PROCEDURES COMMITTEE

AGENDA

13th Meeting, 2004 (Session 2)

Tuesday 26 October 2004

The Committee will meet at 9.30 am in Committee Room 2.

1. **Private Bills:** The Committee will take oral evidence from—

   Margaret Curran MSP, Minister for Parliamentary Business, Colin Miller, Head of Constitution Unit, Damian Sharp, Public Transport Major Infrastructure Team, Murray Sinclair, Head of Constitution & Parliamentary Secretariat, and Andrew McNaughton, Parliamentary Liaison Unit, Scottish Executive,

   and will identify other prospective witnesses.

2. **Commissioner for Public Appointments:** The Committee will consider a possible structure and timescale for the inquiry and identify prospective witnesses.

3. **Commissioner for Public Appointments – witness expenses:** The Committee will be invited to delegate to the Convener responsibility for arranging for the SPCB to pay, under Rule 12.4.3, any expenses of witnesses in the inquiry.

4. **Timescales and Stages of Bills:** The Committee will consider final outstanding issues raised in the inquiry.

5. **Timescales and Stages of Bills (in private):** The Committee will consider a revised draft report and standing order changes.

Andrew Mylne
Clerk to the Committee
Room TG.01
Ext 85175
andrew.mylne@scottish.parliament.uk
The following papers are attached for this meeting:

**Agenda item 1**
Note by the Senior Assistant Clerk on options for oral evidence
Note by the Senior Assistant Clerk on key issues in the inquiry
Summary of the Transport and Works Act 1992
Summary of the Private Legislation Procedure (Scotland) Act 1936
Submission from Anderson Strathern Solicitors
Submission from the Society of Parliamentary Agents
Letter to the Presiding Officer from the Minister for Parliamentary Business

**Agenda item 2**
Note by the Senior Assistant Clerk on approach to the inquiry

**Agenda item 4**
Note by the Clerk on outstanding issues
Note by the Clerk on implementation
Letter to the Clerk from the Head of the Legislation Team

**Agenda item 5**
Revised draft report (private paper – members only)
Revised draft standing order changes (private paper – members only)
Draft summary of recommendations (private paper – members only)

The following papers are attached for information:

Minutes of the last meeting
PROCEDURES COMMITTEE
Private Bills Inquiry – Oral Evidence
Note by the Senior Assistant Clerk

Purpose

1. This note invites the Committee to decide which objectors they wish to take oral evidence from as part of the current inquiry.

Planned oral evidence sessions

2. The Committee will hear from the Minister for Parliamentary Business, Margaret Curran, at this meeting (26 October). The Conveners of the 3 previous Private Bill Committees, as well as representatives from SNH, Historic Scotland and SEPA, have been invited to give oral evidence at the meeting on 9 November (though SEPA has already indicated it has nothing to add to its written submission). The promoters of the three Private Bills passed by the Parliament have then been invited to give oral evidence on 23 November. The Committee has indicated that it wishes to hear from a number of objectors, and it may be most convenient also to do this at the meeting on 23 November.

Written evidence received

3. We have so far received written evidence from the following individuals and groups who are or were objectors to Private Bills:

<table>
<thead>
<tr>
<th>Name</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Odell Milne</td>
<td>Objector, Edinburgh Tram (Line 1) Bill</td>
</tr>
<tr>
<td>John and Wendy Barkness</td>
<td>Objectors, Edinburgh Tram (Line 1) Bill</td>
</tr>
<tr>
<td>Graham Bisset</td>
<td>Objector, SAK Bill</td>
</tr>
<tr>
<td>Tom Adam, Clackmannan Railway</td>
<td>Objector, SAK Bill</td>
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<tr>
<td>Concern Group</td>
<td></td>
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<tr>
<td>Alison J Bourne</td>
<td>Objector, Edinburgh Tram (Line 1) Bill</td>
</tr>
<tr>
<td>Kincardine Railway Concern Group</td>
<td>Objectors, SAK Bill</td>
</tr>
</tbody>
</table>

Possible Witnesses

4. Of these six, three have been involved with the SAK Bill and three are currently involved with the Edinburgh Tram (Line 1) Bill. Committee members are asked to consider which of these objectors they wish to invite to give oral evidence.

5. The SAK Bill is the only works Bill that has so far progressed through the entire Private Bill process, and therefore provides the obvious focus for oral evidence. By contrast, the Edinburgh Tram (Line 1) Bill has not yet progressed to the Consideration Stage and therefore the experience of objectors to this bill is limited to the objection period and Preliminary Stage only. On the other hand, if Committee members feel that witnesses who
are objectors to the Tram Bill raise interesting and substantive points not raised by other witnesses, they may still wish to hear from them.

6. In light of this, it might be sensible either to take a panel comprising all three SAK Bill objectors or to include two SAK Bill objectors and one Tram Line Bill objector on the panel. Committee members’ views are invited.

Procedures Committee
October 2004
PROCEDURES COMMITTEE

Private Bills Inquiry

Summary of Issues

Purpose

1. This paper sets out a number of key issues which members may wish to consider during the course of the Committee’s inquiry on private bills. The following concerns and key issues have been raised either in the written evidence provided to date during the inquiry or during the discussions at the recent Committee awayday.

General Issues

2. The following general issues have been raised:

- Are Private Bills governed by a wholly Parliamentary process the most effective means of facilitating major infrastructure and works projects?

- Does the complexity and pace of the process put unreasonable pressure on those directly involved, i.e. committee members, clerks, promoters and objectors?

- How successful is the current procedure in terms of scrutiny (both of broader policy and technical detail) and public involvement?

- Is there scope for appointing a “reporter” to carry out some of the detailed consideration on behalf of the Private Bill Committee?

- If some or all of the current process was to be replaced by an extra-Parliamentary process, would this best be modelled on the Transport and Works Act 1992, the Private Legislation (Procedure) Act 1936, the local planning inquiry system, or some other model?

Objections

3. The following specific issues have been raised in relation to the handling of objections:

- Is it appropriate to rely on the promoter to inform prospective objectors about a Private Bill?

- What should the procedure be if it becomes clear after the initial objection period has expired that new prospective objectors have been identified?

- Should the existing lodging fee of £20 be scrapped? Alternatively should there be some method of refunding the fee to objectors whose objections pass the “clear adverse effect” test?
• Is the distinction between lodging an objection to the whole Bill and lodging an objection to specified provisions of the Bills helpful and workable?

• Should there be a requirement on the promoter to consult bodies that would (in similar contexts) be statutory consultees – i.e. SEPA, SNH and Historic Scotland – before the introduction of the Bill?

• Should the current distinction between the admissibility of objections (determined by the clerks) and the test of “clear adverse effect” (decided by the Committee) be retained?

• Should it become a requirement to provide a business or financial case as an “accompanying document” at the outset?

Private Bill Committees

4. The following specific issues have been raised in relation to the composition of Private Bill Committees:

• Are 5 MSPs needed to take part in the Committee or could this number be reduced?

• Is there scope to relax the membership criteria, thereby widening the pool of available members?

• Should Private Bill Committees be able to meet at the same time as meetings of the Parliament?

Preliminary Stage

5. The following specific issue has been raised in relation to Preliminary Stage:

• Should the requirement of the Committee to consider and report on the general principles of the bill at Preliminary Stage be removed, thereby leaving all substantive evidence-taking to Consideration Stage?

Consideration Stage

6. The following specific issues have been raised in relation to Consideration Stage:

• At present Committees have the right to group similar objections and to decide who should speak on behalf of the group. Is this appropriate or should this always be for the objectors themselves to decide?
• Should all those who have objected to the bill have the right to give oral evidence to the Committee if they wish?

• Should more be done to enable objectors to participate more on equal terms with well-funded and professionally-represented promoters? In particular, should objectors be entitled to legal aid (or other free legal representation)?

• What should be the limitations on how far the Bill may be amended in relation to the geographical area it affects (i.e. beyond the “limits of deviation”)? If it is so amended, how should the procedure accommodate the rights of new individuals to object?

Other Issues

7. The following two issues have also been raised in the context of the inquiry. Given that these issues go wider than the scope of the current inquiry, it is suggested that they are instead added to the Committee’s forward work plan and addressed separately.

• Does the Parliament also need specific procedures for handling Hybrid Bills (i.e. Public Bills with some provisions of a private nature)?

• Does the Parliament also need specific procedures for handling “special procedure orders” (i.e. orders under the Statutory Orders (Special Procedure) Act 1945)?

October 2004
PROCEDURES COMMITTEE

Inquiry into Private Bills procedure

SUMMARY OF THE TRANSPORT AND WORKS ACT 1992

Note by the Clerk: We gratefully acknowledge the assistance of the TWA Orders Unit with the preparation of this note.

Background

1. The Transport and Works Act (TWA) came into force in January 1993 and can authorise guided transport schemes and certain other types of infrastructure project in England and Wales. Promoters of schemes of this kind will often need a range of powers to put their scheme into practice – for example, powers to acquire land compulsorily, to stop up streets, to close or divert rights of way, to use land temporarily, to impose penalty fares etc. Under the TWA, a promoter can apply to the Secretary of State (or to the Welsh Assembly Government for schemes that only apply to Wales) for an order giving these powers.

2. Although a TWA order can give very wide powers, promoters may also need to obtain other statutory authorisations to enable all of the proposals in an order to be implemented. For example, often planning permission will also be required. However, the TWA enables the Secretary of State, in making an order, to direct that planning permission be deemed to be granted for development provided for in the order, thus avoiding the need for a separate planning application. Where other statutory consents are needed for a scheme, these are usually sought and considered alongside the TWA order (since the Secretary of State would not wish to make an order without being satisfied that the scheme is capable of being implemented).

3. Because of the effect that TWA schemes can have on people and the environment, applications for TWA orders follow a procedure that allows any interested party to have their say before the Secretary of State or the Welsh Assembly Government make their decision. As most TWA order applications require determination by the Secretary of State for Transport, the TWA Orders Unit of the Department of Transport oversees the operation of the TWA process generally. The TWA Orders Unit takes the lead role in advising on procedures, working up proposed changes to the legislation and issuing relevant guidance. The TWA Orders Unit currently has 12 staff, supported by 3 lawyers.

4. There are statutory rules of procedure for making applications and objecting to them (“the Application and Objections Procedure Rules”), and relating to the holding of public local inquiries into TWA applications (“the Inquiries Procedure
A detailed procedural guidance is published by the TWA Orders Unit, *A Guide to TWA Procedures*, and was recently revised in July 2004.

**Pre-application Stage**

5. The Applications and Objections Procedure Rules require the applicant to notify certain bodies (for example, relevant local authorities) at least 28 days before an application is made. This is not, however, intended to be a substitute for full consultation with interested parties well in advance of application, which is strongly recommended by the TWA Orders Unit in its guidance. It is expected that the larger the project, the more critical it will be for meaningful consultations to be conducted. It is also a statutory requirement for the applicant to arrange for newspaper notices to be published not more than 14 days before the application is made, giving notification of their intention.

