect what we are actually doing. If we agreed to the general principles, would we have the right to reverse that if subsequently principles were agreed to that we did not accept? In law, we would not, but it would make sense to have a wee look at that for the sake of tidiness, if nothing else.

Mr McGrigor: In its submission, the Justice 2 Committee noted that there is nothing to prevent the Parliament from imposing conditions by way of an amendment to a Sewel motion and that the committee was content with the current procedure in that regard. The committee gave the example of an amendment in relation to the Serious Organised Crime and Police Bill. Do you agree with that?

Pauline McNeill: Agree with what?

Mr McGrigor: Are you content with the current procedure, whereby the Scottish Parliament can impose conditions by way of an amendment?

Alasdair Morgan: I read the Justice 2 Committee's submission, but I did not have time to check what the amendment that it mentions said. Can you help us with that?

Mr McGrigor: I do not know what the amendment was—I was merely referring to the Justice 2 Committee's submission.

Pauline McNeill: I think that the amendment was about removing a provision.

Mr McGrigor: I am not asking about the amendment or its validity. The Justice 2 Committee's submission states:

"The Committee noted that currently there is nothing to prevent the Parliament imposing conditions by way of an amendment to the terms of a Sewel motion. The Committee is content with current procedure in this regard, and cited the recent example of the amendment to the Sewel motion in respect of the Serious Organised Crime and Police Bill."

Are you content with the procedure by which the Scottish Parliament can amend a Sewel motion if it is not happy with it?

The Convener: To clarify, the amendment related to the issue of trespass. The Sewel motion was amended by the Executive in order to remove provisions on trespass from the bill.

Pauline McNeill: I am not familiar enough with the process of amending a Sewel motion to comment on the issue. However, the option should be available.

Alasdair Morgan: If we decide that Sewel motions should be a bit more specific, amendments may well be needed, because members might not agree with some of the specifics therein.

Mr McGrigor: The question that the Justice 2 Committee was answering was:

"Is it appropriate for the Parliament to impose conditions (through the wording of the Sewel motion) on the extent of any consent it gives, or should consent generally be unqualified?"

Mr McFee: With due respect to Jamie McGrigor, perhaps I can help. It might have been helpful if he had also read out the Justice 2 Committee's answer, which was that there is nothing to prevent the Parliament from amending a Sewel motion.

Mr McGrigor: I did read out the answer.

Mr McFee: It is almost self-explanatory.

Mr McGrigor: I am asking whether the witnesses agree with the Justice 2 Committee's conclusion.

The Convener: To clarify, the issue that Jamie McGrigor is trying to get at is whether the Parliament should be able to say that Westminster can legislate on some matters, but not on others.

Pauline McNeill: The answer is yes. That is the point of the process. If we can say that Westminster can legislate on a certain matter, surely we should also be able to say that we are not content for Westminster to legislate on another matter.

Alasdair Morgan: Clearly, such amendments would have no legislative force, but we are talking about a convention, anyway.

Cathie Craigie: The Procedures Committee members are responsible for the reports that we sign. Both Alasdair Morgan and Pauline McNeill have suggested that more time should be allowed to debate Sewel motions. I do not disagree with that, but how would business managers fit in more time for debate in what is already a cramped schedule, given that the Parliament meets for only a day and a half a week?

Pauline McNeill: That is a fair question. I cannot solve the problem for the business managers. However, in certain debates, such as the debate on the Constitutional Reform Bill and the proposal for a supreme court, which raised big constitutional issues for the Parliament, a bit more time should be found. That does not apply to all motions. In a recent debate on a Sewel motion, an extra 15 minutes was allocated, which perhaps allowed two or three more speeches. The business managers are beginning to accept that, in some cases, we need more time. However, it is difficult for them to weigh up the question of which matters should have priority.

Alasdair Morgan: I preface my answer by saying that I am not speaking for the Enterprise and Culture Committee or my party. In my view, we either need to sit for longer on the days that we are here, or we need to sit on other days. We have a nice new building here, so perhaps we should use it more.

The Convener: Controversial.

Karen Gillon: Part of the issue, I suppose, is that many members who have not been involved in the committee that considered the Sewel motion first get to grips with the issue only in the chamber. To be perfectly honest, a half-hour debate on a contentious Sewel motion is not long enough when we take into consideration the other issues on which we have two-and-a-half and three-hour debates. There are arguments for having longer debates on particularly contentious Sewels to allow people to get into the guts of the matter. Business managers need to take that on board. That issue has been a pretty common theme in the evidence that we have received.

Alasdair Morgan: The danger is that debates on Sewel motions just descend into the usual party bickering, which might be characterised as the Scottish National Party versus the rest.

Mr McFee: Does not the one thing come from the other? If the relevant committee has sufficient time to examine the content of the issue that is the subject of the Sewel motion, the debate in the chamber will automatically need to be longer to reflect that. That is almost self-evident.

The Convener: We are in danger of writing our report before hearing all the evidence.

I thank Alasdair Morgan and Pauline McNeill for their evidence, which has been helpful and useful. For Alasdair Morgan's information, our work programme includes the issue of the parliamentary week, which we will consider later this session. We look forward to receiving evidence from him on that occasion as well.

We will have a short suspension while we change witnesses.

11:11

Meeting suspended.

11:13

On resuming—

The Convener: I welcome what was initially intended to be our second panel of witnesses. Unfortunately, Peter Wishart has had to send his apologies because he has urgent business at Westminster. I intend to write to him to ask whether he wants to give written evidence, as it is unlikely that his oral evidence can be rescheduled at this stage. If we decide to take further oral evidence, we can reconsider, but our oral evidence sessions for the inquiry are currently fairly full, so I doubt that we will be able to fit him in. In any case, he might be slightly busy in April.

I am pleased to welcome Alistair Carmichael MP, who is the MP for Orkney and Shetland. He is here to represent the Liberal Democrats. Do you want to make any brief comments further to the written submission that we have received?

Alistair Carmichael MP: Yes. As well as providing a written submission, I was able to sit in on the evidence that Pauline McNeill and Alasdair Morgan gave. I must say that I thoroughly enjoyed listening to the committee's discussions with them. It was a refreshing change to hear a well-informed debate on an issue such as Sewel motions.

I was interested in what Pauline McNeill said about the different mechanisms for better interface between the two Parliaments. It struck me that Alasdair Morgan's point about the standing committees at Westminster being constituted merely for the passage of a bill was absolutely correct, but with a bit of imagination it would be possible to devise a mechanism whereby the Scottish Affairs Committee at Westminster, which is a select committee, could consider a bill along with the appropriate committee of the Scottish Parliament and put a report to the standing committee that was considering the bill. There is no direct precedent for that, but a highly analogous situation is the existence of joint committees of the House of Commons and the House of Lords. For example, the Joint Committee on Human Rights often considers bills that have particular human rights implications and produces highly persuasive reports, which are frequently referred to in the course of the debate in the relevant standing committee. A wee bit of imagination and flexibility would be required. Neither Parliament is famed for those, but there would be merit in considering the idea.

The Convener: Thank you for your remarks. I open the meeting to questions.

Mr McFee: Mr Carmichael offered a solution to part of the problem, although I do not know whether the approach is possible or whether the idea just occurred to him and he would need a chance to consider it further.

Are there formal procedures at Westminster to inform Scottish MPs that a Sewel motion has been requested, lodged in the Scottish Parliament, agreed to, or agreed to with conditions?

Alistair Carmichael: In my submission to the convener, I indicated that that is a real concern. Scottish newspapers are readily available in London, so we can read in *The Herald* or *The Scotsman* that a Sewel motion has been debated and agreed to, provided that the debate is reported. The informal links between colleagues in Westminster and Edinburgh are of great significance. I sat on the standing committee on the Civil Partnership Bill and had several substantial telephone conversations with Margaret Smith MSP about the bill. However, I am concerned that there is no formal mechanism for telling Scottish MPs that a Sewel motion is coming up. This is an exercise in kite flying, but in my letter I suggest that there might be merit in finding a way of setting up a receiving committee at Westminster. As someone said, the Sewel motion process is a Parliament-to-Parliament process, but in effect what currently happens is an Executive-to-Executive process. There must be a formalised mechanism that creates an interface between the two Parliaments.

