PROCEDURES COMMITTEE

Tuesday 12 September 2006

Session 2

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PROCEDURES COMMITTEE
13th Meeting 2006, 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)
Patrick Harvie (Glasgow) (Green)
Tricia Marwick (Mid Scotland and Fife) (SNP)
Irene Oldfather (Cunninghame South) (Lab)

*attended

THE FOLLOWING GAVE EVIDENCE:

Frazer Henderson (Scottish Executive Enterprise, Transport and Lifelong Learning Department)
Tavish Scott (Minister for Transport)
Elizabeth Watson (Scottish Parliament Directorate of Clerking and Reporting)

CLERK TO THE COMMITTEE

Andrew Mylne

SENIOR ASSISTANT CLERK

Mary Dinsdale

LOCATION

Committee Room 5

Scottish Parliament

Procedures Committee

Tuesday 12 September 2006

[THE CONVENER *opened the meeting at 9.32*]

Transport and Works (Scotland) Bill: Stage 1

The Convener (Donald Gorrie): With us for item 1 on the agenda we have Tavish Scott, who is accompanied by Frazer Henderson, Andrew Brown and Catherine Wilson. I think Tavish intends to make an opening statement, following which we will ask him questions. The interest of the committee in this bill is very much to do with the parliamentary and democratic aspects. I hope that we can concentrate on those.

I invite Tavish to set out his stall.

The Minister for Transport (Tavish Scott): I am grateful to the committee for adjusting its timetable today. I am going to meet our colleagues on the Local Government and Transport Committee later this morning, which is why I have to move on. I welcome the opportunity to share my thoughts on the bill and on the Procedures Committee's interest in its proposals and approach.

The principal importance of the bill—and, I suspect, the principal point of interest for this committee—is the extent of Parliament's engagement in the proposed order-making process, which is what I want to concentrate on this morning. First, however, I want to stress my belief that the principal focus of the bill must be on outcomes—it is about transforming the transport infrastructure of the country. In order to deliver that outcome, it has always been our intention to have a simple, straightforward and efficient process. Anyone who has served on a private bill committee—I have a list of those members with me and spoke to one yesterday—knows the level of intensity of effort that that takes. Serving on such a committee requires a considerable commitment from members, the people who promote bills on behalf of the Executive, local government and the other partners. It is important to acknowledge that.

It is also important that a process has the confidence of promoters, the people who will be affected by proposed developments and the wider public. The intention is that the bill will strike a balance between natural justice for the people who may be affected by a transport development, and the efficiency of the process, which many see as being equally important.

I am keen to ensure that there is consistency of approach across all order-making processes for transport developments. I suspect that many members will be acutely aware of the current difference between the ways in which road and rail projects are handled. When we announce a major roads project—when Government agrees to spend considerable amounts of taxpayers' money on such a project—the process is very different from that for a major rail project. I do not appear before private bill committees in relation to major roads matters, but I do appear before such committees in relation to major rail projects. Yesterday I appeared before the Airdrie-Bathgate Railway and Linked Improvements Bill Committee. Through the Transport and Works (Scotland) Bill, we are seeking increased parliamentary scrutiny of existing legislation on road and harbour developments, in order to achieve consistency with the approval process for railway, tramway and canal developments, as is set out in the bill.

As members are aware, the intention is to apply parliamentary scrutiny proportionately. Transport developments that are of national significance will be subject to parliamentary scrutiny, but lesser developments that address local transport concerns will not be subject to such scrutiny. It is important to emphasise that, under the bill, MSPs will have a much more focused role in engaging with transport projects than they have as part of the private bills process. Members will have an opportunity to influence transport projects at the early stages of development, through various transport strategy documents that will culminate for nationally significant projects in the national planning framework. Members who have studied, or are involved in scrutinising, the Planning etc (Scotland) Bill will be aware of how it is planned that the framework should operate.

The national planning framework will be subject to consultation, parliamentary review, parliamentary consideration and parliamentary scrutiny. Scrutiny of the framework will establish both the national policy context and the principle of the proposals within it. That approach is consistent with the spirit of the proposals that the Procedures Committee made in its report to Parliament last year. I am grateful to the committee for that report.

Promoters will be obliged to engage with members whose constituencies will be affected by a proposed development, in order to ensure that members are fully engaged and are able to influence the design of a transport project that affects their area. Our proposals also confirm the role of Parliament in approving developments that are of national significance. All orders in respect of national developments will be subject to the

affirmative procedure at the end of the process. Parliament will be involved at two stages: first, via the national strategy documents and the national planning framework; and secondly, at the end of the process, through the affirmative procedure.

There are also existing mechanisms that Parliament can apply to scrutiny of projects. Many members and commentators argue that Parliament's committee structure is one of the most important aspects of our young and evolving parliamentary democracy. We have a Finance Committee and Local Government and Transport Committee that are charged with scrutiny of the finance of the Executive's transport investment plans, and of particular projects and the principles behind them. Parliament will have as many opportunities as it wishes to take for committees to scrutinise individual projects or the transport programme as a whole.

I have no doubt that the Local Government and Transport Committee will interrogate the findings of the strategic projects review as it flows from the national transport strategy over the next couple of years. That committee can investigate expenditure against policy objectives and does and will require the Minister for Transport of the day to account for policy and investment decisions. That is as it should be.

Through the bill, I have sought not only to provide Parliament with statutory opportunities to influence transport projects—particularly those that will have public money attached to them—but to build on the existing processes in respect of how Parliament scrutinises Executive spending and policy decisions.

The bill makes no distinction between consideration of developments that are promoted by ministers and developments that are promoted by other parties. The development, not the promoter, is the key to consideration. All promoters will have to provide similar levels of information and to operate within the legislation. All information will be available for public scrutiny. All decisions will have to be supported by detailed, justifiable reasoning and, of course, will be made public. Therefore, there will be no actual or perceived advantage for projects that are promoted by ministers.