**Application Stage**

6. The TWA does not exclude anybody from making an application for a TWA order. Typical applicants are Network Rail, passenger transport executives, London Underground, local authorities, private operators of heritage and leisure railways and private companies seeking to develop guided transport schemes or works that interfere with navigation rights (for example, piers, tunnels, off-shore wind farms).

7. An applicant must pay a fee, in accordance with a fees table that is prescribed in the Applications Rules, that is relative to the size of the works scheme requested and whether compulsory land acquisition is required. Broadly speaking, the fees are set at a level designed to reflect the Secretary of State’s (or the Assembly’s) costs in processing applications through to determination.

8. Upon making an application, the applicant is required to give notice to owners and occupiers of property to be acquired, to publish a notice in local newspapers, to serve application documents on certain specified parties and to otherwise make all the application documents available for inspection in the areas affected. An application will be acknowledged by the TWA Orders Unit and, if it appears that the Rules have not been complied with in some way, the Unit will take this up with the applicant. Although a failure to comply with the Rules will not necessarily render an application invalid, it may well delay the processing of the application, for example, if further notices have to be served.

9. A large array of documentation is required to be sent with an application, however, the exact material will of course depend upon the type of application being made. The typical documents include draft order and explanatory memorandum, plans and cross-sections, an Environmental Statement, the application fee, and proposed costings, funding and timetabling arrangements for the scheme. To assist applicants' legal advisers in preparing a draft order,

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the Secretary of State has published model clauses for TWA orders relating to railways and tramways (SI 1992/3270) although these are currently being updated to reflect changes in legislation and policy since 1992.

**Objections Stage**

10. The notices referred to above will give a period in which people can submit objections, or make other representations, to the Secretary of State, through the TWA Orders Unit. The objection period must be no less than 42 days (6 weeks) from the date of the application.

11. The TWA Orders Unit registers all objections and representations, giving each an individual reference number and forwards copies to the applicant.

12. If objections have been received to an application, the Secretary of State must decide, within 28 days of the end of the objection period (known as the “operative date”), whether to hold a public inquiry or a hearing, or to carry out “exchanges of written representations” between everyone involved. The operative date may be deferred by the Secretary of State to allow more time to consider the way forward, for example, where it is marginal whether or not a public inquiry is necessary and the applicant feels that there is a reasonable prospect of securing the withdrawal of a sufficient number of objections to affect that decision. Or, alternatively, there may be very few objections and the applicant may request an extension to see if all objections can be negotiated away.

**Public Inquiry**

13. A public inquiry is likely to be arranged where there are numerous objectors or where statutory objectors (either local authority objectors or those whose land or rights in land would be bought compulsorily under the order) exercise their right to be heard. The public inquiry process is modelled on those used for planning inquiries and allows all sides to have their say. An inspector, appointed by the Secretary of State, holds the inquiry and reports to the Secretary of State with conclusions and recommendations. Where new evidence is presented after the closure of an inquiry, the Secretary of State will consider whether this is important enough to affect the decision. If so, it will need to be referred to those who took part in the inquiry and the Secretary of State may decide to re-open the inquiry (although that would be exceptional).

**Hearing**

14. A hearing is a less formal alternative to a public inquiry, being more like a round-the-table discussion. There are few TWA cases where a hearing is likely to be suitable, and none has yet been held for a TWA case. As with a public inquiry, an inspector will report to the Secretary of State following the conclusion of the proceedings.

**Exchange of written representations**

15. If the number of objectors is small, no statutory objector wants to be heard and the case appears not to raise any complicated issues, the Secretary of State will carry out exchanges of written representations between the applicant and
objectors. The procedure is brought to a close when enough information has been provided to decide the case; in practice, two rounds of exchanges between the parties will usually suffice.

**Parliamentary approval**

16. Very occasionally, a scheme may be considered to be so big and so important as to be of “national significance” (e.g. a major new railway line crossing a large part of the country). In that case, the TWA requires the scheme to be referred to Parliament for approval in principle, before it can go to a public inquiry. The Secretary of State must arrange notification to those parties involved in the application within 56 days of the application being received, allowing MPs and peers time to familiarise themselves with the proposals. A debate will then be scheduled in each House, at least 57 days after notification occurred. If both Houses pass a resolution approving the general principle of the scheme, the order will then go on to a public inquiry; but if either House rejects it then the application cannot proceed any further. This Parliamentary approval procedure has only been used twice in England since the TWA came into force in January 1993, which indicates the very high threshold that has been applied to the term “national significance”.

**Decision Stage**

17. The decision stage follows where the public inquiry, hearing, or written representations procedure has been completed, or where all objections have been withdrawn. The Secretary of State may decide to either make the order, with or without modifications, or to refuse it. A letter is sent to all parties involved in the application, giving full reasons for the decision. As a TWA decision can be challenged in the courts, it is necessary for the reasons given for the decision to be robust enough to withstand a challenge, if made.

**Modifying an order**

18. In coming to a decision on an application, it is necessary for the Secretary of State not just to consider the merits of a scheme but also to consider whether all of the provisions in a draft order are necessary, appropriate and suitably drafted for a Statutory Instrument. This is where input from lawyers is particularly important and, in practice, it is unusual for the Secretary of State to make an order without some modifications, even if these are mainly of a relatively minor drafting nature. Where the Secretary of State wishes to make modifications that would substantially change the proposals of the application, affected parties must be given a prior opportunity to comment.

19. However, it would not be appropriate to make changes that were so substantial that the Secretary of State would in effect be approving a fundamentally different proposal from that which had been applied for. If it were considered that the proposal as submitted was seriously flawed, and that it could only be put right by making changes that would result in a fundamentally different proposal, then the proper course of action would be to refuse the application.

**Refusing an application**
20. The Secretary of State may decide, after hearing the evidence from the applicant and any objectors as part of a public inquiry, hearing or exchange of written representations procedure, that the order should not be made because the scheme is unacceptable on its merits. The Secretary of State can also refuse an application on the basis that the authorisations sought in the order could be more appropriately be obtained by other legislative means (although where this is so, it should be picked up much earlier in discussion with the TWA Orders Unit).

Making an order
21. If the Secretary of State decides to make a TWA order, with or without modifications, the TWA Orders Unit of the Department of Transport will publish a notice in the London Gazette and the applicant will do the same in local newspapers. The TWA order (including any necessary modifications) is then signed, and normally comes into force 3 weeks later. It is possible (but rare) for the Secretary of State to make a determination in respect of only some of the proposals applied for, while (for example) deferring consideration of others.

TWA Orders and the UK Parliament
22. TWA orders are normally determined by the Secretary of State without any scrutiny by Parliament. The order itself is made in the form of a statutory instrument, but is not subject to either the negative or the affirmative parliamentary procedures.

23. However, Parliament does have a statutory role in the TWA order making process where the application relates to proposals which, in the opinion of the Secretary of State, are of national significance (see above) or where special parliamentary procedure (SPP) applies. The SPP procedure only arises in very exceptional circumstances (so far, it has only arisen once in the 12 year operation of the TWA) such as where open space land is to be compulsorily acquired under an order without suitable land being offered in exchange, or where National Trust land is being compulsorily acquired. In practice, applicants will make every effort to avoid going through the SPP process, as it is liable to bring extra delay and uncertainty after an order has been made.

Timescales
24. There are no mandatory time limits within which the Secretary of State must make or refuse an application for a TWA order. The TWA Orders Unit has, however, published in its guidance the following target timescales for issuing the Secretary of State’s decision to those involved in the application:

- No objections – 3 months after the end of the objection period.
- All objections withdrawn – 3 months from the date on which the last objection is withdrawn.
- Written representation procedure – 4 months after the end of the exchange of written representations.
- Hearing procedure – 4 months after the report of the hearing is received.
• Public inquiry procedure – 6 months after the report of the inquiry is received.

Review of system for making TWA orders

25. The Department for Transport, Local Government and the Regions appointed MVA, a consultancy firm, to review the efficiency and effectiveness of the TWA. Some of the main recommendations of MVA’s report, published in February 2002, were:

• The extension of powers under the TWA to provide a “one-stop shop” for orders embracing consents, closures and compulsory purchase currently under the provisions of other Acts and procedures (e.g. to enable a TWA order to authorise station, network and other railway closures currently required to be authorised under the Railways Act).

• More comprehensive consultation by promoters prior to submission of an application and encouragement of direct negotiation as the best means of resolving objections, with mediation an option.

• The Application and Objections Procedure Rules should be extended to require that any application for a TWA order includes a summary report of the pre-consultation undertaken by the applicant and a statement of the aims of the project.

• The Inquiries Procedure Rules should be revised and updated to take account of changes in the equivalent rules for planning cases.

• The Applications and Objections Procedure Rules and the Inquiries Procedure Rules should be amended to enable service of documents to be effected electronically where persons expressly agree to accept service by this method.

• The model clauses should be updated to reflect changes to legislation and policy; and they should be regularly reviewed so that they retain maximum relevance.

• Parliamentary approval should not be confined to projects of national significance in view of the restrictive interpretation of that term. Parliamentary approval should instead be required for projects of regional significance.

• There should be improved guidance on the TWA, using case studies.

Department for Transport action following review

28. Following consideration of the MVA report, the Department for Transport (DfT) has been taking forward a number of recommendations which require amendment to the relevant secondary legislation:
• Following public consultation in late 2003, new Inquiries Procedure Rules for TWA cases came into force on 23 August 2004, and new Applications and Objections Procedure Rules are currently being drafted.

• Public consultation is currently taking place on proposed new Model Clauses, taking account of changes in policy and legislation since they were last published in 1992.

• The TWA Guide to Procedures has been comprehensively revised and updated, with particular emphasis on the importance of proper consultation and preparation before an application is made, so as to minimise delays during the statutory process.

30. Because of the need to prioritise effort by concentrating on changes which are most likely to deliver real benefits within a reasonable timescale, DfT has focused on improving the secondary legislation and its guidance, rather than taking forward changes to the Act itself. DfT was not in any event convinced that some of the recommended changes to the primary legislation, such as making the TWA process a “one stop shop”, would deliver worthwhile benefits, as there would be a serious risk of over-complicating an already complex process.

31. To the extent that it is accepted that some changes to the Act would be beneficial, this has not been seen as a priority given other competing pressures on the UK Parliament’s legislative programme. However, were a TWA equivalent to be introduced in Scotland, this would present the opportunity to discuss with DfT officials in the TWA Orders Unit what changes they would now make to the Act if they were starting afresh.
Annexe A: Data on TWA applications up to 2001

The following data was prepared by MVA as part of its review of the TWA procedure. As a result, the data is correct up to 21 November 2001.

Summary of applications

Total number of applications received under the TWA is 85. Of these:
- 30 were taken through a public inquiry;
- 15 were considered by written representations;
- 7 were withdrawn;
- 2 were at the pre-inquiry stage; and
- 31 were unopposed.

Two applications were taken through the Parliamentary Stage as they were considered to be of national significance:
- the Central Railway draft order was rejected by the House of Commons;
- the Channel Tunnel Rail Link (Stratford Station) order was accepted by both Houses.

Times for processing applications

The average times for processing applications is given in the table below, which only includes orders for which a decision has been made. Times are given in months, with the range in brackets.

