PROCEDURES COMMITTEE

Tuesday 25 October 2005

Session 2

£5.00

© Parliamentary copyright. Scottish Parliamentary Corporate Body 2005.

Applications for reproduction should be made in writing to the Licensing Division,
Her Majesty's Stationery Office, St Clements House, 2-16 Colegate, Norwich NR3 1BQ
Fax 01603 723000, which is administering the copyright on behalf of the Scottish Parliamentary Corporate Body.

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

CONTENTS

Tuesday 25 October 2005

PROCEDURES COMMITTEE
12th Meeting 2005, Session 2

CONVENER

*Donald Gorrie (Central Scotland) (LD)

DEPUTY CONVENER

*Karen Gillon (Clydesdale) (Lab)

COMMITTEE MEMBERS

*Richard Baker (North East Scotland) (Lab)
*Chris Ballance (South of Scotland) (Green)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Alex Johnstone (North East Scotland) (Con)
Mr Bruce McFee (West of Scotland) (SNP)

COMMITTEE SUBSTITUTES

Murdo Fraser (Mid Scotland and Fife) (Con)
Robin Harper (Lothians) (Green)
Tricia Marwick (Mid Scotland and Fife) (SNP)
Irene Oldfather (Cunninghame South) (Lab)

*attended

THE FOLLOWING GAVE EVIDENCE:

Margaret Curran (Minister for Parliamentary Business)
Patrick Layden (Scottish Executive Legal and Parliamentary Services)
Tavish Scott (Minister for Transport and Telecommunications)
Murray Sinclair (Scottish Executive Legal and Parliamentary Services)

CLERK TO THE COMMITTEE

Andrew Mylne

SENIOR ASSISTANT CLERK

Jane McEwan

ASSISTANT CLERK

Jonathan Elliott

LOCATION

Committee Room 5

Scottish Parliament

Procedures Committee

Tuesday 25 October 2005

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

Item in Private

The Convener (Donald Gorrie): The first item on today's agenda is to decide whether to take item 2 in private, because it is legal advice on the issues arising in item 3. Traditionally, legal advice is regarded as private and the paper that we have is private. Therefore, do we agree to take the evidence in private?

Members *indicated agreement*.

10:16

Meeting continued in private.

10:46

Meeting continued in public.

Private Bill Committee Assessors

The Convener: I welcome Margaret Curran and Tavish Scott, whom we all know well, to the meeting. I also welcome Murray Sinclair, head of the constitution and parliamentary secretariat; Frazer Henderson, transport and works bill team leader; and Patrick Layden, deputy solicitor in the office of the solicitor to the Scottish Executive. I hope that I read that correctly.

Karen Gillon (Clydesdale) (Lab): That was fantastic. Could two of the gentlemen turn their name-plates round?

The Convener: That is a very intelligent suggestion. Thank you.

Karen Gillon: That is why I am your deputy.

The Convener: As I understand it, Margaret Curran will kick off—if that is the right analogy—and Tavish Scott will run with the ball thereafter.

The Minister for Parliamentary Business (Ms Margaret Curran): We are both delighted to be here, convener. I suppose that it is appropriate to congratulate you on your new role as convener of the Procedures Committee. I think that this is our first formal engagement with you; we look forward to working with you in future.

Tavish Scott and I thank you for the opportunity to speak here this morning. I know that the committee has been considering these matters for some time. We note that members had questions for the Executive—we supplied the committee with a written memorandum last week, which I hope addresses some of the details. In partnership with our officials, we are happy to go over any details that need to be dealt with this morning.

It might be useful to say a few words about the general context of our proposals. My colleague Tavish Scott will say more about the proposals in the wider context of improving Scotland's transport infrastructure. There is general agreement throughout the Parliament that the current private bills process is not the most efficient and effective way of taking forward projects such as the major transport projects to which the Executive is committed. You will all be aware—as are the many MSPs who have been at my door—that the current process is extremely demanding of the time of the members who serve on private bill committees and that that is beginning to prejudice their ability to carry out their other responsibilities as elected representatives.

My view—which my transport colleagues strongly agree with—is that the solution to the problem is legislation, specifically a transport and works bill, as recommended in the Procedures Committee's report. Since I was last before the committee, the First Minister indicated in his statement on the legislative programme that that was how we wished to proceed. Nonetheless, we face a difficult situation, because it will not be possible to put in place a statutory solution that applies to the three further private bills that we are committed to delivering in this session—the bills on the Glasgow and Edinburgh airport rail links and on the Airdrie to Bathgate line.

Against that background, I took a proposal to the Parliamentary Bureau to see whether we could come up with an interim solution. I propose that standing orders be amended to give a private bill committee the option of appointing an assessor to hear and consider objections at consideration stage of a private bill. I emphasise that that would not take any decision-making powers away from the committee; it would simply mean that decisions could, if the committee wished, be informed by a written report of evidence heard and considered by the assessor, which would therefore free up some time. Nonetheless, it would remain for the committee to decide whether to accept the report and proceed or to consider further evidence.

I emphasise again that the option would not reduce the role of the Parliament in the determination of a private bill, nor should it reduce or weaken the opportunity that promoters and opponents have to make their case. It would simply provide for the primary work in considering objections to be carried out more efficiently, when the committee considers that to be appropriate.

The proposals would give a valuable opportunity to address some of the challenges that we face in the immediate period; they could be of real value to committees in considering private bills during the interim period. It is in that context that we have brought them forward. With your permission, convener, I will hand over to Tavish Scott. He will set out the wider context of some of the proposed changes.

The Minister for Transport and Telecommunications (Tavish Scott): I am grateful to Margaret Curran, the Parliamentary Bureau and the committee for their consideration of and assistance on the matter, which has caused us some issues in relation to the way in which we take forward our exciting and challenging agenda on capital transport projects.

As Margaret Curran said, three further private bills are proposed for introduction early next year: the rail links to our two major airports and the re-opening of the Airdrie to Bathgate line. It would be helpful for all parties if any proposed changes to the private bill procedures were to be approved in advance of the introduction of those bills—certainly, for that reason, before mid-January of next year.