Mr McFee: I agree. Could the Scottish Affairs Committee act as the receiving committee? Secondly, on a different matter, previous witnesses mentioned qualified commencement provisions. What is your view on such provisions and what is the likelihood of such an approach being given a fair wind at Westminster?

Alistair Carmichael: On your first point, the Scottish Affairs Committee could be the receiving committee, as perhaps could the Scottish Grand Committee, which still exists at Westminster, although it has no clear purpose and—I am delighted to say—has not met for some time.

I would be wary about establishing a rigid rule on qualified commencement. A number of the bills—Sewelled and non-Sewelled—that I have dealt with at Westminster have had commencement provisions whereby the commencement date of Scottish provisions is made by Scottish ministers by order, or by United Kingdom ministers after consultation with the appropriate Scottish minister. Clearly, that mechanism already exists. I would caution against a rigid rule, though. It must be taken measure by measure.

Karen Gillon: That is helpful. In the second-last paragraph of your submission you talk about the difficulties that you have at Westminster if you do not know about the devolved issues that legislation will contain. Obviously, there are issues for us if we move our decision-making process to earlier in the Westminster timetable. Are there ways in which we can have that earlier dialogue and still have a discussion slightly later in the process?

Alistair Carmichael: My preference is for discussion that happens sooner rather than later. It is proper that Westminster should be informed of the views of the Scottish Parliament in respect of a piece of legislation for which a Sewel motion has been lodged, but I cannot think of a constitutional mechanism by which the Scottish Parliament could fetter the discretion of Westminster when it was scrutinising legislation, nor should such a mechanism exist. As was observed earlier, there is a process to be gone through at Westminster. Having committed the legislation to Westminster, it is perhaps then for members of the Scottish Parliament to consider what has been done. I have observed before that Sewel motions are not like puppies. Puppies are for life, not just for Christmas. Sewel motions are very much a gift, and if members of the Scottish Parliament do not like what comes back from Westminster—either a detail or a substantial aspect of the legislation—it remains within their power to pass amending legislation. Obviously they can do that only if they have a formal mechanism for considering what has come back, but that is a matter for members of the Scottish Parliament; it is not for me as a member at Westminster to tell you what you should be doing.

Mr McGrigor: When the Sewel convention was originally envisaged, Lord Sewel himself pointed out that, in his view, its use would be the exception rather than the rule. In fact, there have been 63 Sewel motions. Has the convention been used too often? If so, what should be done to ensure that it is used for the purpose for which it was meant?

Alistair Carmichael: I am sure that if the Scottish Parliament has considered it appropriate to lodge a Sewel motion, it is appropriate. It is not for me to gainsay that. Lord Sewel's original comments in the House of Lords were very much in anticipation of a process whose shape we did not really know. More Sewel motions have probably been passed than Lord Sewel originally suggested. That does not mean per se that the passing of those Sewel motions was wrong or in some way bad; it just means that there has been a different application in practice than had perhaps been anticipated in theory. It is appropriate that, six years down the line, we should be considering how the process has worked and asking what has been the practical outcome. Has it worked? Has it

produced better legislation? On some occasions, particularly in the case of the Proceeds of Crime Bill and the Civil Partnership Bill, both of which I was intimately involved in, it has produced very good legislation, whose operation is at least as effective as it would have been had the legislation come to the Scottish Parliament.

Mr McGrigor: You mentioned the Proceeds of Crime Bill. There was already a Scottish serious crime squad, but that apart, do you think—

Alistair Carmichael: Sorry, I said the Proceeds of Crime Bill. You are thinking of the Serious Organised Crime and Police Bill.

Mr McGrigor: Sorry. The Sewel convention was used in relation to the Serious Organised Crime and Police Bill. Do you think that the Scotland Act 1998 defined properly the respective powers of the two Parliaments or that, in the context, because it appears that the convention is being used more often than it was meant to be, there should be a review of who is responsible for what?

Alistair Carmichael: No, I do not think that there is a need for a review. The Sewel motion mechanism was a recognition that there would be grey areas and that, in some areas, as a matter of pragmatism, it would be sensible to allow Westminster to proceed with the consent of the Scottish Parliament.

On the division of responsibilities, I think that the Scotland Act 1998 is fairly well constructed. It is difficult to imagine how it could be amended—I will leave aside any substantial questions about transferring powers over taxation or whatever—without interfering with the balance that exists.

Cathie Craigie: On the point that Jamie McGrigor made about the frequency of the use of the Sewel convention, your opinion reflects very much what Lord Sewel said at the previous committee meeting, which was that when the convention was put in place, people did not have the "faintest idea" how often it would be used, but the important issue is that the subject matter is correct, not how often we use the convention. You are very much in line with Lord Sewel.

Alistair Carmichael: When I was a student, I served on the senate at the University of Aberdeen with Lord Sewel. I do not recall him, in his academic guise, expressing anything that had such doubt about it, so that is a refreshing piece of news.

Cathie Craigie: It seems from your written submission and the evidence that you have given this morning that you are probably a rare breed, as you are an MP who has taken part in much of the legislation that has gone through the Sewel convention. You have highlighted the need to have a mechanism to alert MPs to the fact that there is a Sewel motion, as you do not always want to pick that up in the newspapers and would prefer to have a more formal mechanism. When Anne McGuire gave evidence to the committee a fortnight ago, she hinted to the committee that that issue would be examined. The committee does not have any power over the way in which standing orders or conventions are set up at Westminster, but could you suggest a way to alert MPs, through Westminster processes, that a Sewel motion has been passed by the Parliament?

Alistair Carmichael: If it is to be a formal mechanism—I think that it probably should be—it would probably require an amendment to the standing orders of the House of Commons. I do not think that it need necessarily be a particularly cumbersome mechanism, nor should it be. A formal process should make MPs aware of a Sewel motion, so that they can decide what action they want to take as a result. That is why I thought that there might be merit in such matters going to the Scottish Grand Committee, because it consists of all Scottish MPs at Westminster. The Scottish Affairs Committee includes members from all parties from Scotland that are represented at Westminster, so there might also be merit in that option. At this stage I am not going to say that one avenue is preferable, but we should consider the matter. I am a member of the Scottish Affairs Committee and there might be mileage in our having a look from our point of view at how Sewel motions have worked and what could be done differently or better. If we have a May election, that would probably have to happen the other side of the election.

The Convener: Some bills that are Sewelled obviously commence in the House of Lords, so they are subject to a different process. Can you suggest how such a mechanism might work if a bill is a Lords bill?

Alistair Carmichael: To be honest, I cannot. I am not sufficiently familiar with the standing orders of the House of Lords to answer that question properly. However, I know that their lordships are the masters of pragmatism. If there is a mechanism that can be found, they will find it.

The Convener: That was very diplomatic.

11:30

Cathie Craigie: How are MPs alerted to the fact that a Sewel motion has been passed on a bill that Westminster is considering? Does that happen as a result of your membership of a particular committee or do colleagues who are MSPs alert you to such matters?

Alistair Carmichael: I am aware of such matters because I keep an eye on what is going

on in the Scottish Parliament and on the Scottish papers. I also have contacts within the Scottish Executive as distinct from the Scottish parliamentary group. If members think about which constituency I represent, they might be able to work out who my contacts are.

In my submission, I refer to the availability of legal aid, which is the responsibility of an Executive minister. When I had a particular interest in that subject, the Executive minister in question was my own MSP. That meant that I was able to discuss matters over a cup of tea on any convenient weekend. Such informal contacts are important, but there must be something more, especially if we were ever to find ourselves in a situation in which the Government at Westminster was of a different colour to that in Edinburgh.