<table>
<thead>
<tr>
<th>Type of process</th>
<th>Total time from application to SoS decision</th>
<th>Time for inquiry</th>
<th>Time from end of inquiry to receipt of Inspector’s report</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public inquiry</td>
<td>26 (12-53)</td>
<td>1 (0-3)</td>
<td>3 (1-10)</td>
</tr>
<tr>
<td>Written representation</td>
<td>16 (8-31)</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Unopposed</td>
<td>11 (3-24)</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Average</td>
<td>16 (3-53)</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

Referring to the target times set by the TWA Orders Unit for the Secretary of State to arrive at the decision on whether to ‘make’ an application (see paragraph 27), the average achieved times (in months) are as follows:

<table>
<thead>
<tr>
<th>Type of process</th>
<th>Target time</th>
<th>Average achieved time</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public inquiry</td>
<td>6</td>
<td>13</td>
</tr>
<tr>
<td>Written representation</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>Unopposed</td>
<td>3</td>
<td>5</td>
</tr>
</tbody>
</table>

The main reason for these target times not being met was given as insufficient resources on the part of the TWA Orders Unit and the then Department for Transport, Local Government and the Regions’ Legal Directorate. The report recognised, however, that this issue had been addressed by increasing staff resources on TWA work during 2001.
Annexe B: Data on TWA applications 2001-2004

The following data continues on from Annexe A by dealing with the position since 21 November 2001. This information has been provided by the TWA Orders Unit in the Department for Transport and is correct up to 20 October 2004.

Summary of applications received since 21 November 2001

In total, 27 TWA applications have been received since 21 Nov 2001. Of these:
- 15 have been or will go through a public inquiry;
- 7 have been or will be considered by written representations;
- 3 were unopposed;
- 1 has only recently been received; and
- 1 was withdrawn.

No applications made since Nov 2001 have been taken through the Parliamentary Stage for considering schemes of national significance:

Times for processing applications

The average times for processing applications decided since 21 Nov 2001 is given in the table below. Times are given in months, with the range in brackets.

<table>
<thead>
<tr>
<th>Type of process</th>
<th>Total time from application to SoS decision</th>
<th>Time for inquiry</th>
<th>Time from end of inquiry to receipt of Inspector’s report</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public inquiry</td>
<td>32 (15-48)</td>
<td>5 (1-13)</td>
<td>6 (2-18)</td>
</tr>
<tr>
<td>Written representations</td>
<td>18 (10-31)</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Unopposed</td>
<td>7 (6-8)</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td><strong>Average</strong></td>
<td><strong>25 (6-48)</strong></td>
<td><strong>-</strong></td>
<td><strong>-</strong></td>
</tr>
</tbody>
</table>

Referring to the target times set by the TWA Orders Unit for the Secretary of State to arrive at the decision, the average achieved times (in months) are as follows:

<table>
<thead>
<tr>
<th>Type of process</th>
<th>Target time</th>
<th>Average achieved time</th>
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</thead>
<tbody>
<tr>
<td>Public inquiry</td>
<td>6</td>
<td>10</td>
</tr>
<tr>
<td>Written representation</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Unopposed</td>
<td>3</td>
<td>3</td>
</tr>
</tbody>
</table>

**Note**

In the figures for inquiry cases, three wholly exceptional cases have been omitted because they would distort the averages. Two were linked to the Heathrow Terminal 5 inquiry, which ran for four years and where the TWA cases could not be decided in advance of the many other applications. The other case (decided by DEFRA) took over six years to decide because of a need for long-running written exchanges after the inquiry.
PROCEDURES COMMITTEE

Inquiry on Private Bills

Summary of the Private Legislation Procedure (Scotland) Act 1936

Background

1. The Private Legislation Procedure (Scotland) Act 1936 (“the 1936 Act”) provided, until devolution, the framework for Scottish private legislation. It was not a new system even in 1936, since the Act merely consolidated existing enactments, and although it has since been further amended, it was generally regarded as needing reform before 1998. All the same, it is a well-tested system that may offer some lessons for the Committee now, in considering options for legislation to remove some or all of the responsibility for private legislation from the Parliament.

Outline of the Act

2. In outline, the system provided for by the 1936 Act is as follows:

- The Act applies to any public authority or other persons (referred to as “the petitioners” – in effect, the promoter) who “desire to obtain Parliamentary powers in regard to any matter affecting public or private interests in Scotland for which they would have been, before the commencement of the Private Legislation Procedure (Scotland) Act 1899, entitled to apply to Parliament by a petition for leave to bring in a Private Bill” (s.1(1)).

- The petitioners must apply to the Secretary of State for Scotland inviting him or her to issue a “Provisional Order”. This can be done only on 27 March or 27 November each year. In practice, the petitioners submit a draft of the Order they would like made, together with a range of supporting documentation required under the “General Orders” (subordinate legislation under the 1936 Act, the equivalent of Standing Orders). In the case of any “works” application, this documentation would include — maps, plans, books of reference, environmental statement etc., similar to those required as accompanying documents under Chapter 9A. The petitioners would also be required (again, by General Orders) to notify relevant persons, place advertisements in newspapers, etc. — including informing them of their right to “petition against” (i.e. object to) the draft Order.

- Copies of the draft Provisional Order must be deposited in both Houses of Parliament, and with various government departments (depending on the nature of the draft Order). In Westminster, responsibility for considering them rests with “the two Chairmen” (i.e. the Chairman of Ways and Means in the Commons, the Chairman of Committees in the Lords), who are required to report on the draft Order — including on whether it complies with the General Orders.
• If it seems to the Secretary of State and the two Chairmen that the powers sought are to operate outside as well as within Scotland and that a single enactment is appropriate to provide them, the petitioners may be required to proceed instead by Private Bill (under s1(4) of the 1936 Act). In addition, if the two Chairmen feel that the draft Order has a big enough impact outside Scotland or raises issues of public policy of “novelty and importance”, they may recommend that it should be dealt with by Private Bill, and the Secretary of State shall refuse to make the Order sought. (In either case, the petitioner must then proceed by standard Westminster Private Bill.)

• The Secretary of State is required to order an inquiry to be held if there are outstanding petitions against the draft Order or he otherwise thinks that an inquiry is necessary. If there are no petitions against (or they are withdrawn), the Secretary of State may make the Order – either as sought, or with modifications recommended by the Chairmen, or certain other government departments or agencies.

• Where an inquiry is ordered, it is chaired by three or four Commissioners, who are usually a mixture of members of three panels established for the purpose – a panel of MPs, a panel of peers and an extra-parliamentary panel nominated by the Chairmen and the Secretary of State. Commissioners must not have any “personal or local interest” in the draft Order.

• The inquiry is held in a relevant locality chosen by the Commissioners, and in public. It hears from the petitioners in support of the draft Order and from petitioners against it, in either case in person or through an agent or counsel, and both petitioners and objectors may call witnesses. The Commissioners also have powers to call witnesses and require documents to be produced, and may apply to a court for an order of contempt.

• The Commissioners report to the Secretary of State, recommending that the draft Order be made as drafted or with specified modifications, or that it be refused. The Secretary of State then makes the Order with or without those modifications (or modifications recommended by the Chairmen, or government departments or agencies) – or refuses to do so if that was the recommendation.

• If an Order is made – whether or not there has been an inquiry beforehand – it cannot come into force unless it is “confirmed” by Parliament. That is done by the Secretary of State introducing a “Confirmation Bill” in the Commons which, if enacted, is deemed to be a Public Act (because introduced by the government).

• If there was no inquiry, the Confirmation Bill is deemed on introduction in each House to have completed Second Reading and Committee Stage – and so only goes through Report and Third Reading, usually without debate at either stage. Such a Bill can pass through both Houses in only 2-3 weeks.
• If there was an inquiry, the Confirmation Bill may be petitioned against within 7 days of introduction, and any member may then move immediately after Second Reading to have it referred to a Joint Committee of both Houses. If that is agreed to, the proceedings are similar to those on an opposed Private Bill, and involve further argument, cross-examination etc. between petitioners and objectors. Otherwise, the Confirmation Bill proceeds much as if there had been no inquiry on the draft Order in the first place.

3. From the above it can be seen that the 1936 Act system differs from the Transport and Works Act system in the following main respects:

• it applies to all applications, not just those involving “works” projects;
• Parliament is involved at an earlier stage (albeit largely limited to procedural matters) and in every instance, not just at the end of the process and exceptionally;
• the local inquiry can be carried out by members of Parliament;
• Parliament can amend the legislation and does not just have the either/or choice of rejecting or accepting it.

Since devolution

4. The Scotland Act (Schedule 8, para 5) amended the 1936 Act by adding a new subsection to the key first section of the Act, namely:

“This section shall not apply where any public authority or any persons desire to obtain parliamentary powers the conferring of which is wholly within the legislative competence of the Scottish Parliament.”

5. As a result, the 1936 Act route is currently unavailable in relation to any project that relates wholly to devolved matters. Such projects must therefore proceed as Private Bills in the Parliament, and (until an ASP provides otherwise) must be dealt with in a manner governed entirely by standing orders.
PROCEDURES COMMITTEE

Private Bills inquiry

Submission from Anderson Strathern, Solicitors

Introduction

1. The Procedures Committee has issued a call for written evidence from all interested parties for its inquiry into the Private Bill procedures of the Scottish Parliament. Anderson Strathern has an interest in the Private Bill process arising from its direct experience of acting for the promoters of the first two railway Bills to be introduced in the Scottish Parliament – the Stirling-Alloa-Kincardine Railway and Linked Improvements Bill and the Waverley Railway (Scotland) Bill. Although the Waverley Railway (Scotland) Bill is in its early stages of parliamentary consideration, the Stirling-Alloa-Kincardine Railway and Linked Improvements Bill completed its parliamentary stages in July 2004 and has now received Royal Assent. Anderson Strathern is also involved in providing legal advice on two major infrastructure projects which will require private legislation in the near future.

2. We note that the Procedures Committee, in its inquiry into the Private Bill procedures of the Scottish Parliament, will consider what scope exists to streamline the current process, particularly in relation to “works” Bills of the kind that Anderson Strathern has been, and continues to be, involved in. We also note that the Committee will consider specifically what options exist to reduce the Parliament’s responsibility for such Bills, including the possibility of adopting an equivalent procedure to that provided by the Transport and Works Act 1992.

3. An equivalent to the Transport and Works Act procedure would involve the adoption of an Order-making process to authorise infrastructure projects. Such a procedure has been adopted in England and Wales under the Transport and Works Act 1992. Whilst the Committee will wish to consider issues of effectiveness and efficiency of procedure in considering the streamlining of private legislation, the Committee may also wish to balance such considerations against other over-arching issues of transparency, accountability, scrutiny and democratic participation.