The draft bills for Edinburgh and Glasgow are already publicly available. In the light of recent experience, much work has been done by our major projects team as well as by the Parliament's private bills unit to ensure that promoters are better prepared and fully aware of procedural matters. The planning assumption that we are making is that the objection and preliminary stages of all three bills will be concluded before the summer recess next year. If our proposals are adopted, the hearing of evidence and objections by a reporter could therefore commence during the summer recess.

Provided that those things progress reasonably well, I expect any necessary amendments to be lodged by the respective private bill committees before January 2007 for the air-link bills and by February 2007 for the Airdrie to Bathgate bill. Working to that timeframe, the bills should be passed before the conclusion of the current parliamentary session. However, it is fair to point out that, if our proposal is rejected and the reporter is not permitted to hear objections, the chance of any of the bills being passed is—by definition—compromised. The two months of the summer recess 2006 would, to all intents and purposes, be dead time, which is something that none of us would want to see. It would be difficult to make up the time in the remaining eight months that follow the summer recess.

By having reporters, we would be able to make the best use of all available time without compromising scrutiny, transparency, fairness and—arguably the most important aspect—the primacy of Parliament. In addition, we would be able to relieve parliamentarians of the burden of dealing with the highly complex and technical matters and make a transitional step to the more fundamental review that we will propose in the forthcoming transport and works bill.

In my earlier letter to the committee, I said that the Executive is committed to introducing legislation next year that will place the principal responsibility for dealing with applications for significant transport-related projects with the Executive—subject, of course, to parliamentary scrutiny. I will be consulting on the legislative proposals in due course. However, the nature of the subject and the interrelationship of these important matters mean that there must be close liaison with the parliamentary authorities.

It is for that reason that I have requested that Frazer Henderson, my bill team manager on this matter, should hold regular information exchanges

with the Procedures Committee clerks and the clerks to the Local Government and Transport Committee. Given that the Procedures Committee was the driving force in suggesting the replacement of the private bills process with a transport and works-type bill process, it is only right that the committee should be made aware of the way in which its initial proposals are being developed and reflected in the Executive's forthcoming legislative proposals.

The committee has our written response to its specific queries. I hope that that response addresses many of the issues that have been of concern. We acknowledge that there are some matters of detail that need to be addressed, perhaps by our respective officials. However, the general principle of using an assessor to improve process efficiency and effectiveness has received general agreement. I strongly argue that it would be beneficial to all parties. I am sure that we will do our best to answer any questions, convener.

The Convener: Karen Gillon has the first question.

Karen Gillon: If the process that has been described is so fantastic, why was it not proposed during our inquiry some months ago?

Ms Curran: You raise a fair point, which I have reflected on myself. In all honesty, my initial—and proper—reaction at the time was to say that the real answer lay in legislation and my feeling that we needed to go ahead with the bill. That is what I was focused on and wanted to happen. However, with the subsequent pressure, particularly from MSPs, over timescales, I felt that we were reaching an unsustainable position and asked officials to look again at what we could drag out of the situation. Up to that point, I did not think that we were in such a position. That is the honest reality.

Karen Gillon: Thank you for your honesty, minister. I trust that it will not happen again.

Chris Ballance (South of Scotland) (Green): What—the honesty?

Karen Gillon: I am not talking about the honesty.

We probably differ over whether an assessor's work should constitute parliamentary proceedings. I am not convinced that that should be the case. That said, I do not necessarily think that it will pose any problems for the Parliament to appoint an assessor. However, I would be grateful if you could give us your views on whether we could go down the same avenue as we went down with the interim standards commissioner, whose powers were conferred in a contract from the Scottish Parliamentary Corporate Body to the employee. I jealously guard parliamentarians' rights and responsibilities and the legal burden that falls on elected members when something goes wrong and I am slightly wary of conferring powers on an individual who is not legally accountable. I would rather find another approach. Would having such a contract provide a solution?

Ms Curran: I ask Murray Sinclair, who is one of my very informed legal advisers, to address some aspects of that question.

Murray Sinclair (Scottish Executive Legal and Parliamentary Services): On the primary question whether powers would be conferred through standing orders, we take the view that, legally, that could happen. However, we do not think that that will be the primary model. Instead, we believe that the role and remit of an assessor appointed by a committee should be clearly set out in the directions that he is given on his appointment. That would be similar to the contractual relationship that you described. We think that, as long as the remit is clear, fairly and reasonably operated and, indeed, stuck to, there will be no difference in principle between the role of an assessor and that of an inquiry reporter in many planning and other contexts. One need think only of the work that housing officers carry out for local authorities and the ample judicial authority of that position.

Ms Curran: I take Karen Gillon's point about the legitimacy of parliamentarians' rights and responsibilities and the lines of decision making and accountability. However, as I understand it, any decision still rests with the committee. Moreover, the assessor will simply provide information for the committee. We are not seeking to alter the existing framework fundamentally.

Murray Sinclair: That is a key point. The reporter would be answerable to the committee under the remit that it set for him and the committee would still take any decisions.

The Convener: In other cases, people in the same position have statutory powers that the assessor would not have. Pursuing Karen Gillon's line, I wonder whether we could insert a standing order to the effect that the committee would refuse to hear people who had bloody-mindedly refused to attend the assessor's hearings. In my natural role of being bloody minded, I have already aired the possibility that some bloody-minded objector might say, "No, I'm not going to speak to this assessor; I want to speak to the committee." We do not want that to happen; instead, we want everyone to get a fair deal from the assessor. Could standing orders be changed to give as much power as possible to the assessor, given that he or she will not have statutory powers?

11:00

Murray Sinclair: There is no reason why that should not happen. Our view is that standing orders could be used to regulate what the assessor does, which would cover the assessor's rights in relation to certain objectors or certain types of objections. We would hope that, in practice, there would be no need to resort to rules such as you describe, just as there is no need in many similar inquiry processes. We would hope that a clear remit and a clear and fairly operated process would suffice. Is that a fair comment, Patrick?

Patrick Layden (Scottish Executive Legal and Parliamentary Services): I think so. What is important is that people with valid objections are given a fair opportunity to present those objections. We envisage that standing orders could provide for the assessor to give those people that opportunity; if they then chose not to take it, we would see no difficulty in the committee refusing them an additional bite at the cherry that other objectors would not have had.