Mr McFee: I was tempted to ask whether you voted for him, but I will not.

Alistair Carmichael: I did. I am happy to make that clear.

Mr McFee: I am sure that you are, so that you can keep your information flow going.

Instead of looking to Westminster to set up a formal process, should we not make the case that, if the Executive got its act together and provided an early-warning system for MSPs and committees, it could, as a matter of courtesy, make that information available to Scottish MPs as it became available?

Alistair Carmichael: There are already informal procedures for passing on such information as a matter of courtesy. That process should be more than a matter of courtesy; it should be a matter of formality.

Mr McFee: My point is that it would be far easier to establish a formal process here, which could serve both MSPs and MPs, than it would be to ask Westminster to do so.

Alistair Carmichael: I feel slightly uneasy about that. I am not sure that contact between the Executive in Edinburgh and parliamentarians in London would be the right mechanism. In view of recent events at Westminster, I have become more convinced that the divisions between Parliament and Executive are important and should be observed.

Mark Ballard: I am interested in the remarks that you made from your perspective as a member of the Scottish Affairs Committee and as a Westminster MP for Scotland about situations in which the implications of Westminster legislation for Scotland are the responsibility of Scottish ministers. In your submission, you gave the example of people who are subject to the Proceeds of Crime Act 2002 and their eligibility for legal aid. You said that the current situation is unsatisfactory and you mentioned a possible solution. Have you thought of any wider options? Could the mechanism that you suggest link in with some of the other feedback mechanisms between the two Executives and the two Parliaments that we have been discussing?

Alistair Carmichael: I do not think that it is a question of feedback, because that is really for the Scottish Parliament. The point that I make in my submission is that there is a beast at Westminster that can take evidence as well as scrutinise a bill—the special standing committee. There would be some merit in Westminster pursuing that option more often than it does. I am not aware that it has ever pursued that option in relation to a Sewelled bill.

The other mechanism that I have floated this morning is joint committees for examining a piece of legislation. That mechanism might allow issues to be identified and addressed, and because it would be informal, MPs would not be circumscribed in talking to Scottish Executive ministers.

Mark Ballard: Excuse me if I am confusing my committees, but would special standing committees also be an option in ensuring that there is a relationship between a committee at Holyrood that has been scrutinising a Sewel motion and providing information—

Alistair Carmichael: If I understand you correctly, I do not think so. The membership of a special standing committee is confined only to members of the House of Commons. When I made my suggestion earlier, I was thinking about a committee that would comprise MPs and MSPs.

Mark Ballard: I am interested in your remarks about parliamentary drafting in the penultimate paragraph of your submission. We now have a bills unit at Holyrood. Is the occasional "poor quality of drafting" that you mention due to timetable problems or lack of experience?

Alistair Carmichael: I have limited experience of the process of drafting legislation. When I was a trainee solicitor a long time ago, I was very peripherally involved in the early stages of what became the Criminal Procedure (Scotland) Act 1995. When I wrote the sentence that you referred to, I had in mind the Scottish bits of the Civil Contingencies Bill which, as a picky lawyer, I felt had been very much bolted on as an afterthought. I might be completely wrong about that, but as I discovered in committee, the act—as it now is—contains four schedules, two of which apply to Scottish agencies and the other two to United Kingdom-wide agencies. The bill as it appeared to us in committee sought to allow organisations to share information among the UK agencies set out in schedules 1 and 3 and among the Scottish

agencies set out in schedules 2 and 4, but did not allow the organisations in the Scottish schedules to speak to the organisations in the UK schedules. I hope that committee members are still with me.

The upshot of such an approach would have been that, as far as civil contingencies were concerned, Scottish chief constables would not have been given the power to share information with UK agencies such as the British Transport Police or the Health and Safety Executive. To my mind, that suggested that the provisions were a bolt-on that had not been properly bolted on. The scary thing about legislation is that Government has these very clever, highly qualified lawyers all over the place who are much better at their job than I ever hoped to be and I only happened to pick up on the matter by accident. Sure enough, the Government tabled amendments at report stage to cure the defect. Occasionally, the shaping of legislation can be a bit hit or miss, but I suppose that that is what keeps lawyers in business.

The Convener: It is like trying to put up something from IKEA, and always finding that a funny little bit is missing.

Richard Baker: Now that we have learned that Mr Carmichael is a graduate of the University of Aberdeen, we can understand why his evidence is so well informed.

I have a question about tracking legislation and another about the end of the process. If joint committees involving MPs and MSPs are not feasible and given the fact that, once we pass the Sewel motion at Holyrood, the bill still has to go through the usual processes at Westminster, could the standing committee or another Westminster committee inform the relevant subject committee here of any major changes that have been made or any other information about the progress of the proposed legislation that the committee should know about? After all, we heard earlier that committees at Holyrood could face practical difficulties in tracking legislation's progress in detail through Westminster.

Alistair Carmichael: That might well happen if the Sewel convention were to be formalised. I should make it clear that it might not be necessary to form a joint committee to scrutinise every piece of legislation that is subject to a Sewel motion, many of which are highly technical and procedural.

I have listed those bills that I have been involved in that have been subject to a Sewel motion. Another substantial one was the Tobacco Advertising and Promotion Bill. I cannot remember many other major pieces of legislation that were dealt with in that way. I think that any special committee mechanism should be used sparingly.

Building in a formal mechanism for reporting back is desirable. However, even without a formal procedure, everything is on the public record. The relevant copies of *Hansard* are available to the committee that would have been responsible for the bill in the Scottish Parliament and it is possible for that committee to compare what has been done in the course of scrutiny at Westminster and to report back to the Scottish Parliament.

The Justice 1 Committee, which reported on the Civil Partnership Bill, produced an excellent report that was of immense assistance to me as a Scottish member on the standing committee for that bill. I would think that, if the Justice 1 Committee were to report back on what emerged from the Westminster process, its report would show that it was pretty pleased with what it got. That is one of the best pieces of legislation that we have produced as the result of a Sewel motion in my time in Parliament.

Richard Baker: It would be helpful to hear about the progress of the bill as it makes its way through Westminster but, as Pauline McNeill said, it would also be desirable to have a mechanism whereby the Scottish Parliament could review what has happened. That mechanism need not be a commencement order, but it would be useful to be able to examine what has been enacted to ensure that it fulfils what the Scottish Parliament intended. Should notice of what has been enacted be given by Government or could that be done through inter-parliamentary liaison between the committees?

Alistair Carmichael: As a matter of principle, the process ought to be Parliament to Parliament but, as a matter of practice, it seems to be Executive to Executive. At the reporting back stage, I am a bit more relaxed about the process being Executive to Executive, as long as there is a mechanism for the Scottish Executive to pass the ball back to Parliament.

Richard Baker: So you think that the Parliament-to-Parliament contact should take place before that stage.

Alistair Carmichael: Yes.

Mr McGrigor: In your submission, you say:

"the links between the Scottish Executive and the Government in Whitehall seem to function fairly smoothly".

If the political climate changed and there were Governments of different parties in Westminster and Scotland, do you think that the Sewel convention would be used less? Would it be more difficult to use the Sewel convention or would everything operate as it does at the moment?

Alistair Carmichael: Who knows? Your question puts me in the same situation as Lord Sewel was in when he made his original remarks in the House of Lords, in that you are asking me to second-guess what would happen in a particular

circumstance. I imagine that the Sewel convention would be used differently but I do not know whether it would be a more contentious procedure. It is fair to say that if there were Governments of radically differing political colourings in Westminster and Edinburgh, the importance of some sort of reporting back and reviewing procedure would be increased.

The Convener: Thank you for attending the meeting and for giving us your helpful and interesting evidence. I know that your attendance has entailed your having to make the ultimate sacrifice and miss Scottish question time.

Alistair Carmichael: No, the ultimate sacrifice is missing questions to the Advocate General for Scotland.

The Convener: Indeed. That concludes this agenda item. I draw members' attention to the additional papers that have been circulated for information.