4. The T&W Act procedure could be expected to result in a greater role for the Scottish Executive in authorising powers and a reduced role for the Scottish Parliament. Thus, whilst facilitating some streamlining of process and a reduction in claims on MSPs’ time, a T&W Act procedure for Scotland could lead to a reduction in the transparency, openness, scrutiny and participation that is possible through the use of a parliamentary committee, meeting (for the most part) in public session to consider the powers sought by the promoter of a Private Bill and the objections made to that Bill by members of the public.
5. If the Parliament wishes to maintain its leading role in the consideration of private legislation, an alternative to the adoption of an Order-making process would be to look at the procedure as it operates at present and identify areas which could be delegated or procedures which could be adapted. Based on our experience of providing legal advice to the promoters of private legislation in the Scottish Parliament, and also our experience of adjudication procedures more generally, we have summarised below our views on how the Parliament might reform its own procedures at Preliminary Stage, Consideration Stage and Final Stage in order to streamline its consideration of private legislation.

**Preliminary Stage**

6. Under the Parliament’s Standing Orders,¹ at Preliminary Stage a Private Bill Committee is required to:

   (a) consider and report on whether the Bill should proceed as a Private Bill;
   (b) give preliminary consideration to objections and reject any objections where the objector’s interests, in the Committee’s Opinion, are not clearly adversely affected by the Bill; and
   (c) consider and report on the general principles of the Private Bill.

Consideration is given below to possible reforms to each part of the Preliminary Stage process in Committee:

**Whether the Bill should proceed as a Private Bill**

7. In determining whether a Bill should proceed as a Private Bill, the Committee is required to consider whether the Bill is in accordance with Standing Orders, specifically:

   • whether the promoter is an individual person, a body corporate or an unincorporated association and whether the purpose of the Bill is to obtain for the promoter particular powers or benefits in excess of or in conflict with the general law; and

   • whether the accompanying documents lodged with the Private Bill enable the Parliament to undertake proper scrutiny of that Bill.

8. Our experience of the current Private Bill process is that the task of considering and reporting on whether a Bill should proceed as a Private Bill is potentially very time-intensive, involving a large range of technical issues and requiring hundreds of pages of written evidence to be submitted to the Committee. Written evidence at this stage may include technical submissions prepared by environmental scientists, transport specialists, planning specialists, economists, legal specialists and a range of other specialist consultants employed by the promoter.

9. Not only are promoters required by the Parliament to submit accompanying documents as defined in the Standing Orders, promoters are also now

¹ Rule 9A.8, Standing Orders of the Scottish Parliament
required to answer a range of questions formulated by the Committee prior to oral evidence commencing at Preliminary Stage, and to provide written evidence addressing each of the points raised in relation to accompanying documents in each objection to the Bill. It is understood that this additional information is now being sought in order to shorten the amount of time that needs to be spent taking oral evidence in Committee. However, this approach has created its own pressures on MSPs, Clerks and promoters alike. Our experience of the current process is that Clerks of the appointed Private Bill Committee and the promoter’s team have worked diligently and under considerable time pressure to ensure the material is available for consideration by the Committee.

10. In terms of the large volume of technical information requiring to be considered before the Committee commences Preliminary Stage oral evidence, it is difficult to see how MSPs, with the many competing demands on their time, can realistically be expected to read and digest all information relevant to the decisions that they are required to take in relation to whether the Bill should proceed as a Private Bill.

11. In terms of an alternative approach to that currently used by a Private Bill Committee to scrutinise accompanying documents and establish sufficiency and compliance with Standing Orders, we believe that a workable solution exists which would streamline the current process, whilst retaining the overall involvement of the Scottish Parliament.

12. Scrutiny of the accompanying documents and all associated documents submitted to a Private Bill Committee could be undertaken by a Reporter appointed by the Committee for that purpose. The Reporter would be concerned with compliance with Standing Orders and sufficiency of the accompanying documents. The Reporter would also be involved in investigating and determining any issues arising from objections in relation to competency of accompanying documents. The Reporter would then report back to the Committee on his or her findings.

13. A parallel for the adoption of a system of Reporters for Private Bills can be found elsewhere, for example, the use of Reporters in planning inquiries. A Planning Reporter presides at a planning inquiry and presents a report to the Scottish Ministers thereafter, for a decision. Planning inquiries are governed by the Scottish Ministers’ Rules. The application of the Scottish Ministers’ Rules is fully explained in Circular 17/1998 and could provide the basis for a robust framework for the consideration of Private Bills. The Scottish Ministers’ Rules regulate access to the inquiry and require an adversarial procedure without a secondary inquisitorial role being performed by the Reporter, all with sufficient formality to ensure that the arguments for and against a proposal are sufficiently tested.

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2 Town and Country Planning (Inquiries Procedure) (Scotland) Rules 1997, as amended
3 Circular 17/1998, Planning Inquiries/Procedures and Practice
14. The use of Reporters by the Scottish Parliament as part of its Private Bill procedure could provide an appropriate level of efficiency and effectiveness in the scrutiny of the complex and technical issues which might arise during the consideration of a Private Bill.

Preliminary consideration of objections

15. Although admissibility of objections, in terms of the criteria set out at Rule 9A.6.5 of the Standing Orders, is settled at the time objections are lodged (based on assessments made by the Clerks and not by the Committee), the Committee at Preliminary Stage must give preliminary consideration to objections in terms of whether each objection is based “on a reasonable claim that the objector’s interests would be adversely affected by the Bill”\(^4\) and must reject any objection where the objector’s interests are “not clearly adversely affected by the Bill”.\(^5\) The Committee has discretion to provide an objector with an opportunity to be heard before a decision is reached on whether his or her interests are adversely affected.

16. If a Private Bill Committee appointed a Reporter to consider accompanying documents, we consider that the Reporter could also be tasked with the Committee’s current role of considering whether each objection is in fact based on a reasonable claim that an objector’s interests would be adversely affected by the Bill, with a discretionary power for the Reporter to hear from any objector, in a public forum, before reaching a decision on affected interests.

Consideration and report on the general principles

17. We consider that there is an alternative procedure for the consideration of evidence on the general principles of a Private Bill at Preliminary Stage to that currently in use. This alternative would entail the use of a Reporter to decide what written evidence needs to be submitted to the Parliament, to decide whether any oral evidence is required, to invite witnesses and hear oral evidence, and, ultimately, to provide a report to the appointed Private Bill Committee setting out recommendations in respect of whether the general principles should be agreed. Such a report would need to include a summary of evidence taken and an annex with a full transcript of evidence. Committee members could either approve or reject the findings of the report, or decide to postpone a decision until they had taken further evidence, either written or oral. This option would provide a more efficient option than the status quo, although there may be a requirement by MSPs to take additional evidence. However, in terms of disadvantages, this option could be perceived as reducing the level of transparency and accountability associated with the current process.

18. Alternatively, the Parliament may wish to retain the current part of the Preliminary Stage process as it applies to the consideration of the general principles of a Private Bill by a Private Bill Committee. This option would be


\(^5\) Rule 9A.8.2, Standing Orders of the Scottish Parliament
based on the premise that MSPs are best-placed to judge decisions of policy in relation to the powers being sought in Private Bills and the many policy issues relating to a particular Bill, e.g. transport, environmental, social and economic issues. Whilst retaining this aspect of the current procedure would require MSPs on the Bill Committee to be directly involved in evidence-taking, and would therefore constitute a call on their time, with possibly fewer opportunities to meet to hear evidence than a dedicated Reporter, this process would enable greater transparency and public accountability, in line with the founding principles of the Scottish Parliament, as set out by the Consultative Steering Group.

**Preliminary Stage consideration by the Parliament in plenary session**

19. Overall, we think that the Preliminary Stage consideration of a Private Bill by the Parliament as a whole should be retained, as all elected representatives should be afforded the opportunity to debate and vote on whether the general principles of a Bill should be approved. In the interests of transparency, all information provided to a Reporter and to a Private Bill Committee should be made available throughout the Preliminary Stage in committee, to enable MSPs who are not on the Private Bill Committee to monitor developments and to keep themselves informed of evidence as it is submitted to the Reporter or the Committee.

**Consideration Stage**

20. If the Parliament as a whole agrees to the general principles of a Private Bill, the Bill is currently sent back to the appointed Private Bill Committee for Consideration Stage. Consideration Stage is a two-part stage involving detailed consideration of the provisions contained within the Bill, followed by a consideration of any proposed amendments. Consideration of the details of a Bill includes the hearing of oral evidence from the promoter and from objectors.

21. Whilst our experience of the operation of the Consideration Stage of a Private Bill was one of proceedings being conducted in an efficient manner, supported by considerable efforts on behalf of the promoter, the Clerks and objectors to provide the Committee with all the information required to undertake the detailed scrutiny, in the most condensed format possible, the technical nature of the process undeniably must have placed time pressures on MSPs in terms of reading into the subject matter and undertaking evidence hearings.

22. An alternative approach to the current Consideration Stage procedure would again entail the involvement of a Reporter, who could conduct a Consideration Stage inquiry similar to the public inquiries that form part of planning procedures. We consider that such an inquiry should be held in public, with all evidence noted in transcript form and with the opportunity for the promoter and objectors to give evidence and to cross-examine other witnesses. The outcome of such an inquiry would be a report to the appointed Bill Committee, containing recommendations. The Committee could either decide to proceed to the second part of Consideration Stage without taking further evidence, or could call for further evidence if it so wished.
23. At the second part of Consideration Stage, once the Clerks have received proposed amendments to a Private Bill, the Reporter could explain to the Committee the policy reasons behind the proposed amendments and the legal effect intended by them. The Committee would then meet to discuss the proposed amendments, call for any evidence they considered necessary and decide whether to accept or reject the amendments.

Final Stage

24. We do not consider that any procedural changes should be made to the Final Stage of the Private Bill process as it operates at present. However, we believe that, at the stage at which all MSPs are involved in debating and voting on amendments to a Private Bill, they would benefit from additional information in respect of the policy reasons behind amendments made at Consideration Stage and any further amendments proposed at Final Stage. We therefore consider that, in addition to the Convener of a Private Bill Committee proposing a motion to the Parliament that a Bill be passed, all MSPs should be provided by the Reporter with an explanatory note on each of the Consideration Stage amendments and each of the proposed Final Stage amendments, in terms of the policy or legal reasons underpinning them.

Conclusion

25. As one of the few law firms in Scotland to have been involved directly in the Private Bill procedures of the Scottish Parliament on "works" Bills, we trust that our response to the Procedures Committee’s call for evidence on how it might streamline procedures is of assistance to the Committee. Drawing on our experience of this and other judicial and quasi-judicial hearings, we have sought to identify elements of the process where efficiencies might be gained.

26. In conclusion, we consider that considerations of competence, compliance, affected interests of objectors, the detail of objections, the detail of amendments and the technical provisions of a Private Bill can be made most effectively by an expert individual appointed by and accountable to the Parliament and whose time can be devoted solely to such considerations, rather than a committee of non-experts upon whose time there are many other demands. The appointment of a Reporter does not significantly diminish public accountability in this regard, provided there are sufficient reporting requirements to the Parliament in place and that proceedings before a Reporter are conducted in public session, are human rights compliant and are fully transcribed.