Richard Baker (North East Scotland) (Lab): Much emphasis has been placed on the fact that the Executive's proposal might relieve MSPs of some of their burden. However, is it fair to say that the key aims of the proposal are not simply to expedite the process but to improve the level of scrutiny? As was suggested by some witnesses during our inquiry, the appointment of a reporter would mean the introduction of a level of expertise into the scrutiny of what can be very complicated issues. In the vast majority of cases, it is inevitable that MSPs will not have such expertise. It would be possible to introduce that expertise while maintaining parliamentary authority through the committee; the final decisions would still be taken by the Parliament.

Tavish Scott: That is a fair assessment of what the process should be like if it is operating correctly. When dealing with private bills on major transport projects, MSPs on all sides encounter very detailed issues—not the least of which are the financial issues. If we wish to improve our processes, it will be eminently sensible if the assessment of evidence can take place in the way that we propose. That would lead to an improvement in the provision of advice—and advice is what it would be—to a private bill committee. The committee would then decide how it wished to proceed. There is a lot in Mr Baker's analysis of why we have made the proposal that we have made.

The Convener: I will pursue the same line—constructively, as we all do—of wondering how we can make the system as good as possible. Many written submissions that we have received from lawyers who are knowledgeable in this area say that the efforts to bring people together to discuss possible solutions do not happen early enough. That raises two points. First, is there any way in which you as the Executive or we as the Parliament can put pressure on promoters to adopt such an approach? It has been alleged that some promoters are very bad in that respect. Secondly, once an issue comes within our ambit, when the bill is published, could we change the system to ensure that the committee is established quickly so that it can appoint the assessor who will then be able to deal with things at the preliminary stage as well as at the consideration stage? As I understand them, the Executive's suggestions have related only to the consideration stage. It might be possible to do things better if we got involved earlier.

Tavish Scott: We might not need that second aspect—that is, a role for the assessor at the preliminary stage—if we can get the first aspect right. It is in the promoter's interest to sort out as many issues in advance as it can. We have all learned from the process that we have been using—including the promoters and especially the agents and other formal bodies or representatives whom promoters employ to give advice. Those bodies may be law firms or—dare I say it?—public relations agencies.

The private bill mechanism in relation to capital public transport projects—as opposed to, for example, the National Galleries of Scotland Bill on the Playfair project—has improved. The process is now much better understood and we know the amount of work that has to be done before issues come before the Parliament. All that I am suggesting is that we could minimise the extent of any dispute prior to a bill arriving in the Parliament. There may be one or two issues that have not been resolved when a bill arrives in the Parliament, but that is what the Parliament is for—it is there to make a judgment on some of those matters, which is why we are all here.

My colleagues may be able to add to the point about the assessor's role at the preliminary or earlier stage.

Murray Sinclair: That is not a point that we have considered in any detail. We were concentrating on the part of the process where the obvious pressures lay. However, if there are pressures at the earlier stage as well, I can see the attractions of the suggestion for the assistance of an assessor, which a committee may find to be of value. That would give the assessor a different sort of role from the one that we envisage. It would have more to do, perhaps, with managing the process. That is why the minister has indicated that, if there is pressure on the promoters to manage the process better, and if they have more experience, there may not be the same pressure

at that stage in the process. Nevertheless, we can see that the suggestion could be an advantage.

The Convener: It is worth looking at whether we or the promoters should try to reduce the number of conflicts, rather than having a better system for dealing with conflicts at consideration stage. If we can prevent conflicts from happening, rather than having to deal with them, that would be a step forward.

Tavish Scott: We are talking about three forthcoming bills, after which—subject to parliamentary scrutiny and approval—we shall be into the transport and works bill mechanism. I hope that that will allow us to handle such processes in a more constructive manner, not least because the Executive will have overall responsibility for them and will therefore be held to account by the Parliament on future projects. It is important to recognise that we are talking only about three bills. However, that is not to say that issues of difference will not arise in relation to those three measures.

Karen Gillon: What I want to say follows on from your point, minister. We have encountered problems with people not being involved in the process at an early enough stage and not having the opportunity to be involved in the sort of consultation that we would want, in line with good parliamentary practice. We do not want to encounter those problems, which have not helped the process, when we deal with the forthcoming bills. I hope that we will be able to build in a good level of pre-legislative scrutiny and consultation.

Tavish Scott: That is a fair point and I hear you loud and clear.

Murray Sinclair: If committees were to get outside assistance, it would be assistance of a different nature from the sort of evidence-gathering role that we are proposing. What Karen Gillon is thinking about is more a process-management role, to which this committee would have to give quite a lot of further thought.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): From the written evidence that we have gathered so far from parties that would have an interest, there seems to be general support for a move along the lines that we are discussing. Some of that evidence refers to the issue of who appoints the reporter or assessor. The Executive has certainly provided information on what its inquiry reporters unit can do and on the work that it has been involved with in the past and is involved with currently. However, some evidence has suggested that the inquiry reporters unit could not cope with any additional work. Somebody who seemed to know about the inside running of the unit even suggested that people are about to retire and that the unit would therefore be losing expertise. I would appreciate the Executive's comments on whether it believes that the inquiry reporters unit could cope and whether it sees the unit as being independent enough to meet the needs of an open and transparent process and to satisfy the bloody-minded witness whom Donald Gorrie keeps talking about.

Ms Curran: I shall kick off on that, but my colleagues may also want to comment. We have lots of experience of bloody-minded people.

My understanding is that the inquiry reporters unit could cope with the development. The general point is that we are confident that there is a sufficient range of expertise and availability in Scotland to meet the needs of the process.

I take your point about the independence of the inquiry reporters unit, but the judicial process in Scotland has determined that the unit is sufficiently fair and independent. That allows us to say that the unit could play a useful role in facilitating the process, although not every assessor need come from that field. There are other avenues from which assessors could be appointed. Law firms in Scotland could perhaps be a source of assessors.

I bow to Murray Sinclair's greater knowledge on the issue.