Private Bills

11:44

The Convener: Agenda item 2 is consideration of another series of papers, which I hope that you have all read, on our private bills inquiry. There are a number of key decisions to be made.

There is a degree of urgency on this matter in that we have to make decisions about which items we should deal with as priorities. We have a slot for a debate in the chamber on 11 May on the issues and any changes to standing orders. The reason why there is a degree of urgency is that we expect some private bills to be lodged at the end of May or the beginning of June and it would be helpful to all concerned if any changes were made before then.

Members have a note by the clerk, which highlights the issues that we need to consider today, and a number of other papers. I propose to go through the issues that are raised in the note and consider them paper by paper. First, we have an update paper from the group of Parliament and Executive officials that has been considering what is now called the TWA-plus model—one that is developed from the system under the Transport and Works Act 1992. I think that we will have to find a better name for it: the Pan Am-minus model, maybe. I am sure that Andrew Mylne and Jane McEwan will be able to clarify any points of fact in the report. We must consider whether we wish to proceed with the TWA-plus model, which is outlined in the report, or to go back and consider some of the other models that were mentioned in the group's first report.

Karen Gillon: The TWA-plus model is the right model. We need to do more work to pull it together and take it forward but, on the basis of the evidence that we heard, it is the right model. We should begin to work it through from now on.

Mr McFee: I tend to agree with that. The bones are there but, as Karen Gillon said, the model needs to be pulled together and fleshed out. We might disagree about some of the minor elements, but the thrust is in the right direction.

Mark Ballard: I am still most attracted to the semi-parliamentary model. I can see the attractions of the TWA-plus model, but I seek scrutiny of the parliamentary sections—the "plus" part—of the model. There is an opportunity to create a model that has the correct level of parliamentary scrutiny but the simplicity of the TWA-plus model. I hope that we will evolve something between TWA-plus and the semi-parliamentary model: a semi-semi-parliamentary model, perhaps.

Richard Baker: I take on board Mark Ballard's points, but there have been a number of meetings about the model and a lot of detailed scrutiny of it. The model addresses in thoughtful ways many of the concerns about the process that I had when I was a member of a private bill committee. Members will want to review some of the parliamentary aspects of the model, but the process that is outlined in the report is good and it closely matches my aspirations.

Mr McFee: I think that we are all singing from the same hymn sheet. The main area in which I envisage potential for disagreement or the need for changes is in relation to the role of Parliament in the matter. Without losing the simplicity of the system, I would like Parliament's role to be beefed up. There are some contradictions in the paper—for example, on the Parliament not approving the general principles but in effect taking the step that approves them. In reading through the report a couple of times, we can see areas in which there is conflict between recommendations. The model needs to be fleshed out, but the general thrust of it is correct.

Mr McGrigor: The model based on the Private Legislation Procedure (Scotland) Act 1936 was always used in Scotland before and I cannot see much wrong with it.

The Convener: Other members are inclined towards using the TWA-plus model, as suggested in our paper. It would be sensible if we agreed that in principle today. We are not agreeing the detail today—we are not approving everything in the paper—but we should agree things in principle.

A lot of detail will have to be worked on—for example, how the model will be introduced and which legislative vehicle will be used. Questions might then arise, such as whether it extended to major roads projects. We will have to come back to such details. We will also have to consider how parliamentary scrutiny would operate. However, if we can agree in principle that TWA-plus is the model that we wish to use, we can put that in our preliminary report and then work on the details at later meetings.

We now have to consider the priority issues for the current system—changes to the existing procedure that we need to put in place immediately in order to deal with the bills that are about to appear on the Parliament's doorstep.

A number of points arise. The first is to do with accompanying documents, particularly in relation to environmental issues. Do we need to make any amendments to make requirements on environmental impact assessments more specific? Alternatively, is the present guidance adequate? My personal view is that if we are operating with the Environmental Impact Assessment (Scotland) Regulations 1999, we might as well state that specifically.

Karen Gillon: The evidence that the committee received contradicts the legal advice that we have been given. It appears to me that the environmental statement is not as robust as we would want it to be. We should be a bit more explicit about what we want. I would certainly want the requirement to consult the environmental regulators to be included. However, we should indicate, perhaps in plainer English, what we expect from the environmental statement.

Mr McFee: As I understand it, the aim of paragraph 31 is to set out more plainly what details are expected in an environmental statement. Such statements would obviously be different for different projects, but there would be some guiding principles. I imagine that those principles are already set down somewhere—correct me if I am wrong. I would assume that there is a formal procedure for compiling an environmental statement.

If the suggestion in paragraph 31 makes things clearer and sets out the timescales, I do not see any reason for not going ahead with it.

The Convener: If all the information that is set out in schedule 4 to the Environmental Impact Assessment (Scotland) Regulations 1999 is required, why do we not just state that up front?

Mr McFee: And the timescales?

Karen Gillon: They are two different things.

The Convener: Yes. They are two different issues.

Mr McFee: I thought that you were discussing everything in paragraph 31.

The Convener: Sorry—the issue of the environmental statement is one thing, and it should be in accordance with the Environmental Impact Assessment (Scotland) Regulations 1999. We then have the consultation with the environmental regulators, which I think we all agree should be part of the process. Then there is the timetable bit.

Karen Gillon: Maybe I confused the issue. Paragraph 31 is necessary and the rule changes that result from paragraph 32 are correct. My concern is about paragraphs 33 to 36. We need to state boldly the points that the convener made, because our legal advice suggests that the process is not as robust as it seems to be.

The Convener: Do we agree with my suggestion and Karen's on environmental impact assessments?

Members *indicated agreement.*

Andrew Mylne (Clerk): For clarification, the point that we tried to set out in the paper was that it is our clear legal advice that the current private bill system—in this case as set out in a Presiding Officer determination—does what the relevant environmental law requires. National legislation, when that is the mechanism for giving consent, is exempted from the relevant European directive, and the Presiding Officer determination, which is quoted from in paragraph 35, is a slightly indirect mechanism for imposing the requirement to provide the information that is set out in schedule 4 to the regulations. It does what is necessary.

Karen Gillon: We want a direct mechanism.

The Convener: We are saying that we want the mechanism to be direct, rather than indirect.

Karen Gillon: Although the determination exists, people told us clearly that the requirement was not as robust as it would be for other processes. Therefore we need to make it more robust. If that means that we have to make it direct rather than indirect, we should do that.

Mr McFee: Do you foresee problems with that? I am picking up a difference of emphasis. I want to be clear that what we are recommending is practical. It is desirable, but we want it to be practical.

The Convener: As I understand it, the legal advice states that private bills can be exempt from the regulations, because they are national legislation. However, I am saying that although they can be exempt, they do not have to be, and we should say in our standing orders that we do not think that they should be. Is that clear?

Andrew Mylne: Yes, so far as being more direct is concerned. If all you mean is moving something out of a PO determination into the rule directly, I do not think that that would make any difference. The requirement still has effect as part of the PO determination.

The Convener: That is what we are doing. We want it to be up front. The problem is that the PO can change the determination.

Mr McFee: I am sorry to labour this, but I am picking up something slightly different from Karen Gillon. I do not know whether I picked her up wrongly. There seems to be a difference in emphasis.

Karen Gillon: I am making the same point as Iain Smith. There is scope for a PO determination to say that private bills should be exempt. My view is that they should not be exempt and that we should state in our standing orders that we require them to comply with environmental impact assessments, as set out in the Environmental Impact Assessment (Scotland) Regulations 1999.

Mr McFee: My question for the clerk is whether it is feasible to remove that discretion.

Andrew Mylne: There are two things that we could do. First, we could take the content of the current Presiding Officer determination and build it directly into the rule, which would make it more permanent, but it would not change the nature of what promoters are required to do under the current system. Secondly, we could impose on promoters more of a full-blown environmental impact assessment process. There may be practical difficulties in doing that because, as I understand it, the process is iterative and takes place over a period of time. Meshing it with a private bill process would bring practical difficulties. We would need to examine that in more detail.