27. In relation to the consideration of general principles at Preliminary Stage by a Private Bill committee, we believe that the Parliament has two options. The retention of the existing role of the Bill Committee in hearing evidence directly, and reporting to the Parliament on the basis of that evidence, has advantages in respect of accountability and transparency, but disadvantages in terms of the additional pressure on MSPs’ time and overall efficiency. Alternatively, the use of a dedicated Reporter for each Private Bill would permit streamlining of the Private Bill process, with the appointed Reporter taking evidence and
reporting to the Bill Committee, with recommendations. However, the latter option would also impact upon transparency and accountability. The Parliament will therefore need to consider the balance it wishes to strike between accountability and transparency on the one hand, and efficiency of process on the other.

28. We would be very willing to provide the Procedures Committee with any further information it may require in the context of its inquiry into the Private Bill procedures of the Scottish Parliament.

Anderson Strathern, Solicitors
18 October 2004
PROCEDURES COMMITTEE

Private Bills inquiry

Submission from the Society of Parliamentary Agents

Introduction

1. The Society of Parliamentary Agents welcomes the opportunity to contribute to the Procedures Committee’s review of the Parliament’s Private Bill procedure.

2. The Society comprises those individuals or members of law firms who are recognised by the UK Parliament as competent both to promote and to oppose Private Bills. When acting in the promotion of a Bill, typically we will draft the Bill, attend to all aspects of compliance with standing orders, assist in the preparation of the case for the Bill and the Promoter’s evidence, appear with or without Counsel before Parliamentary Committees in order to present the case for the Bill, give expert evidence when necessary, assist in negotiating with objectors, prepare amendments to the Bill, advise the promoter on all aspects of the Parliamentary process, advise the promoter on many aspects of public and private law arising and generally “pilot” the Bill through Parliament.

3. This specialism has widened into acting regularly for applicants for, or opponents to, proposals requiring other special forms of authorisation such as Orders under the Transport and Works Act 1992, Orders under the Light Railways Acts 1896 and 1912, Orders under the Harbours Act 1964 and Orders under the Statutory Orders (Special Procedure) Act 1945.

4. Our work extends to all parts of the UK. When we are not acting for a promoter, we are frequently instructed by objectors. Members of the Society have been instructed to act in the promotion of each of the Private Bills that have so far been introduced in the Scottish Parliament. Before devolution, members of the Society acted in the promotion of all, or virtually all, Provisional Orders promoted under the Private Legislation Procedure (Scotland) Act 1936.

The Committee’s Inquiry

5. This paper is a response to the Committee’s inquiry into:

- what scope there is to streamline the current Private Bill process, particularly in relation to “works” Bills;

- what options there may be to reduce the Parliament’s responsibility for “works” Bills; and

- other options to improve the current Private Bill process.
Nature of Private Bills

6 The nature and content of Private Bills vary significantly. They range from single issue or “one section” Bills to Bills authorising major public works; from Bills to approve uncontroversial or minor correcting or updating of outdated local legislation to controversial new proposals that raise important policy issues and impact on the lives of many people. What they share is the need to depart in some way from the general law. This need may be to disapply provisions of general application or to confer on the promoter powers it does not have. Ultimately, only the legislature can do this. A Private Bill is therefore a process of last resort. The challenge for the Parliament is to provide a process which accommodates this variety.

Do MSPs have the time?

7 By the introduction of Chapter 9A, the Parliament has accepted the role of receiving and handling applications for Private Bills. It is unlikely that there will ever be more than a few Private Bills in progress at any one time. So far, in the five years of the Parliament, six Private Bills have been introduced and one view is that the current and anticipated crop is something of a “hump” that may not last, caused by a period of low investment in new public transport infrastructure followed by an increase in Scottish Executive funds for such schemes.

8 For individual MSPs, however, who serve on a Private Bill Committee, it can be a time-consuming task and, under the current rules, availability of MSPs is an issue.

9 Looking at the number of MSPs, the number of Ministers, the number of committees and the Parliamentary timetable, our own analysis suggests that there is a large enough pool of MSPs to serve on Private Bill committees but that it is likely to be difficult for individual MSPs to fit in the work with other commitments and for the Parliament to co-ordinate it. Furthermore, although we have gained the impression that Parliamentarians who serve on Private Bill committees generally find it a worthwhile and rewarding experience, giving them decision-taking responsibilities that they have valued, MSPs, who are, after all, elected to represent their constituency or region, may be reluctant to undertake a duty that, by definition, must not touch upon the interests of their own constituency or region.

10 Accordingly, we believe it is probably fair to say that MSPs can be found to serve on Private Bill committees and that they can accommodate the work into their busy schedules and workloads but that some rule-changes would make it easier for them to do so.

11 For MSPs the burden of Private Bill work falls mainly at the evidence-taking stage. The current practice of the Parliament is not to have any Committee sitting at the same time as a meeting of the Parliament. We believe that the purpose of this rule (Rule 12.3.3) is not to ensure higher attendance at
plenary sessions but to allow due importance to be attributed to the work of Committees. Given the different kind of responsibility it is to sit on a Private Bill Committee than on one of the subject Committees, there may be a case for making an exception to Rule 12.3.3 in the case of Private Bills. This should create more scope and flexibility for a Committee to discharge the evidence-taking function over a reasonable period of time.

Is Private Bill work what MSPs should be doing?

12 The bigger question, to which it would be presumptuous of us even to offer an answer, is whether, having regard to priorities and the perceived importance (or otherwise) of Private Bills, Private Bill work, in particular the evidence-taking element, is what the Parliament and MSPs should be doing.

Distinguishing works Bills from non-works Bills

13 If the Committee concludes that the burden on MSPs should be alleviated, a possible answer that has already been identified would be to distinguish works Bills from non-works Bills and to pass primary legislation equivalent to Part I of the Transport and Works Act 1992. Save for proposals that, in the opinion of Scottish Ministers, are of national significance, this would completely remove from the Parliament the authorisation of such measures.

14 Although a works Bill clearly calls for a different type of evidence from that required for a non-works Bill, in terms of policy decisions to be made on whether a proposal justifies an exception to, or departure from, the general law, we ourselves do not see anything intrinsically different between a works Bill and a non-works Bill.

15 Moreover, it would be wrong to liken a works Bill too closely with an application under the Town and Country Planning (Scotland) Act 1997. An application for planning permission is usually specific to a single site, is not concerned with granting statutory powers that change the law (as opposed to permission to do something that is already legal), is not concerned with the identity or legal status of the applicant, and does not entail compulsory interference with private and pubic rights.

16 Therefore, to adopt a Transport and Works Bill type of approach may appear to be an expedient option but it does not allow for the situation where works give rise to policy issues that the Parliament may consider that it, not the Executive, should decide.

17 Furthermore, some of the Bills currently being promoted or which are in prospect could be said, in one sense, to be Bills for the Executive in that the projects to be authorised by them are being largely funded by the Executive. The Parliament may therefore feel that such schemes should be subject to direct Parliamentary scrutiny.

18 In our view, therefore, what may have been thought by the Westminster Parliament to be the appropriate solution for England and Wales is not
necessarily the right option for Scotland. There may be a better and more flexible alternative to the Transport and Works Bill type of approach.

An alternative: delegating the hearing and analysis of evidence but retaining decision-taking

19 For 100 years (i.e. since the passing of the Private Legislation Procedure (Scotland) Act 1899 – later superseded by the Private Legislation Procedure (Scotland) Act 1936), Scotland has followed its own path for private legislation. Until devolution, that process was a provisional order procedure under which the Secretary of State processed the application but under which Parliament retained its decision-making powers. This was achieved by Scottish Parliamentarians hearing the evidence (though with recourse to a panel of non-Parliamentarians if availability proved to be a problem) and by the Westminster Parliament having the final say, by being asked to pass a confirming Bill. (This is still the process for reserved matters relating solely to Scotland.)

20 Now that there is a Scottish Parliament, we believe that a new approach merits consideration. This would be to combine, for any Private Bill, delegation of the evidence-taking function when the Parliament chooses, on a case by case basis, with the Parliament retaining the decision-taking role.

21 Under such a process, the Private Bill Committee itself would decide whether it wanted to hear and analyse the evidence or whether, having regard to the subject matter of the Bill, it wanted to delegate all or part of this function to another body or panel of suitable persons.

22 In the case of a works Bill, the Committee might decide to delegate the hearing and analysis of evidence to, say, the Scottish Executive Reporters Unit (“SERU”), whose reporters have experience of hearing planning appeals.

23 In the case of other Bills, for example a Bill to confer additional regulatory powers on a local authority, which can also require a lengthy hearing if it is controversial, the Committee would probably decide that a tribunal with a different make-up would be more suitable.

24 In all cases, whether works Bills or non-works Bills, the Committee would decide how the Bill should be dealt with, having regard to the subject matter and circumstances. The Committee might choose to hear the evidence itself in the case of unopposed Bills, or Bills where the evidence-taking is not expected to be too time-consuming, or Bills that raise important or novel policy issues.
Issues arising from the current procedure

Principle versus detail

25 The current procedure requires the Parliament to consider the general principles of a Bill (and objections to the whole of the Bill) separately from, and before, any consideration of detail (or objections to parts of the Bill). The aim seems to be broadly to replicate the process of a Public Bill. We question whether it is appropriate to draw this distinction between principles and details. In the case of most Bills, it seems artificial to do so. Often, the devil is in the detail and whether or not a proposal should be allowed at all should depend upon all the evidence. What is achieved, therefore, by splitting the evidence-taking sessions into two separate stages?

26 Under other procedures, this distinction is not drawn. Accordingly, we advocate that the Preliminary Stage be confined merely to a consideration of whether or not the Bill justifies full scrutiny. This could be carried out by the Private Bill Committee or, better perhaps, by the full Parliament by debate in plenary session. This would give the Parliament an opportunity to put a halt to a Bill that, although technically compliant with Standing Orders, is considered to be unacceptable on policy grounds without the need for, or expense of, full scrutiny. For example, the Parliament might conclude that the promoter was the wrong type of body to be granted the powers sought, or that, in the light of other political or policy developments at the time (perhaps an existing or prospective Executive Bill that would obviate the need for the private Bill), it was the wrong time to be considering a private Bill. Subject to this, the Bill would proceed to the Consideration Stage for full scrutiny.

Preliminary Stage: further observations

27 Much of the early work of a Private Bill Committee during its Preliminary Stage is taken up with questions that are essentially matters of compliance. Is a Private Bill needed to achieve the promoter’s objectives? Are the accompanying documents adequate to allow proper scrutiny of the Bill? Has the promoter complied with the requirements of Standing Order 9A?

28 We believe that matters of compliance would be more appropriately and expeditiously dealt with in the first instance by a “compliance officer” – perhaps the Head of the Private Bills Unit, if not the clerk to the Committee. This would obviate or reduce the need to have committee sittings on such matters; and this would both relieve the burden on MSPs and quicken the process.

29 Those who wish to allege a non-compliance should be given an opportunity to do so. There would be merit in making the time for this sooner than for objections to the substance of a Bill (say, 30 days for allegations of non-compliance).
If the compliance officer does not feel that he or she should make the final decision on an alleged non-compliance, it could then, but only then, be referred to the Bill Committee. Similarly, if the compliance officer finds a non-compliance with the Standing Order, the compliance officer or the Bill Committee should then determine what further steps, if any, should be taken by the promoter before the Bill should be allowed to proceed (for example, additional notifications and a further objection period) or whether the promoter should have to start again.