In previous years, the Executive has provided both financial and other support to promoters who have, in the main, progressed developments in which we have shared objectives. My intention is to be more transparent about ministers' involvement in the future. Transport Scotland, on behalf of ministers, would promote rail projects, in addition to its current responsibilities for road schemes. We are seeking to achieve consistency between how we promote a road project and how we promote a rail project, which is what Transport Scotland was set up to do. It is important that we achieve such consistency, and that we achieve transparency in the lines of accountability and greater distinction of roles and responsibilities.

Our proposals are very much in line with the spirit of the Procedures Committee's recommendations for appropriate parliamentary engagement and accountability. Importantly, our proposals, on which we have conducted extensive consultation, have the overwhelming support of stakeholders.

I hope that that was an adequate summary of the proposals. I will do my best to answer the committee's questions.

The Convener: Thank you. The committee responded to the consultation document that you produced in a letter that I signed on 25 April, so I think that you will be aware of some of our concerns. Nobody wants to keep the status quo, but we are concerned about the checks and balances in the procedures that you recommend. We highlighted three points in the letter. We said that there should be initial parliamentary consideration; that there should be a stronger system of parliamentary approval at the end of the procedure for Government proposals rather than third-party proposals; and that all applications should be open to some parliamentary consideration, not just the ones that the minister thinks are sufficiently important. Will you address those points that the committee made in its letter?

Tavish Scott: Yes. There will be stronger scrutiny of Government proposals for road and harbour developments. Most of us have been here for seven years and we know how the process of scrutiny has operated. I argue strongly that we are enhancing Parliament's ability to monitor proposals for such transport projects.

You mentioned the Parliament's ability to influence developments at the outset. I was clear in my opening remarks that our production of a national transport strategy this year and the strategic projects review, which is under way—both of which will be heavily interrogated by members in all the forums that are open to them in Parliament—will provide an early stage of engagement in transport projects, in addition to members asking questions every Thursday. Believe me—such questions do come up every Thursday; some of my colleagues manage to take questions only once every three weeks, but interest in transport never goes away. That is a good thing for Scotland. I do not think that there is any doubt about the level of scrutiny of both policy and process.

In addition to the strategy and the projects review, which relate to major capital projects throughout Scotland, there is also the national

planning framework, which will of course be subject to the eventual Planning etc (Scotland) Act. I am sure that there will be opportunities for members to ask precisely how that framework is going to work as the Planning etc (Scotland) Bill takes its course.

Ministers strongly intend that there will be full parliamentary engagement with the process and with the structure of the national planning framework so that there is parliamentary approval at the appropriate stage.

09:45

Alex Johnstone (North East Scotland) (Con): One of the issues that the convener raised was the difference between projects that will be put forward for final parliamentary approval and projects that will not. The committee's response to the Executive's consultation refers to parliamentary approval being required for applications for

"projects of 'national strategic importance'".

In practice, will subjective decisions have to be made? Would it be more desirable to ensure that virtually all projects are put forward for parliamentary approval, even under the negative procedure?

Tavish Scott: I do not agree that all projects should come before Parliament. Is Mr Johnstone saying that we should micromanage local authorities' roads budgets simply because we ultimately fund those budgets through the grant-aided expenditure system? I am sure that he is not; I am simply taking things to their logical conclusion, but if he is saying that, I do not agree with him.

Mr Johnstone will be acutely aware that we passed the Transport (Scotland) Act 2005, which set up regional transport partnerships. I strongly believe that those partnerships should have a capital allocation. We have given them a two-year capital allocation, and I hope to do more about such allocations to them in future years. I am sure that the same approach will continue after the election, irrespective of who is in charge, because it makes good sense. We do not know best what the best local transport solutions in the north-east or anywhere else are, so it is logical to devolve decision making for such projects to local authorities or regional transport partnerships.

Mr Johnstone made a fair point about judgment calls having to be made about what is and is not nationally significant. Ministers have not reached conclusions on that tricky matter, but we are considering it. A relatively small project in monetary terms that tackles a strategic pinchpoint on a road or rail network could make a phenomenal improvement—I am thinking of a passing loop project in Ayrshire, on the Ayr to Glasgow rail line, which would make a phenomenal improvement to the efficiency of our rail services on the west coast of Scotland and improve the transport system there. It could be argued that such an improvement would be nationally significant. It would potentially cost £15 million, and we should simply get on with it. It would not be right to hold it up in endless parliamentary procedure. I agree that judgment calls will have to be made, but I am sure that Parliament will properly scrutinise and decide whether judgments that have been made on what is or is not nationally significant are right.

The Convener: I was ungenerous in not acknowledging that you had greatly improved things with regard to roads and harbours—you get a brownie point for that.

Let us consider, for example, a quite important road proposal in the north-east of Scotland that is deemed not to be of national significance. Who will decide whether there will be a public inquiry? Could the council organise a public inquiry or would the minister have to say yes or no to one? One of our recommendations is that there should almost automatically be a public inquiry, which could be modest if a small development is involved. Will you explore that matter?

Tavish Scott: Yes. I apologise for not being clear at the outset. Nothing will change with respect to roads. If there are local objections under the existing statutory processes—which the convener will remember from his local government days—what has previously happened will continue to happen. If a local bypass or a local upgrading of a road is proposed and there are formal objections to the proposal, a local public inquiry will take place, just as it currently would. There will be no change in the right of individual citizens to object formally. Statutory undertakers, landowners, householders or people who own a house in the area will still be able to object.

The Convener: You mentioned a railway loop project, which could have an adverse effect on the local geography for residents. Would they have a chance to have a shout about what was proposed?