Murray Sinclair: The minister is exactly right: the courts have established that, largely because of the fairness of the procedures that the inquiry reporters unit operates and the fair way in which it operates the procedures, the unit is generally speaking sufficiently independent and impartial to put the legitimacy of its decisions beyond challenge. The unit is fair and impartial and, as such, its procedures are apt for processes such as the one that we propose should operate for private bills. I ask Patrick Layden whether that is fair.

Patrick Layden: It is. The reporter will not be a judge—he will not try to work out whether the policy is good, as the Parliament will have decided that by agreeing to the bill at the preliminary stage. The reporter will investigate the factual issues and the objections to the proposal. As I said, it is important that people who have legitimate objections get a proper chance to make them and have them considered. The reporter will not decide whether a railway line or airport is a good policy, because the Parliament will have decided on that and will do so again later; he will simply take account of all the valid comments that are made by those who are for and against it. In that context, the courts have held that the use of the inquiry reporters unit is an impartial method by which to carry out that process.

Murray Sinclair: It is worth stressing that the context in which the courts have reached that view is one in which the relevant policy is that of the

Scottish ministers. As the inquiry reporters are employed by the Scottish ministers, that relationship is in principle much closer than the one that we envisage.

The Convener: If technical issues arise—for example, whether a new railway going under an airport runway would cause aeroplanes to fall into the tunnel—we need to have somebody who understands them. Would the private bill committee hire an expert on tunnel collapse or would the assessor call witnesses who knew about collapsing tunnels?

Tavish Scott: Again, that would be part of the remit that the committee would set down. It would be open to the committee to make the judgment. If it decided that an assessment of large holes into which aeroplanes might fall would be appropriate, it might wish to put that in the remit.

The Convener: So the committee could decide.

Tavish Scott: Very much so.

Chris Ballance: We have heard claims that the inquiry reporters unit is under substantial pressure and may come under greater pressure. The minister mentioned the possibility of law firms providing assessors or expertise. What analysis have you done of the costs that will fall to the SPCB, given that it will be improper under human rights legislation for the Executive to pay its own assessors to assess an Executive programme?

Ms Curran: Again, I will kick off and then ask my colleagues to come in—to support me, I hope. I will make two points to clarify what I said earlier. First, as someone who used to be the minister with responsibility for planning, I was in regular touch with the reporters unit, so I appreciate that it has a heavy workload and is under pressure. However, the evidence that we have is that it is not under pressure to the extent that it could not play a role in the process. If there is evidence to the contrary—that the unit can play no role—I am not aware of it. Any reporter could reasonably be part of the process.

Secondly, I was not saying that we should go to all the law firms in Scotland. The point that I was making was that, again, depending on what role the committee determined that the assessor should play, there is a range of skills and expertise available from many sources in Scotland and that that approach could be considered. We are not saying that such skills and expertise are exclusive to the inquiry reporters unit.

On the issue of costs, as we have developed the issues, there have been on-going discussions with parliamentary officials. Our view is that, essentially, the costs lie with the promoter. However, the procedure is a parliamentary one, so, in the first case, the costs would rest with the Parliament. Murray Sinclair can furnish you with more details in that regard.

11:15

Murray Sinclair: The costs would primarily fall to the Parliament, but the Parliament ought to have powers in relation to the fees that it can charge to recoup some of the cost from the promoter.

Chris Ballance: Are you saying that no cost will fall to the Scottish Parliamentary Corporate Body because any cost would be automatically recouped from the promoter?

Ms Curran: It is for the SPCB to determine, in line with the procedures that are now being developed, how it will determine and recoup those costs. I do not think that the SPCB would be too pleased with the Executive if we were to direct it over how it should do so. We have had reasonable and constructive discussions to ensure that we get a reasonable solution at the end of the day.

Chris Ballance: It just seems that you are proposing measures that might involve costs to the SPCB. We have to be clear about whether that is the case.

Ms Curran: Inevitably, costs will be associated with the process, just as costs are associated with the existing process. The view that is shared across the Parliament and the Executive is that, ultimately, private bill promoters should pay for the process. How that is determined is a matter for the Parliament rather than the Executive.

Murray Sinclair: We are not proposing anything new in that sense. The standing orders allow committees to appoint assessors. As was said, they could be reporters or, as has happened, they could be engineers. The procedures allow for, first, payment by the SPCB and, secondly, the possibility of fees being charged, which, I imagine, could be used to recoup some of the costs that are involved in the appointment of any assessor. It is for the Parliament to decide how it uses the existing model.

Tavish Scott: I will give a particular example in response to Mr Ballance's point. The cost overrun in the case of the Stirling-Alloa-Kincardine railway was caused, to some extent, by the costs of the parliamentary process. The reality is that there will be a cost associated with private bills that go through Parliament. I completely agree with Margaret Curran's contention that the objective would be to recoup those costs from the promoter. However, it is not for us to tell the SPCB how to do its job. We will help it in that process, but it is up to the SPCB to sort out the procedures and negotiations in relation to any particular project.

The Convener: I would like to ask about legal challenges. As has been indicated by other members, the committee and the Parliament as a whole are sympathetic to what you are trying to achieve. However, if anything goes wrong technically or legally, we—not the Executive—will have the problem. Have your people checked carefully that we would not be open to the challenge that the system was unfair under the European convention on human rights or any other legal procedure? It would be unfortunate if the Parliament was presented with lots of legal challenges. That would bring the process to a shuddering halt and frustrate your desire to move speedily. May we have an assurance on the record that your lawyers have considered the situation to ensure that we are setting forth in a waterproof boat?

Tavish Scott: Are we not using football analogies?

Ms Curran: We have come with our lawyers, as you can see.

Patrick Layden: I should say that, although boats are waterproof, we cannot guarantee that they will not be rained on. Nobody could ever say that there will be no risk of a legal challenge. Two acts of the Parliament have been challenged in the courts as being incompatible with human rights provisions. On both occasions, the challenges were rejected by the courts. It is the nature of a Parliament such as the Scottish Parliament, which is subject to a wider constitution, that its acts are liable to challenge. I could not guarantee that there would never be a challenge.