Once the compliance officer or the Bill Committee is satisfied that the requirements of the Parliament have been met, there should be “closure” on matters of compliance up to that point and the Bill should be allowed to proceed to the Preliminary Stage.

In our view, the current practice that has developed of inviting objectors to comment in writing on the adequacy of the accompanying documents long after their objections have been lodged, then inviting the promoter to respond point by point in writing on the objectors’ comments, and then the Committee clerk distilling the outcome into a report to the Committee so that it can then determine the matter, could be dropped. Although this process is intended to be open and thorough, we believe that it tends to give rise to confusion on the part of objectors, and (perhaps for that reason) to repetition of material already in objections, without a compensating addition of valuable material for the Committee. In view of this we believe the practice prolongs the authorisation process unnecessarily.

Admissibility of objections

The current practice of determining the admissibility or otherwise of an objection is confusing, not least for objectors. First, the clerks check objections for compliance with the rules for objections (whether they are in the proper form, etc). Then they analyse them in order to distinguish objections to the whole Bill from objections in detail. This can include corresponding with objectors and seeking further information from them. Then the Bill Committee considers whether the objections demonstrate clear adverse effect and whether that adverse effect is caused by the whole Bill or only by specific provisions of it. These are technical issues on which there is often room for argument. Yet all this is conducted without giving the promoter an opportunity to express its view on the admissibility of an objection, with the result that a Committee may make a decision without being fully informed.

In the case of some Bills, a further practice has developed at the Preliminary Stage. Bill Committees have rejected objections to the whole Bill, on the ground that they have failed to demonstrate clear adverse effect, but have nonetheless invited the objectors to give evidence on the principle of the Bill. This practice raises doubts and causes confusion about the value and purpose of ruling on the admissibility of objections at that stage.
35 If, as we have advocated above, it is not thought necessary to separate consideration of the “principle” of a Bill from its detail, with the consequence that all the evidence can be taken in one stage, not in two separate stages, the process would be much simplified.

36 Moreover, if a promoter is allowed to challenge the admissibility of an objection on grounds of irrelevance or no adverse effect, the Parliament itself does not need to undertake the laborious task of analysing all objections for clear adverse effect. Every objection (that has been correctly lodged in proper form) would be admissible unless and until the promoter successfully challenges its admissibility. The Parliament may even welcome this approach as an expedient means of policing the process for unreasonable or irrelevant objections.

37 The question of admissibility of objections could also be dealt with by the compliance officer, with the option of referring any particular case to the Bill Committee, if he or she thinks fit. The compliance officer should also be empowered to disallow an objection that he or she considers to be frivolous or vexatious.

38 We believe that these changes would significantly streamline the process and alleviate the burden currently placed on MSPs serving on Bill Committees without detracting from the Parliament’s principles of openness and fairness.

*Inquisitorial versus adversarial*

39 Where there are no objections (for example, at the Preliminary Stage where a Committee has determined that all objections are to detail rather than to the whole Bill), the Committee conducts an inquisitorial process. This has several merits. It enables the Committee to take a balanced view of the proposals and not place too much emphasis on the promoter’s case when it is not being challenged by objectors. At the Preliminary Stage under the current procedure, this can take the form of the Committee inviting a range of third parties to give evidence on the general principles of the Bill. In our view, this is a worthwhile innovation when public representative bodies are invited to give evidence. We do, however, question whether it is appropriate to invite private interests to give evidence – either when they have not lodged an objection to the Bill, or when they have lodged an objection and the Committee has ruled it as inadmissible. We think that this practice should be reviewed.

40 When there are objections, the Parliament appears to acknowledge that Private Bill Committee hearings should be adversarial rather than inquisitorial in character. An adversarial hearing allows the promoter to present its case first and more clearly places the onus on the promoter to prove it. Objectors then present their case against the Bill. Both sides have the opportunity to make formal submissions and to present evidence, and can cross-examine each other’s witnesses. The Committee then decides
the outcome based on the relative strengths of the argument for and against.

41 An inquisitorial process places a heavier burden on the Committee and its clerk. An adversarial hearing is likely to be more time-consuming but, if the Committee were to delegate this element to a suitable body (e.g. SERU or a panel) it would not place a greater burden on MSPs and the hearing might be concluded sooner.

42 Furthermore, adversarial hearings do not have to be lengthy. We suggest that consideration be given to the Bill Committee making procedural “directions” at an early appropriate stage. This would not only comprise a determination of whether or not the Committee itself was to hear the evidence but also, if not delegated, of how the evidence should be presented, e.g. as to the form of any oral hearing, the submission and exchange of written precognitions, and time limits for various stages. Insofar as this occurs now, it takes place only sequentially over a protracted period of time.

43 More generally, whilst we applaud the innovation of inquisitorial hearings in principle, we wish to express some reservations as to how this has worked out in practice. We believe that most hearings should follow a more conventional adversarial character, which promoters and objectors better understand and which is less likely to raise human rights issues. In particular, a promoter should be allowed to make its case first and include in it everything the promoter feels it needs to. This is consistent with the onus being on the promoter to prove the need for the Bill. It would then also be open to the Parliament to disallow a Bill without necessarily hearing objectors, on the ground that the Promoter’s own case, as presented, was not sufficiently convincing.

44 If a promoter is not allowed to present its case in full before objectors or other third parties have their say, it could give rise to a challenge by the promoter under article 6 of the ECHR on the basis that, although the Parliament had allowed the Bill to proceed to a full scrutiny, the promoter had not been allowed a fair hearing.

Other points arising from the current process

Report and recommendation at end of Consideration Stage

45 We believe that the Consideration Stage should conclude with a report and recommendation to the Parliament by the Committee as to whether, in its opinion, the Bill should be allowed to proceed and, if so, with or without any further amendment. We advocate this in any event but particularly if our view were to be adopted that all the evidence should be taken at the Consideration Stage.
Scoping environmental assessment

46  There is no system in place for the Parliament to give a “scoping opinion” in relation to a prospective environmental assessment of works to be authorised by a private Bill in accordance with the Environmental Impact Assessment (Scotland) Regulations 1999, which implemented in Scotland EU Directive 97/11, which amended the main Directive on environmental assessment (85/337). The Presiding Officer has simply determined (at Annex N to the guidance on Private Bills) that all the information listed in Schedule 4 to the regulations should be provided. Whilst the Parliament may not consider itself well enough equipped to give scoping opinions, it is out of step with current practice under non-Parliamentary procedures. We believe that this should be looked at. Perhaps the Parliament could give scoping opinions if it were to obtain expert advice in each case?

Changes to a Bill that extend its scope

47  During the progress of a Bill, the promoter may wish to amend the Bill in a way that might adversely affect third parties who were not previously affected. Alternatively, the Committee itself may be minded to make such a change in the light of objections. It would be unfair for such a change to be made without the newly affected third parties being notified of the potential change and being given an opportunity to object. It is not uncommon for this situation to arise; yet there is no process specified in the rules for dealing with it. It arose during the proceedings on the Stirling-Alloa-Kincardine Railway and Linked Improvements Bill. The Guidance on Private Bills was altered but we believe that Standing Order 9A also needs to be reviewed if this is to be catered for properly.

Notifications and land referencing

48  The land referencing requirements in the Guidance on Private Bills is not as clear as it might be. This can give rise to genuine practical difficulties for promoters, even when they have consulted the Private Bills Unit. The first issue concerns the categories of person with an interest in heritable property who are to receive formal notice of the Bill. At Annex G, the Presiding Officer has determined four categories of persons who should be notified. However, Annexes E and M, which specify the contents of the book of reference, only appear to address the fourth of the categories listed at Annex G. There appears to be no requirement to record those in the first three categories anywhere. There does not appear to be any logic to this. Consideration might also be given to requiring promoters to produce their list of affected persons, which at present is not publicly available.

49  Furthermore, there is some ambiguity in Rule 9A.2.3(d)(i) caused by the requirement to notify persons having an interest in land that is “affected” by the Bill. The wording implies that notification has to be given not just to those whose land is to be compulsorily acquired or used but also to those whose land will be affected in some other way. The obvious example is a person whose land abuts proposed works but does not have to be entered,
i.e. a “frontager”, but it could also mean “affected” by reference to proximity in some other way, or access to it, or view from it, or noise near it, or the value of it. Clarification on this would greatly assist the preparatory work for a Bill and reduce the prospect of argument, expense and delay during the passage of a Bill.

In addition, it would not be to anyone’s disadvantage to remove the doubt caused by there being no definitions of certain terms, such as “owner”, “lessee” and “occupier” in Annexes G and M to the Guidance. The reference to persons on the council tax register ought to be omitted as that register is not a public document.

It would also be helpful if the Guidance were to consolidate the requirements for each accompanying document. At present they are scattered throughout the main text and the annexes. For example, to establish the requirements for the Promoter’s Statement, one must look at Rule 9A.2.3(d), Guidance paragraphs 2.16 to 2.26, and Annexes D, F, G, H, I and J. Annex D is, however, not referred to in paragraphs 2.16 to 2.26. The Book of Reference requires reference to Rule 9A.2.3(c)(ii), Guidance paragraph 2.32 and Annexes D, E, G and M, but paragraph 2.32 only refers to Annex M.

We believe that clarification on such issues would benefit all stakeholders in the process, including Committees and their officials when they have to make decisions on procedural issues.

Hybrid Bills

Rules of procedure for Hybrid Bills, as and when they are required, may draw on the Private Bill procedure. However, as Hybrid Bills are not part of the Committee’s current remit, we make no comment on them in this paper. We hope we may have the opportunity to do so should the Committee consider Hybrid Bill procedure in the future.

Summary

The Society’s thoughts may be summarised as follows:

(1) The work of Private Bill Committees would be facilitated if they could meet more frequently each week, if they so choose. This could be achieved by excepting them from Rule 12.3.3 (that a committee meeting shall not be held at the same time as a meeting of the Parliament) (paragraph 11).

(2) Rather than distinguishing works Bills from non-works Bills (which we do not regard as intrinsically different from each other), we believe that any changes to the process should apply to all Bills (paragraphs 13 to 18).

(3) Therefore, if the Committee concludes that MSPs should be relieved of at least the most time-consuming element of Private Bill work, Private Bill committees should have the option of delegating to another body or panel...
the task of hearing and analysing the evidence for and against the Bill (paragraphs 20 to 24).

(4) Such a solution would enable the Committee itself to hear the evidence if it wished to do so and the Parliament to retain ultimate control and the decision-taking function (paragraph 20).

(5) The current Preliminary Stage should be re-shaped so that the Parliament no longer seeks to be satisfied at this stage as to the general principles of a Bill before, and separately from, its consideration of detail. Instead, the Preliminary Stage would be confined to a debate as to whether the Bill justified being given full scrutiny. All admissible objections should be heard at the (later) Consideration Stage, whether they be against the whole Bill or against specific provisions only (paragraphs 25 and 26).

(6) Issues of compliance should be left, in the first instance at least, to a compliance officer of the Parliament to deal with, under a shorter and more streamlined process. The compliance officer would have the option to refer matters to the Bill committee if he or she thought fit (paragraphs 27 to 31).