Tavish Scott: Yes. In any rail project, there is an inquiry mechanism both for statutory undertakers and for people who might be directly affected by the passing loop. For example, if someone's house lies on a loop's proposed route, that will usually be handled by what is known as advance purchase: indeed, the bill refers to and makes provision for that agreed procedure.

Chris Ballance (South of Scotland) (Green): Before I became a member, this august committee

held a detailed inquiry into and made a series of recommendations on the process. In response to the Executive's consultation document, it decided to repeat those recommendations. What representations did you receive in response to that document that persuaded you that the committee was wrong?

Tavish Scott: Mr Ballance cannot have been listening to my earlier comments. We have not said that the committee is wrong; instead, we have broadly accepted the committee's approach, which has been supported by our consultation. For example, we have enhanced the parliamentary scrutiny of road and harbour facilities. As far as rail projects are concerned, anyone who has served on a railway bill committee knows that that process has to be changed. I do not accept for a moment that we have ignored the committee's findings—in fact, quite the reverse is true. The basis of your question is simply wrong.

Chris Ballance: Perhaps I should clarify my question. What responses to your consultation persuaded you to omit the fourth and sixth steps in the process that the committee recommended, both of which require parliamentary involvement?

Tavish Scott: We have to reach a judgment on such matters—

Chris Ballance: What responses did you receive that persuaded you to reach that judgment?

Tavish Scott: I would like to answer the question instead of being interrupted by Mr Ballance.

We have reached a judgment on the matter. Mr Ballance clearly disagrees with our decision. However, I notice that he has never served on a private bill committee, so he is not in a great position to lecture the rest of us on how tough the process is or how much time it involves for a lot of members.

My overriding consideration was the very strong representations that I received from all the political parties—I stress that for Mr Ballance's benefit—about their concern that the current process is disproportionate with regard to the time that members have had to spend on it and the level of scrutiny that is required. With the Airdrie to Bathgate rail link, which I was discussing in committee yesterday, the Government's proposal emerged from the central Scotland transport corridor study on ways of reducing road traffic on the M8 and improving public transport links. If Government decides to move forward with such a proposal, the proposal itself becomes open to all kinds of scrutiny, which we are seeking to enhance both through the processes that we have discussed this morning and through the national planning framework. I believe that such moves represent steps forward in parliamentary scrutiny. In any case, we have to make a judgment call on the level of scrutiny that can be carried out without slowing the process down even further. As we know, MSPs and bill promoters have been deeply concerned about that. We believe that we have made the right decision.

Chris Ballance: So, I am right to assert that none of the responses to the consultation recommended that you drop the fourth and sixth steps that the committee suggested.

Tavish Scott: No—Mr Ballance is quite wrong about that. We received representations on that matter. Indeed, given that the issue is arousing such interest, I will go through the three points that the committee made about the matter that Mr Ballance has raised. I state for the record that, in the consultation, stakeholders were against the three points.

The committee said that the process could risk being delayed by the parliamentary timetable—[*Interruption.*] Sorry—this is what stakeholders said—[*Interruption.*] Let me start this again.

Chris Ballance: Will you also be clear about which stakeholders you are talking about?

Tavish Scott: On the committee's comment that Scottish ministers did not believe it to be necessary or useful to have parliamentary consideration after the objection period, stakeholders in our consultation made three points: first, the process could risk being delayed by the parliamentary timetable; secondly, scrutiny at that stage would pre-empt detailed consideration of the project by a reporter; and thirdly, a full consideration of the issues would be required by Parliament to make an informed judgment. As a result, they felt that such an approach would not be conducive to an efficient process.

Chris Ballance: We have a situation in which ministers may themselves introduce the project and will

"undertake pre-application scrutiny to ensure that the documentation"

is correct. Ministers will determine whether a project is of national importance. Ministers will also

"decide whether the application is procedurally correct".

Ministers will "appoint an independent reporter", and after the report ministers will

"decide whether to proceed with the final Order".

We will then be presented with an affirmative instrument on which there is the potential for one three-minute speech for and one three-minute speech against in Parliament. That is your definition of appropriate parliamentary scrutiny.

Tavish Scott: Until his final loaded point, Mr Ballance missed out the role of parliamentary scrutiny. There is parliamentary scrutiny at all stages of the long list that he read out.

Mr Ballance's view is suspect. What we have created, what we are discussing today on the Procedures Committee and what we will ask Parliament to consider later in the autumn is a process in which parliamentary scrutiny will be involved at every stage. The parliamentary scrutiny will be of a variety of different natures and in many cases it will be stronger than it was in the past. Therefore, Chris Ballance is wrong to infer that there will be no parliamentary scrutiny. I do not accept that and I will never accept it. As a democrat, I do not believe that such an approach would be the right way forward. Ministers are not control freaks who want to do things for the sake of doing them. They are here because Parliament is here and they are accountable to Parliament every day of every week. It is wrong to suggest that there will be no parliamentary scrutiny in the process and I will not accept that suggestion.

Chris Ballance: For the record, I make it clear that I am not inferring that there will be no parliamentary scrutiny; I am inferring that there will be no adequate parliamentary scrutiny and that what little scrutiny there will be is entirely inappropriate.

Tavish Scott: I fundamentally disagree.

Alex Johnstone: Can we clarify the extent of parliamentary scrutiny that is possible when an affirmative instrument is presented to Parliament? My understanding is that a debate of up to 90 minutes can take place. Although such a debate has traditionally taken place in committee, it could happen in a meeting of Parliament.

Tavish Scott: That is my understanding of the procedures of Parliament, but this is the Procedures Committee, so I will be guided by its greater knowledge.

The Convener: The current position is that if the instrument is considered by a committee—

Alex Johnstone: As I understand it, the process under which we deal with an affirmative instrument allows debate of up to 90 minutes. Although in the past that has usually taken place in committee, there is nothing to stop it happening in Parliament should the Presiding Officer decide that that is appropriate.