Our assessment is that, provided that the procedures used by the assessor or reporter were clear, fair and impartially conducted, the risk of a successful challenge would be very low. We do not see any risk of a successful challenge to the system that we are suggesting the Parliament might set up. However, we cannot guarantee that, at some stage in the future, a reporter will not act in a way that is subsequently held not to be fair and impartial. In that case, there could conceivably be a successful legal challenge. We can never give such guarantees at the beginning; all that we can say is that the system that we are suggesting ought—as a system—to be proofed against a successful legal challenge and that there is absolutely no reason why that system should not be operated in a manner that is equally proofed against successful legal challenge. I cannot guarantee that there will be no litigation—nobody could guarantee that.

The Convener: We will now move on to the subject of timescale. We would probably wish to hear from the SPCB on this, as it would have to provide the resources and defend any legal case. We might also wish to hear from the inquiry reporters unit to find out whether it feels that it could manage and to elicit its guidance on the rules that we should write into the system. We might possibly hear from one or two other people. That evidence would occupy another meeting.

After that, we might be able to come to a conclusion. The advice that we have received from our clerks is that, given the system as it is, we would be unlikely to come to a conclusion long before Christmas. I think that that is a fair statement. I am not sure whether that causes a problem.

Tavish Scott: It would certainly be helpful to the Executive if the procedures could go through the Parliament in early January, as long as enough time is given—taking into account the Christmas holidays, dare I say it—for anything formal that must be drafted to be drafted. I hope that you will consider that point, taking advice from your clerks and in discussion with our officials. That would be the important aspect from our perspective.

The Convener: If I understand this correctly, our advice seems to be that proceedings could take place to set up the three forthcoming works bills without our having got through Parliament the new arrangements for standing orders and so on. That raises the question whether it would be unfair to people if we changed the rules after the process had started. I think the view was that, if we did it properly, that would be okay. Is that correct?

Murray Sinclair: I do not think that we would demur from the proposition that there would be no fundamental legal problem were the change in procedures to take place after the introduction of a bill. However, it would be highly preferable for the changes to be in place before the introduction of any bill. We should liaise with your officials about this. It ought to be possible to have the necessary standing orders in place in good time in January, before the bills in question are introduced. I hope that we can work towards that collectively.

Tavish Scott: My concern is about any future suggestion—fair or otherwise—that we had changed the rules halfway through. As we have discussed, there are always one or two awkward individuals, as I think we have referred to them. People will make representations and use the fact that, fairly or unfairly, arrangements have been changed. I agree with Murray Sinclair. Given the timescale, it would be hugely useful to have the matter concluded in January if possible.

The Convener: We will certainly do our best. Taking your line, I acknowledge that it might help awkward people with their case if we appear to rush through the new system without giving it proper thought. We need to strike a balance.

Tavish Scott: I understand that.

Cathie Craigie: I agree that we have to take the evidence that is necessary to allow us to reach our conclusion. As members of the Parliament, we are aware of the pressure on our colleagues who have to serve on private bills committees, as well as the pressure on their substitutes—one such weary substitute is sitting here. We also have to be aware that if we had to use existing procedures even just to start one of the forthcoming works bills, people would find themselves at breaking point. I am sure that committee members around the table will take that into account and that we will address ourselves to the issue.

Richard Baker: I sympathise with that view. Three major transport bills are coming and, as Tavish Scott suggested, delaying them would lead to extra cost. That is a serious consideration and I am sure that, when we discuss the matter, the committee will want to go the extra mile to ensure that the appropriate recommendations are made in time. I am also sure that flexibility in meeting the timescale is not beyond the committee.

The Convener: Being new to the business of convening a committee, I failed to pass on Bruce McFee's apologies for his absence. If that could be put in the *Official Report*, that would make my nose clean again.

Is there any question that we have failed to ask you that we should have asked you, minister?

Ms Curran: Will I show you? [*Laughter.*]

The Convener: Well, thank you for your attendance. The good will of the committee is certainly with you, and we will do what we can, operating prudently, to make progress.

Ms Curran: Thank you.

The Convener: The clerk has pointed out to me that I may have jumped the gun. I am not sure whether the committee decided to have another evidence session, although I thought that we did.

Richard Baker: No, we have not decided that.

The Convener: I apologise. It was my recollection that we had discussed the matter. Could we discuss that now? The SPCB is relevant, as it will have to pay for the process and defend any legal cases, and I presume that the inquiry reporters unit would have some interesting advice on how the standing orders might set up the reporter's role. It might be useful to take evidence from the SPCB and the inquiry reporters unit.

Richard Baker: I endorse that. The overwhelming majority of the evidence that we have heard so far has been in favour of the proposal. There seems to be a huge amount of consensus around it. It would be useful to invite the SPCB and the inquiry reporters unit to give evidence, especially on some elements of the process that have been mentioned. It would also be useful to speak to the inquiry reporters unit to clarify the reporter's role. Beyond that, I do not think that we need to cast the net much further, as the inquiry seems to have quite a narrow focus. However, I see the logic in inviting those people to give evidence.

Chris Ballance: We could ask the corporate body, if an assessor were to be appointed by contract, what experience it has of putting the relevant procedures into such a contract. Those procedures might fill any gaps in what can be put into the standing orders.

The Convener: I found some of the short written submissions from outside lawyers quite helpful. If we could take evidence from one or two lawyers on the same day, would there be any merit in talking to them about the business of getting involved as early as possible in the procedure?

11:30

Richard Baker: I cannot remember which, but one of the law firms brought up the point about dealing with the issues as early as possible. Having been a member of the Stirling-Alloa-Kincardine Railway and Linked Improvements Bill Committee, I know that the clerks already try to work on such issues as early as possible. Therefore, some of those concerns are dealt with by the current process. I am bit confused about what the reporter's role would be at that stage. It is a very pertinent point, but it is fair to flag up that work is already done. However, I have no strong opinions on who might be invited to give evidence.

Karen Gillon: The evidence flagged up a failure in the local planning process. Perhaps I am reading the evidence wrongly, but there seem to be problems at the consultation stage and in drawing up where a railway line will go. I do not know that we can solve those problems other than through the proposed planning bill. The evidence that we have taken might usefully be passed on to our colleagues on the Communities Committee, which will be responsible for scrutinising the proposed planning bill, to see whether something could be brought into that to cover future private bills. The bills that will be introduced in Parliament after Christmas are far too far down the line for their drafting to be influenced now—they will come into the parliamentary process.