(7) All objections submitted in the proper form should be treated as admissible unless and until the promoter has successfully challenged their admissibility on grounds of irrelevance or no clear adverse effect (paragraphs 33 to 36).

(8) Issues of admissibility should also be dealt with by the compliance officer in the first instance (paragraph 37).

(9) Where there are no objections, the practice of inviting stakeholders to give evidence, particularly representative public bodies, should be retained, but the Parliament should review its practice of whom to invite to give evidence in such circumstances (paragraph 39).

(10) More generally, and always when there are objections that have not been withdrawn, a conventional, adversarial, style of hearing should be adopted (whether the hearing is conducted by the Bill Committee or by some other body to whom the function is delegated), giving the promoter the opportunity to present its case for the Bill first (paragraphs 39 to 44).

(11) At an early appropriate stage, the Bill Committee (or the body or panel to whom the evidence-taking session has been delegated) should give directions as to how the evidence-taking sessions are to be dealt with (paragraph 42).

(12) At the conclusion of the Consideration Stage the Committee should recommend to the Parliament whether or not the Bill should be allowed and, if so, with or without further amendment (paragraph 45).
The Parliament should look at how it can give scoping opinions in relation to environmental assessments in order to bring its practice into line with the usual requirements of the Environmental Assessment Directive (85/337, as amended) (paragraph 46).

The procedure for extending the scope of a Bill should be reviewed and formalised (paragraph 47).

The rules for notifying persons with an interest in land that is affected by the provisions of a Bill should be reviewed and clarified (paragraphs 48 to 50).

It would be helpful if the Guidance on ‘Accompanying Documents’ could be consolidated and clarified (paragraph 51).

We believe that none of the changes that we have proposed would infringe the ECHR and that they could be introduced without the need for primary legislation.

Representatives of the Society would be glad to give further evidence orally if invited to do so.

Society of Parliamentary Agents
20 October 2004
Dear Presiding Officer

PROCEDURES COMMITTEE INQUIRY ON PRIVATE BILL PROCEDURE

I know that you exchanged correspondence with my predecessor, Patricia Ferguson, about both resource and procedural issues relating to Private Bills, resting with Patricia’s letter of 3 June and yours of 2 July.

The Procedures Committee has of course now embarked on an inquiry on Private Bill procedures, and I will be giving oral evidence to the Committee on 26 October. Before doing so, I thought it might be helpful if I set out some thoughts on these issues and the ideas you have canvassed.

First of all, I very much agree that there is merit in looking for ways of streamlining the existing procedures set out in Standing Orders and trying to find ways of making them work more effectively. No doubt these are issues which the Procedures Committee will be considering in the course of its inquiry, and we will be happy to work with both the Committee and the Parliamentary authorities with a view to reaching a consensus on the way ahead and bringing forward the necessary changes in Standing Orders.

I also agree with you that there may be merit in the idea of legislation along the lines of the Transport and Works Act 1992 to confer Order-making powers on Scottish Ministers which in certain circumstances, particularly in relation to major infrastructure projects, would avoid the need for Private Bills altogether. Clearly any such procedure would have to be subject to appropriate safeguards, and shown to be more efficient than the Private Bills process. Once again we will be very interested in the Procedures Committee’s views on this issue in due course. As Patricia Ferguson pointed out in her letter of 3 June, it is for consideration a Bill for this purpose should be brought forward as an Executive Bill or a Committee Bill, and at this stage I have an open mind on that point.
A further option which we have been considering is the possibility of dealing with at least some of the major transport infrastructure projects which are in prospect by means of Executive Bills which, as they would inevitably deal with private interests, would take the form of hybrid Bills. Standing Orders do not preclude the possibility of hybrid Bills but neither do they set out a procedure for dealing with them. Plainly thought would need to be given to how such a Bill might be dealt with by the Parliament in procedural terms and in due course it might well be necessary to reflect this in changes to Standing Orders.

I look forward to discussing these issues with the Procedures Committee next week and to working with both the Committee and the Parliamentary authorities to find ways of addressing the issues relating to private Bills as effectively and expeditiously as possible. If you and Iain Smith thought it would be helpful, my officials and Parliamentary officials could perhaps meet to discuss the various options which I have set out in more detail.

I am copying this letter to Iain Smith for information, and look forward to giving evidence to his Committee next week.

Yours sincerely

pp MARGARET CURRAN

Approved by the Minister and signed in her absence
PROCEDURES COMMITTEE

Commissioner for Public Appointments – Consultations and Reports to the Parliament

Note by the Senior Assistant Clerk

Background

1. The Presiding Officer wrote to the Convener on 24 June 2004 to ask the Committee to consider developing procedures for Parliamentary consideration of consultations or reports made under the Public Appointments and Public Bodies etc (Scotland) Act 2003. A copy of the Presiding Officer’s letter is attached as Annex A.

2. The Committee agreed in principle at its awayday on 13 September that it would consider these issues, with a view to reporting on any necessary procedural changes before the end of the year. This paper therefore outlines the main issues and invites the Committee to agree the arrangements for handling this short inquiry.

Key Issues

3. The Public Appointments and Public Bodies etc. (Scotland) Act 2003 was passed towards the end of the first session of the Parliament. It provides for a Commissioner for Public Appointments in Scotland, to be appointed by The Queen on a nomination from the Scottish Parliament. The first Commissioner, Karen Carlton, was appointed on 6 May 2004.

4. Under the Act, the Commissioner is required to prepare and publish a code of practice in respect of the making of appointments or recommendations for appointments by the Scottish Ministers to the public bodies listed in Schedule 2 to the Act. In preparing or revising the code, the Commissioner is required to “consult” both the Scottish Ministers and the Parliament (section 2(4)(a) of the Act).

5. The Commissioner must also “report” to the Parliament any case where the code of practice has not been, or appears likely not to be, complied with and where Scottish Ministers have failed or are likely to fail to act in this non-compliance. In such circumstances, the Commissioner may direct Scottish Ministers to delay making the appointment/recommendation until the Parliament has considered the case (section 2(8) of the Act).

6. The Commissioner must also prepare and publish a strategy for ensuring that appointments are made in a manner which encourages equal opportunities. In preparing this strategy, the Commissioner must “consult” both Scottish Ministers and the Parliament (section 2(10) of the Act).

7. Finally, the Commissioner must lay annually a report before Parliament on the exercise of his/her functions (para 13(4), Schedule 1 to the Act).
8. There are currently no provisions within the Parliament’s Standing Orders which relate to the Commissioner’s role and, consequently, there is a lack of clarity over the way in which a breach of the code would be dealt with in procedural terms. It is also unclear how the requirement for the Parliament to be consulted on the contents of the code and equalities strategy would operate in practice.

9. The Office of the Commissioner for Public Appointments is currently working on the draft Scottish Code and it is expected that the draft will be ready for publication some time early in the New Year. Any new procedures should therefore be in place before then. It is not yet known what the timescale for the production of the Equalities Strategy will be, however it is likely to be received after the draft Code of Practice. We are not aware of any reports of non-compliance in the pipeline.

10. It should also be kept in mind that other Acts may, in the future, similarly make provision for the Parliament to be consulted or to consider reports. It would therefore be helpful if any procedure devised for present purposes was capable of being applied or adapted to such future needs.

Suggested Remit

11. A proposed remit for the inquiry is set out below. Committee members are invited to agree this remit.

“To recommend procedures for the Parliament to respond to consultation by the Commissioner for Public Appointments, and to consider reports by the Commissioner, under the Public Appointments and Public Bodies etc (Scotland) Act 2003.”

Written and Oral Evidence

12. The issues raised here are narrow and largely internal to the Parliament, and it is not obvious that many people outside the Parliament would have a view to offer. However the Committee may wish to consider inviting the Commissioner for Public Appointments, Karen Carlton (or a member of her staff) either to give oral evidence as part of the inquiry or to submit evidence in writing. Should the Committee wish to hear from the Commissioner, then time could be made available at the Committee meetings either on 9 or 23 November. This would still provide adequate time for the Committee to finalise a report before the Christmas recess.

Recommendation

13. Committee members are invited to:
   - agree the suggested remit for the inquiry; and
   - consider whether they wish to invite the Commissioner for Public Appointments to give evidence.
ANNEX A

LETTER TO CONVENER FROM PRESIDING OFFICER

PUBLIC APPOINTMENTS AND PUBLIC BODIES ETC (SCOTLAND) ACT 2003

The Public Appointments and Public Bodies etc (Scotland) Act 2003 requires the new Commissioner for Public Appointments in Scotland to among other things, to prepare and publish a Code of Practice in respect of the making of appointments or recommendations for appointments by the Scottish Ministers to public bodies listed in schedule 2 of the Act. In preparing or revising the Code, the Commission is required to consult both the Scottish Ministers and the Parliament, and to invite others to make representations.

The Commissioner must also report to the Parliament any case where the Code of Practice has not been, or appears likely not to be, complied with and where Scottish Ministers have failed or are likely to fail to act on this non-compliance. In such circumstances, the Commissioner may direct Scottish Ministers to delay making the appointment/recommendation until the Parliament has considered the case.

The Commissioner is also required, under the Act, to prepare and publish a strategy for ensuring that appointments are made in a manner which encourages equal opportunities. In preparing this strategy, the Commissioner must consult both Scottish Ministers and the Parliament.

As you may know, there is currently no specific procedure for Parliamentary consideration of consultations or reports under the 2003 Act. It might be possible to use existing general procedures to facilitate such consideration as an interim measure, but this would not be satisfactory in the longer term.

It would be helpful therefore if your committee would consider developing a specific procedure for dealing with matters arising from the 2003 Act, and to any other statutory consultations and reports that require some response from the Parliament. This could, perhaps, include giving the Bureau a power of referral to an appropriate committee.

I should also like to take this opportunity to provide you with advance notification that I may also have to refer an issue to do with the possible re-appointment of Commissioners and Ombudsmen to your committee to consider a change to Standing Orders and I shall write to you further on this issue when I have more information.

A copy of the letter has also been sent to the committee clerk.

George Reid
24 June 2004
PROCEDURES COMMITTEE

Inquiry on Timescales and Stages of Bills

Note by the Clerk

1. A few minor policy decisions remain to be made in relation to the above inquiry.

Publication of committee reports

2. The Committee has already decided there should be a Rule requiring 5 sitting days (i.e. a week) between publication of a Stage 1 Report and the Stage 1 debate, and that if the report is published late, the Stage 1 debate can still go ahead so long as the Parliament agrees to a motion to that effect, moved (with notice) by any member.

3. Arguably, it would be sufficient simply to provide a new Rule about the timescale for publishing reports, without introducing a specific, new procedure to deal with the situation where that timescale is not met. Procedures already exist which members could use to question whether the Stage 1 debate should go ahead notwithstanding late publication of the report – asking their business manager to raise in the Bureau the possibility of postponement, or themselves trying to move a motion without notice (or raising a point of order) just before the debate is due to start.