The Convener: That is perhaps a point to consider for our recommendations.

The current rules are that in Parliament there can be only one speaker for and one against a motion on an affirmative instrument. It would be necessary for us to change the rules to permit a 90-minute debate.

Richard Baker (North East Scotland) (Lab): We recently had the medical fees debate in Parliament, in which a speech from each party was followed by a speech from the minister. I presume that that was under the affirmative procedure, so I do not see why the same approach could not be taken in the situation that we are discussing today.

Chris Ballance: That debate took place following a motion being passed to suspend standing orders.

Richard Baker: Could we not do the same thing in this case?

The Convener: We can examine standing orders.

Richard Baker: I take Chris Ballance's point about the importance of parliamentary scrutiny. However, I have served on a private bill committee and it became clear that there was far too much parliamentary involvement and scrutiny in the old process. In some ways it was not very good scrutiny. It seemed bizarre that we put hurdles in the way of major rail projects when it is much easier to build road projects. The minister has made important points about the consistency of the approach.

I also take the minister's points about the different stages of parliamentary involvement. I know that the committee made it clear that it wanted two parliamentary points of involvement. It seemed bizarre that in the old process Parliament agreed the general principles then took another vote at the end. The debate on the bill after the general principles had been agreed seemed a little bit compromised, limited and in some ways incongruous.

The minister made some helpful points about parliamentary involvement. Members can correct me if I get this wrong, but after the briefing that we had last week, we heard that, if there are no objections to a project of national importance, that project might not go through the parliamentary procedure. Has the minister considered that? Is he comfortable with it or might there be an amendment to cover that situation?

10:00

Tavish Scott: All national projects will be subject to the affirmative procedure in addition to the elements of the process that we discussed earlier, such as the national transport strategy, the strategic projects review and the national planning framework. In addition, without rehearsing the arguments again, it will always be open both to members—through the normal processes of Parliament—and to the Local Government and

Transport Committee to examine a particular project if there are concerns.

However, it is fair to reflect that, if there were no objections to a project, we might take the view that something had gone right with the process and that to achieve that position the issues had been teased out appropriately at different levels.

The Convener: As I understand it, which might not be correctly, the bill weakens the position of local residents with regard to having an inquiry if their property will be blighted but they are not closely involved. Under the bill, they will not have the chance that they get under the existing legislation on roads and railways.

Tavish Scott: We can check that, but I am not aware that there is any change in that respect. You will be aware that there have been discussions in the Parliament on both the advance purchase scheme and the voluntary purchase scheme in relation to one of our major capital transport rail plans, and we now have those schemes in place. Earlier in the summer, Transport Scotland published a policy in that area specifically to assist with examples of the kind that you mentioned. I am clear that we are not making any change that would be detrimental to those interests.

We will check the point, but I am aware of the issue and we have tackled it through the Transport Scotland policy that is now in place.

Karen Gillon (Clydesdale) (Lab): This is more a matter for us, convener, but I do not think that there is anything in the rules that would preclude an instrument that is subject to affirmative resolution from being referred to a Committee of the Whole Parliament rather than to a committee. I do not see why that would be impossible.

The Convener: I am advised that the rules would have to be changed to permit that.

Karen Gillon: We could make that change to the rules if it was necessary.

Chris Ballance: It might be easier to get the procedure right in the first place, rather than having to change standing orders.

Karen Gillon: We come to the matter from different perspectives. I do not want to stop any major road infrastructure projects, but others do. If someone comes from an ideological position of being against major infrastructure development, no process will be perfect and no process will meet their needs if it comes up with the wrong answer.

We have to strike the right balance. Until now, we have not managed to pursue major public transport infrastructure projects at the speed at which many of us in the room would have liked to do so because they have been held up by inadequate processes. If we are serious about driving forward public transport in Scotland, we have to speed up the process and bring it into line with the existing process for roads projects.

I want to probe the minister further on some aspects of the process that has been outlined. If we want to prevent things from happening, we can, but if we want to proceed with major transport infrastructure projects such as the ones that I want to see in my constituency, we have to get the process sorted out sooner rather than later.

The Convener: That was not a question.

Karen Gillon: Do you agree, minister?

Tavish Scott: I do.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Karen Gillon spoke about the need to speed things up. You are aware of a major road project in my constituency that has taken more than 30 years to get to where it is now.

I fully support the bill's objective of making the process more open, transparent and quick. As an example, can you tell us how the A80 proposals would have been affected had the bill been in force?

Tavish Scott: That is a good but tough question to answer. If that road had not been part of the plan, the strategic projects review would have concluded that it was an important strategic transport investment for Scotland and the road would have become part of the national planning framework, subject to the determination that Alex Johnstone asked about earlier—in other words, that it was nationally significant. At that stage, the project would have rolled through the process that all roads currently go through and will continue to go through.

The important point is that there would have been a parliamentary check, to deal with the cynicism of some, through Parliament's scrutiny of both the strategic projects review and the national planning framework. That process would have taken two to three years. I am sure that we all recognise that resources are an issue, and that could have slowed matters down because, like the infrastructure investment programme across the entire Executive, capital transport projects are subject to the normal constraints of Government spending. However, once the decision had been taken that the project was nationally significant and it had been placed in the national planning framework, the financial argument would have been Parliament's only other consideration with respect to the project.

In short, the bill's proposals should dramatically quicken the process. My only caveat is that it will depend on the road—the linkage that you asked

about—or whatever being seen as being nationally significant.

Cathie Craigie: I am not saying that there was anything wrong with the previous procedure, but people found it strange that one man had all the power to make the final decision. Crucially, if the bill is passed, there will be an element of parliamentary scrutiny of the process, which was missing before.