Alex Johnstone (North East Scotland) (Con): Are we confident that we can fit in with the timescale that the minister described? Having heard what he said, it is very important that we deliver usable proposals within the timescales that were mentioned. If we are planning to take evidence from other individuals, it is important that we do that within a comfortable timescale.

The Convener: Can we finish off taking evidence at the next meeting, which will be in a fortnight? I presume that the SPCB and the Scottish Executive inquiry reporters unit would be able to roll up.

Andrew Mylne (Clerk): We can certainly contact the SPCB and the inquiry reporters unit and urge them to appear at the earliest opportunity. As you said earlier, other witnesses would have to come within the same timeframe.

Karen Gillon: It was useful to have the evidence in front of us today. If people have comments to make or evidence to give it would be useful if it could be submitted to the committee in advance. If any updated legal advice comes out after today's meeting but before the next meeting, it would be useful to have that as well.

The Convener: Does the committee want to seek evidence from Shepherd and Wedderburn, McGrigors and the Society of Parliamentary Agents, among others? It would be useful to have one person from outside. The clerks could approach those organisations; it is just a question of finding one that has the right spokesman available on the right day. If we have an outside view as well as an in-house view, that would show that we have taken the issue seriously.

Members *indicated agreement*.

Bill Timetables

11:33

The Convener: Item 4 is on a paper that I have circulated, although I do not intend to ask members to talk about it today. I wrote it some time ago, before I became convener. The paper sets out a view that I think quite a lot of people take, and it deals with a point that is relevant to the discussions and round-table meetings that we are going to have. If anyone wants to say that my paper is rubbish, they are welcome to do so. I am aware that many of the issues have been discussed by the committee in the past, but I thought that I would contribute my tuppence-worth. We can put it in the bin or we can discuss it—along with everything else—at some future date.

Cathie Craigie: I do not know whether you circulated the paper to members previously, but I have certainly read it before. In our inquiry into the timescales and stages of bills, which took place before you joined the committee, we discussed a great many issues concerning the timing of the legislative process. I do wish to go back through all that again until we see how the new processes kick in.

Chris Ballance: I thought that the paper was very useful. I noted that the committee's report recommended that more time should be allowed for stage 3 proceedings. It appears that there is still a problem that is worth raising with the parliamentary authorities.

Karen Gillon: There is a problem with stage 3. However, as a Parliament, we determine the timetable by voting on it. There is no procedural solution to the problem with stage 3; the procedure is in place. The solution must be a political one. Whether people are prepared, if they feel that there is a need for more time, to vote against a timetabling motion that has been agreed by the Parliamentary Bureau will come out in the wash.

Having been through all this ad infinitum during our previous inquiry into the matter, I am very reluctant to go back into it. It is one thing to acknowledge that there is a problem with stage 3, but it is for the Parliamentary Bureau to find a solution to that problem.

Alex Johnstone: I was a member of the bureau for two years and I can say that my experience of timetabling for stage 3 was that there was no malice involved and no intention to reduce the time available for debates. The timetabling issues were largely related to fitting in with decision time and the other things that Parliament aspires to achieve in timetabling and in its business overall.

The difficulty was in assessing how much time was required for specific issues. We had some success in my time on the bureau, which ended more than two years ago, in frontloading the timetabling motion so that more time than necessary was made available. That created some slack in the system.

There is an issue, although I do not think that it was created maliciously. It is just that we are finding it difficult to reconcile two competing priorities: the need for a controlled timetable so that we all understand where we will be at specific times; and the need to ensure that there is proper time for discussing important issues.

The Convener: Timetabling will be discussed at various meetings, so we will hear what people have to say about it.

Crown Appointees

11:38

The Convener: Item 5 is on procedures relating to Crown appointees. We have an options paper on the subject. The main question is whether a reappointment after a person has had their first stint of four years or so should be an open competition between the incumbent and anyone else who wishes to apply, or whether it should be just an administrative process to reappoint the incumbent unless there is something very heavily in the balance against him or her. The third option is that there could be a panel that would interview only the incumbent, if he or she wished to continue in post. There would have to be a system of evaluating and monitoring the incumbent's performance, perhaps by an outside assessor, and a committee would have to reappoint. However, the competition would not be open to others, unless the committee thought the incumbent to be unsuitable. Those are the three options. I incline to the third.

Karen Gillon: I concur. That is the most sensible option.

Chris Ballance: With option 1, there is clearly a presumption against reappointment. With option 2, there is clearly a presumption in favour of reappointment. Option 3 would allow for compromise between the two.

The Convener: The aim is to attract really good people to such important posts. If people think that after four years they will have to fight their corner all over again, they will be less likely to give up a settled job to apply for such positions. An eight-year stint is feasible, as long as the person is doing a really good job.

If we go for option 3, who will interview and how will we get hold of a well-informed and neutral assessor to see how well the incumbent has done?

Karen Gillon: Given that appointments may run from one parliamentary session to another, it is probably appropriate that the Scottish Parliamentary Corporate Body of the day should have that role. I do not know how such things work, but the SPCB is probably the official employer of Crown appointees. I am sure that there are organisations and agencies that provide independent advice on employment practices, so we could try to find out who would be appropriate. However, I think that it should be the SPCB, given that it will have a day-to-day or month-to-month dialogue with the post holders—probably more than any committee. The alternative would be to have committees that span two sessions, which might not work.

The Convener: It has been suggested that, if the SPCB formed the basis of the appointing panel, the convener of the committee that deals mainly with the appointee should be included on that panel to give a more informed view. There are arguments both ways. The convener would know more about what the official has been doing but—being human—politicians and officials may sometimes get up one another's noses, which may mean that the convener is not the most neutral person when it comes to reappointment. Which of those two arguments do colleagues see as being stronger?

Cathie Craigie: I do not think that a convener should be involved in the process. As Karen Gillon said, evidence that we took suggested that an external assessor would evaluate the job that the individual had done and whether the person was suitable for reappointment. It would be for the SPCB to take the final decision on whether to recommend to the Parliament reappointment of the incumbent.