Mr McFee: I understand the desire. I am hearing that there may be practical difficulties.

The Convener: If the committee agrees what it wants to do in principle, the clerks can come back with a note on implementation for the draft report. If they come back and say that there are practical legal difficulties, the report can reflect that.

Mr McFee: If there are practical difficulties, that would be useful. I accept what you are saying in principle, but I want to ensure that anything that we recommend stands up.

The Convener: Absolutely.

Karen Gillon: I seek further clarification from the clerks. It seems bizarre to me that it is possible to exempt a fairly major railway scheme—such as the proposed Borders rail link, which is a long stretch of line—from a full-blown environmental impact assessment because it is dealt with by a bill that is passed by the Parliament rather than by a different process. If small local projects that have significantly less environmental impact than a large railway line need an EIA, large projects that are introduced by a private bill should also be subject to a full-blown EIA. As a Parliament, we need to find a mechanism whereby such projects are subject to that process, regardless of who introduced the bill in Parliament.

12:00

The Convener: We all agree that that is what we are seeking to achieve, but we will obviously need to take advice on how we achieve it.

If there are no further points on environmental statement issues, let us move on to consider the size of private bill committees.

Richard Baker: The paper helpfully raises many issues about the size of private bill committees, but aspects of paragraph 41 need firming up. I am reluctant to agree to the suggestion that the norm

would be for private bill committees to have five members. First, parties will increasingly experience practical difficulties in finding that number of committee members. Secondly, I am not convinced about the assumption that the members would have more work if their committee consisted of three members rather than five. The reality is that the work falls on the clerks who provide questions and information. I am not convinced that reducing the number of members would mean a huge amount of extra work for the remaining few committee members.

I welcome the suggestion that a smaller committee could be considered when political parties have practical problems in proposing committee members. We should reconsider whether five members should be the norm for a private bill committee. We should give the Parliamentary Bureau more flexibility in recognition of the increasing practical difficulties that will be experienced as more private bills are introduced.

Karen Gillon: For the avoidance of doubt, can it be explained why private bill committees could not have a membership of five with a quorum of three? I have concerns about reducing the membership to three because the quasi-judicial nature of the procedure requires, I think, all members to be present. Given that some private bill committees can run for a seriously long time, would we need a process whereby a committee member who became ill could be replaced? If the process is quasi-judicial, how could someone else become a member of the committee halfway through the process? Would we need to go back to the beginning? Would the bill fall? That is my concern about any move towards having private bill committees of only three members. Why can they not have a membership of five with a quorum of three? Can someone clarify the position for me?

The Convener: Paragraphs 50 to 53 cover the issue. At present, if one member of a five-member committee drops out, the committee simply continues with only four members. If two members drop out, the committee ends up having only three members. If three members drop out, the process has to start again.

Mr McFee: My understanding is that provision exists for the promoter to agree that a member who has missed meetings can return to the committee. Is that correct?

Andrew Mylne: There is certainly provision that a member who has missed part of the evidence taking at consideration stage can continue as a member of the committee, subject to the agreement of the parties involved. That sort of provision is applied in more or less any judicial-type context to ensure that decision makers have heard and participated in all the evidence sessions.

Mr McFee: So private bill committees usually have five members because that gives them room to drop to four or three members. If they were to start off with only three members, they would really struggle if somebody dropped out.

The Convener: We will come on to that. According to the legal advice that we have been given, it is expected that a member of a private bill committee must be present to understand the evidence. I must say that I am not so certain that that is as necessary as in a jury trial, where things such as body language might form part of the evidence. I would have thought that it would be adequate for the committee members to have read the evidence. I cannot quite understand why they must be present at every single hearing to receive all the information.

Andrew Mylne: We specifically considered that issue because there was evidence on that point. We received clear legal advice that, based on analogies with judicial process, it would be insufficient for members just to have read the evidence. Although the private bill committee process is only quasi-judicial, I understand that the advice was that the Parliament could be vulnerable to legal challenge if that process was not followed and a decision was taken that was seen to be unfavourable to one of the parties. I am not a lawyer and am only conveying what I was advised.

Karen Gillon: That exemplifies how ridiculous the current system is and why we need to proceed as quickly as possible to set up a new system.

The Convener: An analogous situation might be local authority planning committees, the members of which must take into account all the information that has been received but are not required to be present throughout the entire meeting in order to vote. I am looking at Bruce McFee because I think that he was a member of a planning committee in the past.

Mr McFee: Yes. I can think of situations in which it was probable that many members voted without even reading their papers.

Karen Gillon: Allegedly.

Mr McFee: I avidly read every paper, but that is done. However, a person would be in severe difficulties with a licence application either in the licensing court or in respect of miscellaneous licensing. They would be debarred from voting if they had not been present during the evidence giving.

The Convener: We cannot do anything about the matter anyway. It does not strike me that it makes a great deal of sense to proceed in such a

way if the evidence is fully recorded substantially verbatim. It has been said that people cannot keep up to date with the evidence by reading it rather than by being present on every occasion, but that presents problems with three-member committees. There is the possibility of a member not being present and the whole thing collapsing.

Richard Baker: At the moment, the same requirements exist for committees with five members. As far as I am aware, no one has dropped out of a committee so far. Practical issues are involved.

A dichotomy that is not as informative as it might be has been drawn between non-works bills and works bills on the basis that non-works bills seem to be less complicated. However, a lot of preparatory work on the detail of works bills is done for members by the clerks. I would not say that five members should be the norm—I would give the bureau more flexibility than that.

The Convener: I understand from paragraph 37 that the bureau already has flexibility. The issue is whether a five-member bill committee can still carry on with four members if a member is ill or falls under a bus or a train and they simply drop out. If there is a three-member committee and somebody falls under a bus, it cannot continue with only two members. That is where the problem arises with a three-member bill committee.

Mr McFee: Could it continue with two members? If the membership fell below two members—if there is only one member, in other words—it could not continue.

Mr McGrigor: If the number of members fell below that, it definitely could not continue.

The Convener: If there is a one-member committee, I think that proceedings might be subject to a judicial review.

Mr McFee: On paragraph 41, is it fair to make a distinction between non-works bills and works bills on the basis that one is normally simpler than the other?

The Convener: I suspect that it is more a question of the time that is involved. A non-works bill probably requires fewer meetings overall than does a works bill. It is therefore probably easier to get through without the risk of a member falling ill for a lengthy period.

Andrew Mylne: That is right. The suggestion was not meant to be that that should be the only basis of distinguishing between them, but it might be one main factor. The number of objections—or, indeed, whether there are objections—would be the other main factor.

Karen Gillon: Do we know what bills will be introduced in May and whether they are works bills or to do with other private interests?

The Convener: I think that three works bills are expected—the two airport link bills and the Airdrie to Bathgate railway bill.

Richard Baker: I will have a final go. I do not think that we should say that the norm should be five members.

The Convener: I am not suggesting that we should.

Mr McFee: Paragraph 41 suggests that

"the norm should remain 5 members for any works Bill".

Karen Gillon: I think that it will be exceptionally difficult—certainly for my party—to find six members with no interests who can take part in committees that deal with rail bills relating to Edinburgh, Glasgow, Airdrie and Bathgate. We should find a way that allows the bureau flexibility. If that means that we stick with the existing rule, we should do so. We should allow the bureau to use its good offices to determine whether the Parliament has enough members to fill these committees. We should look at the issue again as part of our wider consideration of the new process.

The Convener: We can highlight the issues that we have discussed. Instead of saying that the norm should remain at five, we should highlight the fact that members could drop out.

Mr McFee: Can I suggest that paragraph 41 would be clarified by the removal of the words "non-works" from the third line?

The Convener: We are not talking about a committee report.