Tavish Scott: Absolutely. There would be parliamentary scrutiny. Ultimately, the Scottish ministers are accountable for decisions that are made on the approval of, or disagreement with, the findings of local public inquiries. That will continue, and nobody is seriously suggesting that we should change that. Someone has to make the ultimate decisions, otherwise nothing would happen in life—as Karen Gillon pointed out. We live in a democracy and the ministers who make those decisions are accountable to Parliament for them, as they should be.

Cathie Craigie: The policy memorandum raises the possibility of reconsidering the local public inquiry rules to allow objectors who are not legally trained to receive financial assistance. Has that idea been taken any further?

Tavish Scott: Frazer Henderson, our bill team leader, will deal with that point, as I do not know the detail on it.

Frazer Henderson (Scottish Executive Enterprise, Transport and Lifelong Learning Department): If an objector seeks initial legal advice, publicly funded advice might be available if it relates to a matter of Scots law. Eligibility for such public funding will be granted in accordance with some statutory tests that will be performed by solicitors. Information or advice on the availability of such public funding will be available from the Scottish Legal Aid Board.

In addition, the Executive will administer the process, and we intend to provide procedural advice to objectors on the process itself. So, in addition to advice from the Scottish Legal Aid Board, substantial procedural advice will be produced by the Executive next year, once the secondary legislation is in place. It will provide advice to objectors on the processes that they must go through and on where they can find assistance.

Cathie Craigie: I understand that an objector is not able to make a submission to the Scottish Legal Aid Board at the moment. Will you confirm that?

Frazer Henderson: That is my understanding although, in certain circumstances, the Scottish Legal Aid Board will view applications favourably. I am more than happy to send a note to clarify that, if that would be helpful.

Cathie Craigie: Thank you. That would be useful.

The Convener: When the committee drew up proposals some time ago now, it tried to address the need to have a stronger alternative to the minister's view, so it proposed a super-affirmative procedure. I was not involved at the time, but I understand that there was a concern that, for example, a minister might be very keen on a railway from Bathgate to Airdrie, for perfectly good political reasons, and so propose one, and would then make the decision on whether the project should go ahead in that particular form. I am not at all expert in human rights, but is it not possibly contentious to have the minister be the judge in his own case? Is there not an argument for re-examining the committee's suggestions for a super-affirmative procedure in the case of a Government proposal on which the Government will make the decision?

Tavish Scott: The Government makes proposals on policy issues every day of every week, including on rail lines. If we are blunt about it, it is the Government that is promoting all the rail lines at the moment, using the private bill procedure that we inherited from Westminster. Being a former member of that Parliament, the convener will know more about the private bill procedure than I do. The blunt truth is that we are promoting those schemes and, broadly, we are paying for all of them to a greater or lesser extent. They are Government projects. As I said in my opening remarks, we propose that we should be blunt and transparent about it and say that they are Government proposals. Without rehearsing all the arguments again, the checks in the system in respect of parliamentary scrutiny are important in that regard.

Let us take a hypothetical example. The Parliament might, for whatever reason, be opposed to the Airdrie to Bathgate line and think that it was not the right investment for Scotland because there was suddenly a better transport solution or different spending priorities. That would be entirely fair; indeed, it might be the subject of a future debate in Parliament. I cannot envisage the Minister for Transport of the day deciding to proceed with the measure in a national planning framework or through the strategic projects review in the face of total parliamentary opposition—by that, I mean across-the-board parliamentary opposition.

If it were a case of the Opposition saying, "We don't like this," and the Government saying that it is going to do it, if the Government had a majority, as a democrat I would go with the Government position. However, if Parliament as a whole said

that there was something fundamentally wrong with the project or there was some other argument against it—I struggle to conceive what that might be—and Parliament, including back benchers of Government parties, told the Government that it had got it wrong, I suspect that the minister of the day would be in a whole load of trouble. There is a political process and a dynamic in our Parliament that is very active in that way.

Given all the steps and measures that were put in place following consideration by the committee, I think that it would be unnecessary to ratchet things up to the next level. However, we will obviously listen to the committee's conclusions on that point.

Chris Ballance: On a point of information, you mentioned the stakeholders group. Where can we find information on that? There is no reference to it in the papers supplied to the committee.

Tavish Scott: I am sure that we can write to the committee on that.

Chris Ballance: That would be helpful if there is a public document.

The Convener: We have talked quite thoroughly about the issues that concerned the committee. Different views will be held by different people but we are clear about the facts and the minister's position. I thank the minister for his attendance. We will let you off in time for your next meeting.

10:14

Meeting suspended.

10:19

On resuming—

Guidance on Committees

The Convener: Agenda item 2 is guidance on committees. A document on the subject has been circulated to members. Elizabeth Watson, the document's main author, is here to answer any questions. The document has been approved by the Conveners Group. It has to be approved by us, but it is not a committee report as such, which means that we do not have to scrutinise it line by line. Obviously, however, members might want to ask questions about particular aspects.

I invite Elizabeth Watson to introduce her paper.

Elizabeth Watson (Scottish Parliament Directorate of Clerking and Reporting): The guidance that is currently available on the website is substantially out of date and does not represent the way in which committees now work, nor does it include up-to-date references to standing orders and other practices. The document before the committee is an attempt to update the existing material. It is part of a suite of guidance documents that we have—there is guidance on public bills, guidance on private bills, guidance on motions and guidance on parliamentary questions.

The guidance is intended to represent how the standing orders are translated into action and it fills in some of the practices that are not detailed in standing orders. It is only guidance and it reflects the current practice. Of necessity, the document has to be flexible. One of the problems with the existing material is that, because it exists in hard copy as well as on the website, it is fossilised and, as procedures and practice change, it has not been possible to update the guidance. However, it is intended that we will publish the new document only on the website and that we will have an updating mechanism so that, as standing orders and practice change—for example, if there were more determinations by the Presiding Officer about the interpretation of certain standing orders—we will be able to update the guidance quickly; in that way, it will always be a useful source of reference.