The Convener: That is a good point of view.

Chris Ballance: There is a strong argument for having an external assessor. I presume that the SPCB would be involved, because the assessor would be appointed by the SPCB.

Alex Johnstone: The argument against the inclusion of a supposedly relevant committee convener could be extended. Reappointment might happen when there was no relevant committee convener or when the convener had no experience if he or she had been newly appointed. The assumption that a committee convener should be involved is probably irrelevant.

The Convener: That is very helpful. Is the general view that we would leave matters to the SPCB?

Members *indicated agreement*.

Karen Gillon: There should also be an independent assessor.

The Convener: There are two possibilities. I am open to advice, because I am not an employment expert, but an assessor would ensure that the procedure was fair. There would also need to be someone to evaluate the four years' performance of the person in post, which could be the post holder's English equivalent or a former holder of the post. Is it correct to say that two people would need to be involved?

11:45

Jane McEwan (Clerk): We can consider the different annual appraisal process options. One option would be internal appraisal via the corporate policy unit and the corporate body. Another option might be to use an independent assessor. There are different avenues that we could explore. An independent assessor could certainly be used to oversee the interview and reappointment process to ensure that they are fair.

The Convener: I am not fully aware of what happens in the current system. Are there annual reports for ombudspeople? Does somebody give them a beta plus, for example, for the year?

Jane McEwan: No annual appraisal process is currently in place because a reappointment process is not in place, but we can recommend a process if we want to do so.

The Convener: So, that was a good question. Do members want to suggest that there should be annual appraisals or should incumbents wait until the four years are nearly up for an appraisal? I assume that somebody neutral and well informed must assess how well a person is doing.

Cathie Craigie: When I said that there should be an independent assessor or assessment, I envisaged that a person would assess the individual's work, decide whether it was good, very satisfactory or fantastic and recommend that there is nothing to stop their being reappointed. Annual appraisals are done in many employment circumstances, but we do not need to consider such appraisals; rather, how the individual has performed in their role during their term of appointment must be considered. Obviously, if the person was seeking reappointment and an independent appraisal showed that their work was not up to the level and quality that the SPCB required in the post, it would not seek to reappoint that person.

The Convener: Do members agree? Must the whole procedure finish within four or five years?

Jane McEwan: The corporate body can appoint someone for up to a five-year term.

The Convener: Yes, but I assume that it would appoint an appraisal person some months before that. If there is to be a person to appraise the candidate's performance, would somebody else be needed to monitor the panel to ensure that it was operating fairly?

Jane McEwan: That is a decision for the committee. Certainly, independent assessors are used in procedures for ministerial appointments to oversee the process and to ensure that it is fair. They are not used to decide whether the candidate is the best candidate, but to oversee whether the process is fair.

Karen Gillon: There should be such a person.

The Convener: So two people would be needed.

Karen Gillon: Yes—there are two different roles.

The Convener: Somebody would be appointed to assess how the person has done and to provide information to the panel after the three years or whenever, and somebody else would ensure that the panel and the procedures were okay. Is that a correct understanding of members' views?

Members *indicated agreement*.

The Convener: Are there any other points that we have failed to address? On the whole, we do not really want there to be a third term.

Karen Gillon: I feel strongly that there should not be a third term, except perhaps if someone has been appointed but has chosen not to take the position and somebody is needed to cover the gap. Otherwise, I am not convinced about the special circumstances.

Alex Johnstone: We are therefore considering the suggestion in the paper in order to solve the problem. If someone has been appointed to a post for four years but is allowed a maximum of five years, the option to extend their second term would satisfy the demand.

The Convener: The argument was advanced that the person might be halfway through a situation like the Trojan war and might want to continue in post. The counter-argument is that if the person knew that he or she had only a year or so to go, they should not have started the Trojan war.

Karen Gillon: The reality is that most inquiries are undertaken by deputy commissioners and that work can be delegated. If a commissioner knows that an inquiry will last for a substantial time, there is nothing to stop their delegating it to a deputy commissioner to provide continuity.

Cathie Craigie: From the questioning at the previous meeting and from members' discussion, I cannot even think of an exceptional circumstance. Perhaps the only example is that which Karen Gillon gave this morning, which is that if somebody had been selected but did not take up the appointment, the existing commissioner could be asked to remain. However, we do not want to set in place a mechanism that we hope will never be used. If something happens, we can quickly meet to find a solution. No member feels that we should set in place such a mechanism for general use.

Chris Ballance: We seem to agree on the mechanism that is described in the second half of paragraph 24. Perhaps the clerks can turn that into an official form. What are we writing? It is not a standing order. We agree that a second term should be for up to four years and that the SPCB should be allowed to extend the period for up to a year if necessary.

Jane McEwan: Does the committee want to say in standing orders what the exceptional circumstances would be beyond that?

Karen Gillon: I would like to do that, if we can.

Alex Johnstone: Do you have your crystal ball?

Chris Ballance: I feel that specification of exceptional circumstances will be unnecessary if we say that a third appointment will be for an absolute maximum of a year.

Alex Johnstone: We have eliminated the concept of such an appointment. We are talking about emergencies at the end of the second term.

The Convener: We can say that third-term appointments are not on, but that a second term might be extended to deal with a problem. It would still be the second term, rather than a third term.

Alex Johnstone: We need a general form of words that says that a term of appointment can be extended in exceptional circumstances.

Cathie Craigie: What would be the situation if the person in post was working out their notice and the new person was ready to start, but something happened? As far as I remember, the papers for our previous meeting said that it takes about eight months from advertising a post to making an appointment. The proposed year's extension would provide plenty of time to do that. I do not know how we can satisfy Karen Gillon by describing in standing orders exceptional circumstances. However, the worry is that the term "exceptional circumstances" is too wide. Perhaps we need to tease that out.