Mr McFee: I know, but I am trying to think of a way of simplifying the matter. If those words were to be removed, that part of the paragraph would read:

"the norm should remain 5 members for any works Bill, but … the Bureau might be encouraged to appoint committees of only 3 members to consider simpler … Bills."

A definition of a simpler bill could be arrived at; it could be because of its content, the frequency of its meetings schedule and so on. That would give the flexibility that Richard Baker is looking for.

The Convener: Thank you for that helpful comment, Bruce.

We move on to the section on the disqualification of MSPs representing the area affected. I am slightly concerned about this section and the next section, which look like they will make it even more difficult to find members for private bill committees. The idea—or the hope—behind the paper was to make things easier in that respect.

Richard Baker: Although the suggestions in this section are constructive, we need to get more clarity about the way in which members are disqualified because of their registered interests.

Before we go to a TWA-plus model or whatever system we come up with, a practical point has to be addressed. I understand that members who have residences in Edinburgh would be disqualified from becoming members of the Edinburgh airport rail link bill committee because of that interest. The rule creates a real difficulty for some of the political parties and we need to address the issue in terms of both airport rail ink bills.

The Convener: I recognise that that is a big issue in respect of those bills. The application of that rule would preclude any member who lives in Edinburgh or who has a residence in Edinburgh from serving on the Edinburgh airport rail link bill committee. The rule reduces the number of members who are eligible to serve on the committees to the members who live in parliamentary allowances zone B. The argument could conceivably be made that a member who lives in north-east Fife would also benefit significantly from having a direct rail link to the two airports. Perhaps they, too, should be disqualified from membership. Where do we draw the line when every single member has a theoretical interest in the airport rail links?

Mr McGrigor: The purpose of the rule is to ensure that members who serve on private bill committees are not biased in favour of the development. I am thinking of the Robin Rigg Offshore Wind Farm (Navigation and Fishing) (Scotland) Bill. The policy on wind farms is a subject in which many people have an interest. How the hell can we get away from bias on subjects like that?

The Convener: That bill was not about wind farms but about navigation rights.

Mr McGrigor: I know; I was simply using the bill as an example. It is not possible to limit bias simply on the basis of the area that is the subject of a bill. That idea does not hold water.

Mark Ballard: There is also an issue with the regional MSPs—

Karen Gillon: There are lots of issues with them.

Mark Ballard: Thank you. If we take the Airdrie to Bathgate line, for example, the regional MSPs for Edinburgh, the Lothians, Glasgow and Central Scotland whose constituents would benefit would be knocked off that committee. Given that we are talking about areas that are "particularly affected" by a bill, a huge swathe of members would be knocked out.

I note that paragraph 48 addresses the issue of

"any MSP who has registered a financial interest directly relevant to the subject-matter of the Bill."

I am a member of Sustrans, the sustainable transport charity. Does that give me a get-out-of-jail-free card for any public works bill?

Karen Gillon: We will all join if it does.

The Convener: For example, the local government requirement for a declaration of interests says that if it gets to the point where a majority of the council has a similar interest, the category of interest no longer applies. For example, if all the council members live in council housing, they would not be ruled out of voting on housing rents.

Mr McFee: Local government does things more sensibly; it divides interests into the categories of pecuniary and non-pecuniary. Although there is a fine dividing line, councillors would be expected to exclude themselves from making judgments even where they had no direct pecuniary interests.

I also have a problem with paragraph 48, which refers to

"any MSP who has registered a financial interest directly relevant to the subject-matter of the Bill".

I can foresee the situation arising in which a member has an interest that, although not necessarily direct, affects them indirectly. If one of the member's relations owns land in the immediate vicinity of a development, for example, the member could stand to benefit financially; he might not have a direct financial interest, but his brother or someone else close to him might. I think that, if we use the words "directly relevant", which are quite tight, we might be creating a rod for our own backs, as the member might have other interests or members of their family might have interests—such as land that they owned—that could enable them to benefit from a decision that was taken.

Paragraphs 42 to 46 give rise to some ridiculous situations. For example, if a member lives within the catchment area of an airport, they would be excluded. I do not know how the issue of bias can be addressed. Some people might say that Mark Ballard would be biased in relation to a decision about whether a railway line should connect to an airport because he does not think that airports should be expanded. That is a different sort of bias.

I thought that the rule would be designed to exclude people who have a financial interest—including an indirect financial interest—that might cloud their judgment and make them arrive at a decision that they might not come to based on the merits of the case. However, I am not sure whether it is our job to rewrite the report.

12:15

Karen Gillon: Obviously, we have to work within the legal advice that we get. However, as a steer to the clerks, I suggest that we want to be flexible to enable as many members as possible to participate in the consideration of the bills.

The Convener: We should consider what the situation in Westminster would be if a bill were required for major public works in London. TWA would probably cover that, but some projects are hybrids, such as the channel tunnel link, which goes into London. Would all members who have residences in London be excluded from considering that bill?

Andrew Mylne: I do not know the answer to that question but I can find out what the comparable rules are in Westminster.

In the report, we were aiming to strike a more flexible balance, as far as possible. It seemed to us that, because the terms that are used in the current rule, such as "area affected", are not well defined, the number of MSPs who are directly excluded by the rule—as opposed to being excluded as the result of a politician exercising a judgment as to whether they should be on the committee—is potentially quite large. The aim of the suggestions that we have made is to reduce the number of MSPs who are directly excluded by the application of a rule and, instead, to expand the discretion of the Parliamentary Bureau to take into account the particular circumstances.

Karen Gillon: So your suggestion is that paragraph 45 is better than what we have at the moment, as it would lead to fewer members being excluded automatically.

Andrew Mylne: Exactly. That is the intention.

The Convener: But it might have the opposite effect. I think that the words "living in C" would quite clearly exclude members from Mid Scotland and Fife as well as all members in the Lothians from taking part in the consideration of the Waverley Railway (Scotland) Bill. At present, those members are not excluded.

Andrew Mylne: We are suggesting that whether those members were ruled out would be a judgment for the Parliamentary Bureau to make and that they would not be ruled out directly by the application of the rule.

Karen Gillon: Are you suggesting that, currently, the application of the rule would rule them out directly?

Andrew Mylne: That depends on how you interpret the words "area affected".

Karen Gillon: I understand.

The Convener: We are all clear that we would like greater flexibility. We need to consider how that can be delivered by what is being proposed and ensure that we do not accidentally make the situation less flexible.

Mr McGrigor: Is the idea that the member should be outwith the constituency or region whose electors might lobby on the matter and that the member's electors should not be in a position to lobby them on the matter?

The Convener: That is the present guidance.

Mr McGrigor: In other words, it is easier for a constituency MSP to avoid exclusion than it is for a regional MSP.

The Convener: At the moment, if the relevant constituency is within the regional MSP's region, the member is excluded. MSPs from neighbouring constituencies are not excluded.

Mr McGrigor: I can see the point of that.

The Convener: If a member lived in Edinburgh as a result of their duties as an MSP, they would have a direct financial interest in a bill concerning, for instance, a tramline, if their house were on the route. However, I am not sure that there would be a direct interest if their house were anywhere else. I am not sure why they should be excluded from considering an issue that affects Edinburgh. That is the sort of issue that we need to clarify.

Mr McGrigor: Presumably an MSP who was not in that region could say to people that they must go and talk to their own MSP.

The Convener: Yes.

Mr McGrigor: That would be the thinking behind this. Is that right?

Andrew Mylne: Yes. There is a rule at the moment that directly excludes MSPs who represent any part of the area that is affected by the bill. If that definition is very narrow and—in a tramline bill, for example—includes only the area on the map that shows where the tramline will go and the limit of deviation of that line, only a very small number of MSPs will be excluded. However, the term is sufficiently vague that it could be interpreted as including people who are further afield but whose constituency will perhaps benefit economically. We are suggesting that the first bit of the definition should be narrowed down but that the bureau should have the discretion to be able to take into account those wider factors.