The guidance is aimed primarily at members, their staff and the clerks, but it will also be available to a wider audience. It will flesh out the way in which the committees work, as that is not immediately obvious on reading standing orders.

The Convener: Are there any questions?

Karen Gillon: I have a comment. I certainly will not be able to sign off the guidance today, because I want to go through it line by line. I am concerned about the fact that guidance in the

Parliament is taking on a role that it should not have. It is being interpreted as rules. Clearly, the guidance is ambiguous. Last week, the position of one clerk in the Parliament on the rules on substitution differed from the position of another clerk.

If we put down on paper something that is no more than a convention or a working practice, I am concerned that it can take on the status of something more than that. I would prefer to spend some time between now and the next meeting going through the guidance to ensure that we are not setting in tablets of stone something that has no right to be set in tablets of stone.

Whatever Elizabeth Watson says, the guidance will be viewed in that way, regardless of the form in which it is produced. I have already been told by another member of the parliamentary staff that something that is in the guidance is a rule, which clearly it is not. However, that could have prohibited me from doing something in the Parliament. Some confusion is being created about the status of guidance in relation to the status of the standing orders.

The Convener: You have every right to go through the document privately line by line and to come back with questions and views at our next meeting.

A point that was made last week was that the guidance merely quotes the standing orders word for word and that, with all due respect, decisions that were made in other committees as a result of that were, quite clearly, wrong. We are endeavouring to sort that out and have written to all the relevant players, who have been invited to reply by tomorrow. I hope that we will have a definite proposal for changing the wording of rule 12.2A at next week's meeting.

Chris Ballance: Like Karen Gillon, I would like another week in which to consider the paper. However, I want to ask now about the status of the guidance. If a member wants to do something differently from what is in the guidance, what happens?

Elizabeth Watson: Practice in committees has always evolved, and there have been changes over the years. Provided that something is competent within the standing orders and the committee agrees to it, the guidance can evolve to reflect that.

One example is the increasing use in committees of round-table sessions rather than formal evidence-taking sessions. Nothing in the standing orders prevents committees from having round-table sessions. They find them a useful way of taking evidence, and the practice is increasing. When the guidance was first issued, it did not refer to those round-table sessions because they did not exist as a practice. They now exist and appear in the updated version of the guidance as a way in which committees obtain information.

Chris Ballance: If I tried to do something and was told that it was against the guidance, what would happen next?

Elizabeth Watson: The real question is whether it is against standing orders. If it is possible within the standing orders, that must be what rules.

Chris Ballance: So the guidance is simply guidance and by no means a limit. If anyone says, "That is not in the guidance," we can say that that is tough and we can still do it.

Elizabeth Watson: As long as the action is within the standing orders and the remit of your committee, it is competent.

Andrew Mylne (Clerk): I want to add briefly to what Elizabeth Watson has said. One or two things that are referred to in the guidance are more mandatory in character but are not reflected directly from the rules. That would include, for example, a ruling by the Presiding Officer on the interpretation of standing orders, or where there is a power in standing orders for someone to make a determination. Whatever the determination happens to be, it has a more mandatory character and that would be reflected in the guidance.

Guidance brings together all the various rules that exist—some of which are standing orders, while others are the sorts that I have just described—together with descriptions of practice, as Elizabeth Watson explained.

Chris Ballance: Is it clear in the guidance what is a determination and what is not?

Elizabeth Watson: When a determination has been made, that is referred to in the guidance.

Cathie Craigie: Would it not be simpler if we made the standing orders that are agreed by the Parliament for the smooth running of committees available to everybody in the same way as they are available to committee clerks and the convener? If we produced them and included updates, there would be no room for conveners or clerks to give different advice. The standing orders already exist and are clear.

To me, the guidance document is unnecessary and leaves open the possibility of an interpretation that is not in accordance with the standing orders. It would be difficult for a member to challenge a convener if they were going by something that was included in the guidance.

Elizabeth Watson: The standing orders are available on the website and in hard copy. The bulk of the guidance document is a description of practice in committees. For example, it describes how the committees normally set their work

programmes, conduct inquiries and invite witnesses. It contains a lot of material that is not included in the standing orders. It fleshes out the standing orders with the practice of the committees.

10:30

Cathie Craigie: This is about opinions and how things are working, rather than questioning the specific document. Surely our committees have a remit. They are unique in their make-up. We should not follow practice just for the sake of it.

Elizabeth Watson made a point about standing orders not preventing committees from holding round-table discussions. The fashion for those discussions was probably left behind a few months ago. At one time, it seemed that every committee was having a round-table discussion because some other committee had taken evidence in that way. I have been on committees that have held those sessions, and I do not know whether the evidence was as good as or better than normal.

The Parliament does not want to set its procedures in stone. We are only seven years old and we want to evolve. By putting things down in black and white, we would be sending out the message to committees, "This is what is expected of you," rather than allowing the committees to form their own way of doing things.

Alex Johnstone: I robustly defend the existence of the draft guidance. Although I have reservations, I take that view because if the document did not exist it would not stop custom and practice evolving around the administration of the standing orders. It would be to our tremendous disadvantage if that custom and practice existed in the ether somewhere and was not defined in black and white. That would make the standing orders open to almost infinite interpretation; I know that some politicians would love to have the opportunity to do that. It is important that the guidance document exists and is open to scrutiny.

The key issue is the status of the document. Some members may have attributed an inappropriate status to the document and consequently confused it with the standing orders. The committee should concern itself with that confusion and how it can be prevented.

Given the significant status of the document, Karen Gillon has a good point; considering the document in greater detail before we comment on it would probably be worth while. However, I strongly defend the existence of the document.