Karen Gillon: We must be clear about what we think exceptional circumstances are. If somebody was working out their notice and was going to another job, why would they want to be reappointed for six months to cover for somebody who did not take up the job? If I were the commissioner for children and young people and my job finished in July 2000-and-whatever, surely to goodness I would not be put out to grass—I would probably go to work elsewhere. A person who was selected might become unable to take up their appointment shortly before it was due to start. We must consider what would be done in that situation, because the current commissioner might be going to work elsewhere. I had assumed that the provision was supposed to cover any gap; however, it will not cover the gap if the commissioner who is leaving has somewhere else to go. It will not plug that hole.

The Convener: I do not know. Do all the commissioners have at least one deputy?

Jane McEwan: No, they do not.

Karen Gillon: They do not all have deputies.

Jane McEwan: I will need to check, but I believe that there is provision in the relevant acts to allow the corporate body to appoint somebody on a temporary basis, were an office to become vacant. That might be an alternative, but we will need to look into that.

The Convener: I think that that would be better. I agree with the sentiment that once something is permitted in special circumstances, the restriction continues to get eroded. It is much better to say that there should be no third term—full stop. If there is a problem, somebody can fill in. Will you cleverly write up something to that effect?

Jane McEwan: Absolutely.

The Convener: There is also the question of removal from office. The paper says that we do not need new rules for that, but if there was widespread feeling in Parliament that a certain commissioner was on the wrong track, what could be done about it? The commissioners are all independent, but I presume that there is a limit to how far they should go in a direction that is totally opposed to what Parliament wants. At the moment, the occasional member who is fed up with a specific decision lodges a motion to say that Mr X should resign forthwith, which gets half a dozen signatures, and that is it. We do not want such motions to be debated every time they are lodged.

The question is whether we should consider some other procedure. It may be that the business bureau would have to assess whether there was sufficient impetus behind the desire to debate somebody's performance for it to allow a debate on that subject. Should we just leave the matter alone? It is quite a difficult issue. The independence of the commissioners is key.

Alex Johnstone: I would be concerned that any set procedure that went beyond the opportunities that we already have would simply open up an opportunity for mischievous individuals to exploit the process. We know that we have one or two such individuals in Parliament.

Karen Gillon: They are on this committee, in fact.

There are clear voting thresholds—it would become apparent very quickly if a commissioner had lost the trust of a majority in Parliament. If a majority of members wanted to remove a commissioner from office, they would have the power to vote on that. I assume that the bureau would get the idea that it should include such a motion in the business programme.

Alex Johnstone: There is no shortage of opportunities to raise such issues when there is a genuine grievance. There is non-Executive time and debates on the business motion. The issue can be forced if it cannot be dealt with on the bureau in order to get something on to the agenda.

The Convener: Is that the general view?

Members *indicated agreement*.

The Convener: That is fine. Is there anything else that members want us to say? There is a specific point about the Scottish Commissioner for Human Rights Bill. The bill has been referred to the Justice 1 Committee, which is seeking evidence as part of its stage 1 inquiry. Do we want to reply to that committee? Do we have views on which the clerks could build for an official response?

12:00

Karen Gillon: I suppose that the points that we have made about there being no third term are useful, given the bill that the Justice 1 Committee is considering. Similarly, the points that we have made on issues around removal from office, voting thresholds and so on are useful issues for us to raise.

The Convener: Is what we have said on the procedure for reappointment relevant?

Karen Gillon: Yes.

The Convener: It seems sensible for us merely to report to the Justice 1 Committee on what we have just agreed about our position in general.

Jane McEwan: The committee may wish to note one other point about the new bill. The committee had a discussion at its last meeting about the provisions in the bill that established the Scottish public services ombudsman. The discussion focused on directions being given to the ombudsman on the form and content of her annual report. We are still awaiting a response from the Executive on that matter. The provision is also included in the Scottish Commissioner for Human Rights Bill. Depending on the Executive response and the view that the committee takes on the issue, the committee may also decide to highlight that matter.

Karen Gillon: That would be useful.

The Convener: Yes. I return to the question of removal from office. I think that we are saying that we do not need to say anything in particular about that. The clerks have made the point that the rules for such appointments are set out in statute, so as far as I understand the situation, standing orders do not need to replicate them. We could just leave things to the law as it stands. Is that right?

Jane McEwan: The point that is made in the paper is that provision on removal exists in standing orders. For example, the standing orders

replicate what is set out in statute for the removal of the Auditor General for Scotland. To make matters consistent, we could replicate in the standing orders the procedure for removal of other commissioners or—again, to keep things consistent—we could delete from the standing orders everything that relates to removal. That decision is for the committee.

Karen Gillon: We should have consistency. Given that different rules of statute apply to each appointment, we should delete the references from standing orders; the statutes remain, after all. Given the number of commissioners we seem determined to appoint, the standing orders do not need to replicate the process for removal of every commissioner.

The Convener: I had a friend who used to refer to "ombudsmania".

I understand that the clerks also want us to talk about visits. I am referring to the useful written evidence from other Parliaments on how they use their time. Is that right?

Jane McEwan: No. The paper was submitted on an information-only basis. It sets out the visits that the committee agreed, the correspondence that was involved and the members who wish to attend each of them. We are finalising the other draft paper that summarises the responses from other Parliaments. We will circulate it for a future meeting.

The Convener: The paper is certainly interesting. There is a huge variety in the content of the responses; some Parliaments never meet at all and others meet incessantly. It is amazing.

Our next meeting will be held on Tuesday 8 November. It will include the first of our round-table discussions and evidence on Crown appointments. I think that it was agreed that the first round-table would be composed of non-parliamentary people. We will have all the great and the good but not the parliamentarians next week—the parliamentarians will form the second round-table discussion. The agenda will include evidence on the SPCB and the reporters and then the round-table discussion. I thank members for their attendance.

Meeting closed at 12:04.

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

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

The deadline for corrections to this edition is:

Wednesday 9 November 2005

PRICES AND SUBSCRIPTION RATES

OFFICIAL REPORT daily editions

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

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

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75
Annual subscriptions: £150.00

Standing orders will be accepted at Document Supply.

Published in Edinburgh by Astron and available from:

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

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

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

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

Telephone orders and inquiries
0131 622 8283 or
0131 622 8258

Fax orders
0131 557 8149

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

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

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

sp.info@scottish.parliament.uk

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

Printed in Scotland by Astron