The Convener: So are we agreed that the clerks will reflect on what we have said and will come back to the committee with a proposal—

Mr McFee: I am uncomfortable with the phrase about

"any MSP who has registered a financial interest directly relevant to the subject-matter of the Bill".

That is probably taking discretion too far. A member of an MSP's family might have a direct financial interest that the MSP does not have to declare. For example, if an MSP's brother or cousin owned land on which something had to be built, would the MSP have to declare that as an interest under the present rules?

Andrew Mylne: In this part of the report, we are trying to arrive at a similar position to the one that I outlined when we were talking about the previous issue. There will be a relatively narrow band of members who are directly excluded, which is why we have restricted the discussion to the direct financial interests of the MSP concerned. We have also suggested other mechanisms, such as those in paragraph 49, which might help to deal with that wider but more nebulous range of circumstances that might affect the perception of someone's impartiality.

The Convener: The issue comes down to the proposed changes that will be in the registration of interests bill. Members have to make a judgment about public perception. If the public perceived that a member had a direct financial interest, the member would not stand for the committee.

Mr McFee: Absolutely, so why wait until the member is a member of that particular committee? Paragraph 49 says that the member has to declare interests

"at the first meeting of the committee",

by which time they have already been appointed as a member of the committee. Do we have a way of exercising that judgment beforehand?

The Convener: That would have to be done through the informal mechanisms. Presumably the business managers would check with their member before they recommended his or her membership to the bureau.

Karen Gillon: We cannot have a situation where every MSP declares every interest of every member of their family, extended or otherwise, in the register of members' interests, but there is no way of knowing whether a member has a relevant interest unless they declare it. The only way a member will declare such an interest is if they are required to do so when they are involved in a particular bill. I suggest that the member should declare such interests to their whips when the whips ask them to be part of the bill committee.

The Convener: The whips should specifically ask.

Karen Gillon: Yes, the whips should ask. If the member says that they have no interest but, because of the rule change described in paragraph 49, they seem to have a conflict of interest, there is nothing to prevent the Parliament from moving a motion of no confidence to remove the member from the committee or for the member's party to remove the member from the committee. However, how are we to know whether a member has an interest unless they are required to declare it in the register of members' interests? It would be a bit absurd if they were required to declare every interest that every member of their family might or might not have.

Mr McFee: There must be a clear understanding of the position. We do not want to get to the first meeting of a committee and find that three or more members have to say, "Oh, by the way." The informal process has to be clear or we could end up in a ridiculous situation.

Mark Ballard: Rule 9A.5.4 gives flexibility. Any attempt to go beyond having

"regard to the interests registered in"

the register of members' interests would lead us down all kinds of tortuous routes. It is good that paragraph 49 suggests going beyond the register, but initially we ought to stick with having

"regard to the interests registered in"

the register. Otherwise, most Green MSPs could reasonably be thought to have interests that made impartial scrutiny of public works difficult. If we tried to give a tighter definition now, we could get tangled up. We are implementing a stopgap measure before we introduce the new mechanism, so we should keep the existing phrase—"regard to the interests"—in the standing orders.

Karen Gillon: I do not think that we should remove paragraph 48. If someone has a direct financial interest, they should not be a member of the private bill committee. That should be explicit in the rules.

Mark Ballard: The second part of paragraph 48 refers to a member

"who has registered any other interest that could reasonably be thought to be inconsistent with that MSP's impartial scrutiny of the merits of the Bill."

That bit should go, although I agree that we should keep the financial interest provision.

Mr McFee: We cannot have a situation in which a member who has an interest that affects their impartiality on a subject sits on a committee that determines whether that matter proceeds.

Mark Ballard: An interest could be the fact that they are a member of a political party that has been campaigning for—

Mr McFee: If that is Mark Ballard's problem, he could address it in paragraph 49, which he has just approved.

The Convener: A bit of common sense needs to be applied as to whether a registered interest affects a member's impartiality on a particular issue. Direct financial interests would clearly rule a member out and there is no reason why that should not be stated. In considering the membership of a private bill committee, the Parliamentary Bureau would take account of other factors, which business managers would consider when they recommended a particular member to be appointed to such a committee. We should leave it to the bureau to have that flexibility.

Mr McFee: The third line of paragraph 49 refers to "previous public pronouncements". I would have thought that that was Mark Ballard's get-out-of-jail-free card.

Karen Gillon: It is bizarre to suggest that a member who has said in the past that they support a project cannot effectively scrutinise the relevant private bill. That would rule out every member from considering every bill on which they had made a manifesto commitment. That is a stupid rule and we need to get rid of it.

Mr McFee: We should move to take it out.

The Convener: The clerk wants to provide clarification.

Andrew Mylne: The purpose of what we have outlined in paragraph 49 is separate from the issue of who is excluded from being a member of the committee. That will already have happened. One rule might exclude a narrow category of members; other members might subsequently be excluded by the bureau, which will exercise its judgment as to who is fit to be on the committee. The purpose of paragraph 49 is to instil public confidence, once the membership of the committee has been established, in the members of the committee through ensuring that they are open about previous public pronouncements that they have made, so that there is no secret about those. They can then carry on and scrutinise the bill.

Karen Gillon: You are not ruling out those members.

Andrew Mylne: There is no suggestion that they are being excluded because of their public pronouncements.

Karen Gillon: That would allow people who would previously have been ruled out to be on a committee. I am thinking of, for example, Mike Pringle, who could have been included on the Waverley Railway (Scotland) Bill Committee, but was ruled out because of a previous pronouncement, although he could equally have been ruled out because of a constituency interest. The provision would allow someone in that situation to be a member of a bill committee.

Cathie Craigie: How would a public objection to an individual's membership of a committee—the Waverley Railway (Scotland) Bill Committee or the committee dealing with the Airdrie to Bathgate railway, for example—be dealt with if it was lodged because the member had pronounced their support for improved public transport?

The Convener: The Parliament would have to consider from a legal point of view whether it thought that there was any substance to the objection and whether the Parliament might be subject to judicial review if that member remained a member of the committee. There would be a legal judgment at that stage.

Karen Gillon: An MSP could be in breach of the code of conduct for members if they failed to register an interest that might affect their impartiality on a bill and the interest subsequently came to light. Such a breach would be dealt with by the standards commissioner.

12:30

Cathie Craigie: Someone might have been going to a nice, wee, remote cottage for 10 years that had once been a station house on the Waverley railway or the Airdrie to Bathgate line and that would have a railway running right past it if the line reopened. That individual could object to the appointment to the private bill committee of an MSP who had indicated support for improved public transport, on the ground that the MSP had an interest in the matter. That could hold up the process.

The Convener: We could come up with all sorts of hypothetical situations and reach a point at which every Liberal Democrat MSP was ruled out of membership of, for example, the private bill committee for the Edinburgh airport link, because they had made public statements in favour of the project. In the case of the Borders railway, every Green MSP and probably every Labour MSP would be ruled out, so virtually nobody could serve on the Waverley Railway (Scotland) Bill Committee. That would be a ridiculous situation. I am not sure that a judicial review of the Parliament's decision would be successful if policy pronouncements were the issue. A member would have to have a more direct interest.

Karen Gillon: Surely if someone applied for a judicial review on such a ground, their challenge would be successful only if it was proved that the MSP had failed to exercise due scrutiny of the bill as a result of the pronouncement that they had made. It would have to be demonstrated that the MSP had failed to take into account or analyse impartially the evidence that they had received, as would happen in a judicial review in relation to any

bill—that is my guess of how the process would work.

Cathie Craigie: However, some thought must be given to how we would deal with an objection by a member of the public to a MSP's serving on a committee. If not, the process could be held up while we scrambled about to find ways of dealing with the situation. Perhaps the clerks could come back to us on that.