The Convener: Some members wish to go through the document in more detail, which they are at liberty to do. The document explains that it is just guidance and that standing orders are standing orders. Until recently, I was not aware of the existence of the document; most members are unaware of it. It is there for the guidance of committee clerks, not for rules. If somebody is appointed as a committee clerk and wonders, "What the hell do I do next?", the document gives them a start.

Karen Gillon: The issue is the confusion between custom and practice and rules. Custom and practice is being interpreted as rules by many in this building. It is for members to determine how the committees of the Parliament operate within the standing orders. I am concerned that guidance is being interpreted as rules, not just within committees but outwith them.

We need to be clear about the status of such a document and how it might be interpreted by a member of the public who is reading it. The document says:

> "This is largely a formality since, if there is more than one eligible member, they will normally have decided beforehand who is to stand."

Why would we include that in a public document of the Parliament? It is for a committee to decide who its convener is. Putting something like that in the guidance is not helpful. You, as clerks, may believe that that is what should be there, but the rules of the Parliament say that the committee will elect the convener, and not that a wee back-door deal will be done beforehand. You may believe that that is what happens, but the rules of the Parliament say that the Parliament will elect that convener and that the committee has the power to remove the convener. Why would something like the statement that I quoted be included in a document that has official status within the Parliament? That is not what the rules of the Parliament say.

Chris Ballance: Because that is what happens.

Richard Baker: But it is not right.

Karen Gillon: Exactly. We are giving the practice a status that it does not have.

The Convener: We should give the matter further consideration. Elizabeth Watson will attend next week's meeting to guide members through the issue and to answer questions, so that we can make a definite decision on what to do about the document.

Consolidation Bills

10:35

The Convener: Item 3 concerns the procedure for consolidation bills. There are two substantive points and some more minor technical issues. We will deal with the substantive points.

The first issue is whether there should be a parliamentary debate—or at least the opportunity for a debate—at stages 1 and 3 of the bill. If a bill is so trivial or technical that no one is worried about it, it could be nodded through, but there is an argument for having an arrangement for allowing a debate to happen at stages 1 and 3, if members wish. The concern is that the boundaries of a consolidation bill are a subjective issue and there is always the fear that the Executive or an interest group might include in the bill subjects that push the frontiers beyond where they should be. It is suggested that Parliament should have the chance to consider bills to ensure that that does not happen. Do we wish there to be an opportunity for a parliamentary debate at stages 1 and 3 of a consolidation bill, or are we happy with the status quo? I think that it would be helpful for us to have that opportunity. What do members think?

Cathie Craigie: Debate is always useful, but we are talking here about consolidating existing legislation that has presumably been debated by the Parliament. The purpose of consolidation bills is not to change legislation but to make it easier for people to interpret it. Given that the committee is concerned that members should have more time to debate areas where we are changing the law, is it sensible for us to introduce a new arrangement for the sake of allowing someone to stand up to say something? In effect, that is what the arrangement would be. Debate is always good, so I am not digging in my heels on the issue—I just wanted to make that point.

Karen Gillon: I support the option in the second bullet point in paragraph 10 of the paper, primarily because we will sometimes consider consolidation bills that include legislation that we have not debated, because it was in place before the Parliament came into existence. It would be useful for the Parliament to have an opportunity to talk about such legislation. By adding the word "normally", we can determine which bills fall into that category and which do not. That is probably the simplest way of proceeding.

Alex Johnstone: The idea that Parliament should have an opportunity to raise issues at stages 1 and 3 appeals to me. I assume that the aims and objectives of such parliamentary debates will be entirely different at each of those stages. At stage 1, the decision is whether it is necessary to consolidate. At stage 3, the decision is whether the bill does what it set out to achieve. The great fear is that such debates might run for hours and hours in Parliament, but I think that some consolidation bills will ultimately be dealt with without any debate. I would prefer the issue to be put to Parliament wherever possible.

The Convener: Do members wish to support Karen Gillon's proposal that the word "normally" should be added to rule 9.18.5 and 9.18.7? Therefore, instead of stating,

"There shall be no debate on that question",

the rule would state, "There shall normally be no debate on that question." That would still allow the opportunity for a debate. Are members agreed?

Members *indicated agreement*.

The Convener: The second substantive point concerns timing. I understand that those who dealt with the only consolidation bill that we have had so far felt that the bill was introduced very late in the parliamentary session. They felt under a lot of time pressure to push the bill through, which was not felt to be helpful to the mature consideration of the subject. We could have a rule that there should be a cut-off date for consolidation bills similar to the cut-off that we have for members' bills. Alternatively, instead of introducing a new rule, we could publish advice—one might even call it guidance—for the Executive that recommends that consolidation bills should not be introduced when Parliament is very busy with other things but should be postponed until there is some more time, such as at the beginning of a new parliamentary session.

We can either ignore the issue, introduce a deadline or just give an opinion that offers guidance to the Executive.

Alex Johnstone: Perhaps the most constructive way forward would be to issue a strong opinion. Those of us with experience of the legislative race that is the last six months of a parliamentary session realise that that is not a time when people want to deal with consolidation bills. Any future Executive should be encouraged to introduce any consolidation bills as early as possible in the session.

Given that we cannot foresee the future and therefore cannot know whether there might be a need—although I cannot imagine how this could happen—to introduce emergency consolidation legislation, it is probably not appropriate to tie the hands of a future Executive. We should issue strong guidance to the effect that it is useful to the parliamentary process if the Executive can get these things moving early on.

The Convener: Do colleagues agree with that?

Members *indicated agreement*.

The Convener: Right. Those are the two main issues.

Does anyone wish to ask about or comment on any of the technical issues? The recommendations are clear and quite a number of them involve no change or only slight changes to the wording of standing orders.