Andrew Mylne: That is a matter for lawyers, rather than clerks, but in general terms it seems to me that any system that requires politicians to act in the quasi-judicial capacity that is inherent in the private bills process is potentially vulnerable to the problem that members raised. The problem already exists. The best protection that members can have against a successful legal challenge is a robust procedural mechanism for ensuring that members who have an obvious conflict of interest are not appointed to private bill committees in the first place and that interests are clearly declared in public. By putting in place such mechanisms, members do as much as they reasonably can do to ensure that they are safe from legal challenge.

The Convener: Members act in a quasi-judicial capacity at the consideration stage of the bill, by which stage the Parliament has already approved the general principles of the bill.

The clerks have taken notes and I hope that they can make sense of them and come back to us with suggestions for the draft report.

We have discussed the requirement to attend meetings and must accept it, whether we like it or not—[*Interruption.*] Sorry, I am talking about the position that is described in paragraphs 50 to 53 of the paper on private bills. The next part of the paper recommends a revision of the rules to allow private bill committees to meet exceptionally during a meeting of the Parliament. If members are content with that recommendation, we will move on.

Members *indicated agreement*.

The Convener: Since our most recent meeting, the Edinburgh Tram (Line One) Bill Committee has referred an issue to us. We are asked to consider whether consultation guidance should be included in our inquiry as a priority. To be perfectly honest, it is not entirely clear to me that the matter requires a change to the standing orders, so I am not sure that we need to consider it at this stage.

Mr McFee: Are you talking about the Edinburgh Tram (Line Two) Bill Committee?

The Convener: No, the Edinburgh Tram (Line One) Bill Committee.

Mr McFee: The covering paper says "Line One", but the submission itself refers to line 2.

The Convener: All the papers that I have are about line 1.

Mr McFee: Oh well. It says—

The Convener: Sorry, I see the one that you mean. The extract from the *Official Report* refers to line 2.

Mr McFee: The problem is that the replacement paper that I was sent was the same as the original.

The Convener: The referral is from the Edinburgh Tram (Line One) Bill Committee, although the extract is perhaps from the debate on line 2. I am not sure about that—we will check.

Do members agree that the issue does not need to be considered as a priority at the moment? I am not entirely sure how we could have rules on how consultation should take place, because that varies depending on the type of bill. Are members content to leave the issue for consideration later?

Members *indicated agreement*.

The Convener: The second issue, which is slightly more complex, relates to financial resolutions. We have a letter from the convener of the Finance Committee and a fairly detailed note from the clerks on the issue, which are both in paper PR/S2/05/4/13. The clerks highlight potential problems with the Finance Committee convener's request. I recommend that we send a response to Des McNulty that is in line with the clerks' comments on the potential problems. In essence, the Finance Committee's role relates to the general budget and there may be problems if that committee were designated a role in the formal private bills process. Do members have any comments?

Karen Gillon: The letter exposes a flaw with the current process. If the Executive spends £300 million here and £150 million there as a result of private bills, that has an impact on the Executive's other budgets, but there is no parliamentary scrutiny of the expenditure. That exposes why we need a new process. A council can introduce a private bill even though it is putting in a minimal amount of money and the vast majority of the expenditure is from the Executive. In that situation, the Parliament has little, if any, control over the money.

The Convener: I accept that, but the counter-argument is that the money is highlighted in the available budgets and the Finance Committee can scrutinise that aspect of the Executive's budget separately. Do members agree that, at present, we do not wish to change the procedure, given that we will cover the issue when the proposals for legislation are introduced? The clerks have highlighted several potential difficulties.

Mr McFee: I agree, as long as we can flag up the issue when we consider the proposed changes and ensure that it is taken into account.

The Convener: We will deal with it.

Karen Gillon: As part of the new solution, we need to have a process in which the Parliament can scrutinise fully the financial implications of private bills, as we do with the financial implications of other bills.

Mr McFee: There are no new priorities, only new solutions.

The Convener: Indeed. Do members agree to leave the issue for the moment?

Members *indicated agreement*.

The Convener: I apologise—I missed out the second issue in the letter from the convener of the Edinburgh Tram (Line One) Bill Committee, which was about late objections. Do members wish to consider that as a priority issue?

Richard Baker: I thought that that had been resolved earlier.

Andrew Mylne: This is the second issue that Jackie Baillie raised. She feels that there are problems in the current rules for late objections. At present, such objections can be lodged up to the end of the preliminary stage. On the basis of her committee's experience, she is concerned that the current rules can force a private bill committee to hold an extra meeting at very short notice, simply to consider whether to allow a late objection to proceed. It seemed as if some small changes to the rules could ameliorate the situation and ease the pressure.

Mr McFee: Should we not consider that issue along with others? For example, if we are talking about appointing reporters, there will be particular rules on late objections and evidence.

The Convener: The suggestion is a relatively minor amendment that would allow late objections to be considered at the consideration stage rather than at the preliminary stage. That would probably ease things for the three bills that are coming up. We could therefore consider that minor change as one of our priorities. It will not have a major effect on how bills are dealt with.

Mr McFee: I presume that the bill committee will determine whether there is a good reason why the objection was delayed in the first place.

The Convener: The suggestion is that, rather than the committee having to decide whether to admit an objection during the preliminary stage, before the preliminary stage debate—which would require an extra meeting—it could do so at the start of the consideration stage.

Richard Baker: If the objection was to the general principles of the bill, it would be redundant to discuss it at that stage.

The Convener: Yes, it would, but I am not sure that the bill committee would be keen to accept a late objection to the general principles of the bill.

Mark Ballard: I am a bit confused by paper PR/S2/05/4/11, which seems to cover some of these issues. Are we going to discuss them at this meeting?

The Convener: That paper is a summary of the evidence that we have had to date. We are considering whether to add the issue of late objections to our list of priorities—agreed at our previous meeting—for the debate on 11 May and therefore for the draft report. We can consider all the other issues later, as we reach our final conclusions.

Mr McFee: If we confirm that we are happy with that change, will it help the three bills that are coming up?

The Convener: Yes.

Mr McFee: And it will be for the bill committee to decide whether to accept that there is good reason for the lateness of the objection.

The Convener: Yes. It seems that members are content that we should add that issue to our list of priorities.

Paper PR/S2/05/4/14 is a note from me. It has occurred to me that, in at least one of the private bills that are due to be introduced in May or June, the promoter of the bill may no longer be the appropriate promoter—or may, in fact, no longer exist. It therefore seems sensible to allow for the possibility of a change of promoter.

Members *indicated agreement*.

Public Petitions (Admissibility)

12:44

Mr McFee: I think that this is the second meeting in which paper PR/S2/05/4/16 has floated around with us. It is on the admissibility of public petitions. Will that be on the agenda?

The Convener: I was going to suggest that we defer that item to a future meeting. It is not urgent and members have pressures on their time.

Mr McFee: In the paper, the question arises of whether to invite the convener of the Public Petitions Committee. If our time is restricted, it might be wasting time to wait until our next meeting to decide whether to invite him to a future meeting.

The Convener: The only restrictions on our time are at this meeting. There is no particular rush for us to deal with the item, so we can defer it. We may have to defer it for a couple of meetings, as we have quite a lot of business to get through to ensure that we have the report on private bills ready for the 11 May debate. Is that acceptable to members?

Members *indicated agreement*.

Item in Private

12:45

The Convener: Agenda item 4 proposes that we discuss the draft report on private bills in private at our next meeting. Do members agree that we should do that?

Members *indicated agreement*.

The Convener: I warn members that the next couple of meetings could be fairly lengthy. The alternative is to have extra meetings, which no members will be keen on in April. I certainly am not. I also warn members that the meetings may have the slightly later start time of 10.30 am.

Karen Gillon: Later? If the meetings are going to be longer?

The Convener: There will be a lot of business but I hope that we will get through it quickly. I have a problem for the two meetings in April and will not be able to make it for a 10.15 am start.

Karen Gillon: I am happy with that, as long as the committee concludes in reasonable time, because I have commitments at 12.30 pm.

The Convener: I appreciate that all members have other commitments. It will be up to us to do our best to get through the business as quickly as we can.

Meeting closed at 12:46.

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