Karen Gillon: On paragraph 22, why can consolidation bills not include a restatement of the common law if that has been recommended by the Scottish Law Commission?

The Convener: I am not in a position to answer that.

Andrew Mylne: I think that it has been the convention and practice with consolidation bills that they involve bringing together statutory provisions and restating them. There is a difference in status between common law and statute law. If consolidation bills were to start to bring in common law and put it in a statutory form for the first time, they would make a change to the nature of that law that would, in a way, take them beyond pure consolidation. The convention has been that such bills—which do exist at Westminster—are known as codification bills. A codification exercise has wider implications than does pure consolidation and might require a different sort of scrutiny. The presumption behind the rule is that we are dealing only with statute law being restated as statute law.

10:45

Karen Gillon: That is not what it says in paragraph 21, which states:

"Rule 9.18 defines a Consolidation Bill as being 'a Bill the purpose of which is to restate the existing law, whether or not with amendments to give effect to recommendations of the Scottish Law Commission or of the Scottish Law Commission and the Law Commission jointly.'"

The Scottish Law Commission sometimes provides recommendations on matters that are currently covered in common law. I would welcome clarification of that. It might be the case that custom and practice are becoming a rule without adequate scrutiny.

The Convener: That is a technical point on which we will take advice.

Karen Gillon: I have a particular interest in the issue.

The Convener: Do members want to make any other points about these technical matters?

Karen Gillon: What do the current rules say about who can introduce consolidation bills?

Andrew Mylne: At present, it is open to any member to introduce such a bill.

Karen Gillon: Why would you seek to restrict that, if the member could secure adequate support and assistance to be able to introduce such a bill?

Andrew Mylne: It seemed to the officials who considered this over the summer that, in practice, only the Executive—with the input of the Scottish Law Commission—has the necessary resources and expertise to carry out a consolidation exercise. It is hard to conceive of circumstances in practice in which a consolidation bill would not be an Executive bill. The suggestion is that that situation might be formalised. That is one of the recommendations that we have presented to the committee. If the committee does not agree, the rules can remain as they are.

Karen Gillon: If it is custom and practice that only the Executive introduces consolidation bills, perhaps in the future only the Executive will do so. However, there is nothing in the current system to prohibit a member from introducing such a bill in a particular area of interest, if they have the necessary resources and skills or if such resources and skills were supplied to them by an outside body. I would not support anything that would remove that right from members, who have limited rights to introduce legislation as it is. I reject the recommendation in paragraph 24.

The Convener: In practice, I presume that the proposal would be put by the Scottish Law Commission. Do you think that it is important that members should have the right to initiate consolidation bills?

Karen Gillon: There might be an area in which a member has a specific or perhaps constituency interest. Through research and work with various organisations such as the Scottish Law Commission, they might come to the view that a consolidation bill would be appropriate. If they had secured the necessary outside help to introduce the bill, the Parliament should not preclude them from doing so. Given that the rules do not currently preclude them from doing it, I would be reluctant to put before the Parliament a recommendation from officials on which we had not consulted members.

Alex Johnstone: We must remember that in future a member who wants to introduce such a bill might be an experienced lawyer or former Government minister—or both—and might well have the necessary experience.

The Convener: Right. We will not make the recommendation in paragraph 24.

Karen Gillon: I hope that we will not be making the recommendation in paragraph 34, given that we have not yet agreed to the recommendation in paragraph 22 in relation to the definition of a consolidation bill.

The Convener: It may be that the clerks can produce options for the way forward. When will the matter come back to us?

Andrew Mylne: In the light of the view that the committee has taken today, we will need to come back with some further information or advice on the specific points that have been raised. After that, we will bring a draft report to the committee for consideration.

The Convener: Okay. I apologise for missing something out because I was so keen to have a cup of coffee after Tavish Scott and his colleagues left. We still have to decide whether to produce a report on the Transport and Works (Scotland) Bill—I assume that we want to do so—covering our interest in it. Do members want to have a private session at our next meeting or at an early meeting thereafter? Given the differing opinions in the committee, I do not know whether the clerks are in a position to produce a draft report. I ask the clerks whether they will produce a discussion paper, or whether we will just discuss the bill ourselves—what is the best way forward?

Andrew Mylne: We are in the committee's hands. The deadlines are as indicated in the papers. In order to report to the lead committee and give it time to take this committee's views into account in its stage 1 report, this committee needs to report to the lead committee, if possible, before the October recess. That is a fairly tight timescale.

The committee always has to decide whether to consider draft reports in private. If it wishes to have a deliberation before it considers the text of a draft report, that may be done in public or in private, according to the view of the committee.

The Convener: Do we want a debate in public, in which we would try to clarify our views, or should we ask for notes and a draft report, which we would discuss in private?

Karen Gillon: Can I clarify something before I answer your question? Have we started to have weekly meetings? If so, when was the decision to do that made?

Andrew Mylne: Today's meeting is an additional meeting that has been slotted into our normal fortnightly schedule. It was arranged because of the minister's availability.

Karen Gillon: But there are no more additional meetings to be slotted in.

Andrew Mylne: The normal pattern is still for fortnightly meetings.

Karen Gillon: That is all right, then.

The Convener: Do members want to have a round-table discussion in public at our next meeting, following which the clerks will produce a draft report that we will consider in private? Or should we go straight to consideration of the draft report in private?

Karen Gillon: Given the timescales that are involved, we need to move straight to a draft report. The clerks have a fairly good indication of where members are coming from, but I am sure that they will get a better indication at our next meeting.

Chris Ballance: I agree. I assume that it will be a fairly short report, as there is not much for this committee to consider in the bill.

The Convener: Okay. Thanks very much. I should have raised that matter before.

We will now move into private session to discuss a draft report to the Parliament on our review of parliamentary time.

10:53

Meeting continued in private until 12:03.

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