4. What the Committee has already agrees deals with the normal situation where (in practice) a date for the Stage 1 debate is set well before the Stage 1 report is published (i.e. so the committee can “count back” from the debate date to establish the publication deadline). It might also be worth including provision for the (relatively rare) situation where a Stage 1 report is published first, before any date has formally been established for the Stage 1 debate. This could arise, e.g. with a Member’s Bill, where the Bureau sets a generous deadline for completion of Stage 1 and the committee reports well before it.

Motions without notice to alter Stage 3 timetabling motions

(1): Overall upper limit on time-extension

5. The Committee has already agreed to allow timetabling motions to be varied by means of a motion without notice (for short, MWN), and at the last meeting further agreed:
   
   • that any member should be able to move such a motion,
   
   • that the maximum extension achievable by each such motion should be 30 minutes,
   
   • that there should be no overall limit on the extension to the proceedings achieved in this way.
6. However, later in the meeting (during the private discussion on the draft report) members began to reconsider whether it would be better to have a fixed upper-limit on the overall extension of time achievable. It was therefore agreed that this point could be re-visited.

7. Without some overall limit on the extension of time achievable by MWN, it would be theoretically possible for the end of the Parliamentary day to be pushed back (in increments) by an indefinite amount – causing disruption and inconvenience to MSPs with travel or other commitments immediately after Decision Time, and to members of the public who have travelled to see Members’ Business.

8. It may well be that most members would be content to have a later finish occasionally (i.e. with Decision Time at 6 or even 7 pm) to deal with a particularly big Stage 3, but only if they knew well in advance that this would be when Parliamentary business would end. It would be a different matter entirely to plan other commitments on the assumption that Decision Time would be at 5 pm and then find it pushed back on the day to 6 or 7 pm.

9. The most obvious way of addressing this problem would be (Option 1A) to set an overall limit of, say, 30 minutes on the total extension of time by which any day’s business could be extended (i.e. regardless of the number of Stage 3s dealt with that day). Thirty minutes is long enough to allow a reasonable degree of flexibility in relation to a big Stage 3 (for which 3 or 4 hours might have been timetabled initially) but not so long as to make realistic planning of later commitments impossible.

10. The other option (Option 1B) would be not to fix an upper limit in the Rules, but rely on more informal mechanisms. The Committee has already agreed that all MWNs should require the Presiding Officer’s agreement to be moved – and it would therefore be open to the PO to operate a convention that he would not normally allow further such motions to be moved after extensions totalling 30 minutes had already been agreed to – although this could be departed from in exceptional circumstances. This option could therefore achieve a very similar result in practice.

11. The choice between these two options comes down to a judgement as to whether it is better to have more advance certainty or more flexibility on the day.

Motions without notice to alter Stage 3 timetabling motions

(2): Knock-on effect of motion being agreed to

12. In previous papers on this subject, it was suggested that agreement to an MWN would automatically lead to the next and all subsequent time-limits being pushed back by the amount specified in the motion. This option (Option 2A) has the merit of simplicity. However, there may be cases where the overall time-allocation is probably adequate but one particular time-limit has been set too early. In that situation, the member trying to move the MWN might wish only to extend that next time-limit while leaving subsequent time-
limits unaffected – particularly as this might enhance the chances of the motion gaining acceptance around the Chamber.

13. The alternative (Option 2B) is therefore to leave it up to the member moving the MWN whether to extend only whichever time-limit falls next, or to extend that and all subsequent time-limits. The disadvantage of this is that it adds an extra variable into a procedure that could already (because of its necessarily ad hoc nature) be quite difficult to manage from the point of view of the PO and the clerks. The advantage, however, is greater flexibility.

14. This greater flexibility could be particularly useful if the Committee also agrees to fix an upper limit on the overall extension of time possible in one day (as outlined above) – since it would still allow internal time-limits to be moved even where the overall limit had already been reached. To illustrate this, consider the following situation:

- the Parliament agrees a timetabling motion that sets time-limits at 1 hour, 2 hours and 3 hours after proceedings begin;
- during the first 2 hours, one (or more) MWNs are agreed to, the effect of which is to extend all remaining time-limits by (a total of) 30 minutes;
- as a result, the revised timetable for the remainder of the proceedings is for time-limits at 2h 30 and 3h 30;
- then—
  - with Option 2A, any further MWNs would be precluded by the Rule; but
  - with Option 2B it would still be possible to move (e.g.) at 2h 25 to extend the next time-limit only by (e.g.) 10 minutes – i.e. to revise the timetable to 2h 40 and 3h 30.

**Motions without notice to alter Stage 3 timetabling motions**

**(3): PO discretion to allow debate/amendment of motion**

15. The Committee is also invited to decide, in relation to the new motions without notice, whether the Presiding Officer should be able to allow such a motion to be debated and/or amended. This could be useful where, for example, different MSPs are trying to extend a deadline by different amounts at the same time. On the other hand, it adds some further complexity to the Rule. The best outcome might be to allow this only as a clear exception – i.e. with the default position being that such motions are decided without debate or amendment.
Motions without notice to alter Stage 3 timetabling motions

(4): Individual upper limit on time-extension

16. Finally, the Committee should decide whether there is to be any upper-limit on the amount of the extension to timetabling deadlines achievable by any individual motion. Whether this is necessary will depend on what decisions are taken on the other issues outlined above. For example, if there is to be an overall upper-limit of 30 minutes (Option 1A above) it may not be considered necessary to set any individual limit – which would effectively allow any single extension to be up to the full 30 minutes (or even higher in some cases, if there was to be no automatic knock-on effect (Option 2B). On the other hand, if there was to be no overall upper-limit, an upper-limit on individual motions (of 15 or 30 minutes) might be seen as more appropriate.

Revised or supplementary Financial Memorandums

17. The Committee has already agreed that revised or supplementary Explanatory Notes should be provided where Bills are substantially revised at Stage 2. However, no similar provision has so far been considered for Financial Memorandums.

18. There are two good reasons why this should be required. The first is simply that Financial Memorandums have always been considered the single most fundamental of the various accompanying documents (other than the statements on legislative competence, which are statutory requirements). This was the CSG view – which is why a Financial Memorandum has always been mandatory on introduction for all types of Bill (whereas Explanatory Notes have been mandatory so far only for Executive Bills). It would be odd in that context to have a situation where it was obligatory to update the Explanatory Notes for Stage 3 but not also obligatory to update the Financial Memorandum.

19. The second reason is to address the issue that the Committee agreed, at the beginning of the inquiry, to consider on behalf of the Audit Committee (which had originally been going to conduct its own inquiry). That issue (originally raised by the Auditor General for Scotland in relation to the Standards in Scotland’s Schools Bill) was that a Bill can be amended during its passage in ways that substantially affect its overall cost-implications, without there being any procedural mechanism for picking this up. Some of the other procedural changes already agreed to – more time between Stages, for example – might certainly help in this respect, but there would still be no specific mechanism to make such an occurrence less likely.

20. Requiring a revised (or supplementary) Financial Memorandum to the same timescale as revised (or supplementary) Explanatory Notes would address both these points.

21. Executive officials have been informally consulted about this suggestion, and have indicated that they—
“would accept that this .... is consistent with the proposed revised procedures for Explanatory Notes and the Delegated Powers Memorandum. In the case of a non-Executive amendment that carried substantial additional costs being agreed at Stage 2, the Executive would, of course, seek to provide a fair assessment of these costs in the revised or supplementary Financial Memorandum consistent with Rule 9.3.2, having regard to the information provided in the course of the debate and any other relevant information which Ministers considered appropriate. It may be, of course, that the Executive would seek to remove or revise such an amendment at Stage 3. Our approach would be similar to that for Explanatory Notes, and I assume that the practical arrangements for publication by the Clerk would be the same.”
Consideration of amendments to Bills: possible presentational innovations

I am writing to you further to discussions we have had over the past few weeks concerning how the technical and sometimes complex process of considering amendments to Bills might be made clearer. This has arisen from your committee’s inquiry into the timetabling of legislation. My team is very happy to offer what assistance it can to MSPs, within the confines of Standing Orders and the tight legislative timescales within which the legislative process operates (or may in the future operate) at Stages 2 and 3.

We are currently looking at new methods of presenting information that might make the process of considering and disposing of amendments easier to follow. This is intended to be of benefit primarily to MSPs. I am sure your committee will be interested to hear, however, that further measures are being considered to help interested visitors to Parliament better understand our legislative procedure. We hope to be in a position to introduce these measures very soon.

It seems to me that the main problem identified by your committee on understanding the amending process concerned difficulties in relating the order in which amendments are disposed of (as set out in the Marshalled List) with the order in which they are debated (as set out in the Groupings). That is to say, problems sometimes arise in preparing for, and keeping up with, proceedings whilst “jumping” from one document to another and back again – especially when a large number of amendments are being considered at a meeting, or a series of meetings.

Accordingly, my team has been working on new methods of presenting information on amendments in such a way as to more effectively knit together the Marshalled List with the information on the order of debate found in the Groupings so as to make this process of “jumping” less difficult. There are a number of possible templates that might be used, and it seems to me that the most appropriate next step would be to pilot two or three different models that I have been experimenting with on committees which are about to undertake Stage 2 proceedings, and are willing to be tested out in this way and to provide constructive criticism afterwards. If a consensus emerges that any of the new methods piloted added value to the process, I would hope it could be brought into more general use as soon as possible.

It seems to me that the piloting of these new documents presents an opportunity to advise members on other matters they may find useful in
considering amendments, for instance express information on any direct alternatives and pre-empted amendments. I would imagine that many MSPs would welcome having such advice at their fingertips.

I am mindful that legislating is often a necessarily complex process and do not suggest that any eventual solution proposed will be a perfect one. The possibility of new difficulties arising does also have to be considered. One matter of which members should be mindful is that increasing the amount of non-automatically generated information in any document (as will be the case with those documents being piloted) increases the chances of human error creeping in, particularly where time is limited.

I hope you and your committee find this information useful but would be very happy to provide you with any further information you may require.

Peter McGrath
Clerk Team Leader, Legislation Team
25 October 2004
PROCEDURES COMMITTEE

Timescales and Stages of Bills - implementation

Note by the Clerk

1. The Committee has now largely agreed the recommendations it expects to make to the Parliament, and the draft Rule-changes needed to give effect to those. Rule-changes are brought into effect by means of the Parliament agreeing to a motion (in the name of the Convener), moved at the beginning of the debate on the Committee’s report. Normally, of course, the motion specifies a single “implementation date” – usually the day after the debate.

2. We have considered carefully whether it would be problematic in this instance to bring all the Rule-changes into effect in this way – given that this would, in effect, “move the goalposts” for Bills that were already in progress. Executive Bills, in particular, are likely to have target completion dates which will have been formulated by reference to the existing Rules – and so could be compromised by changes to those Rules that extend parts of the Parliamentary process (e.g. by lengthening intervals between Stages).

3. We therefore considered ways to avoid this problem. For example, it would be possible to specify that the Rule-changes are to have effect only for Bills introduced after the date specified in the Convener’s motion. This would have the advantage of giving the Executive (and others, e.g. committees) the ability to plan timescales of Bills around the new Rules from the outset – while existing Bills would continue to be subject to the existing (unamended) Rules for the remainder of their passage.

4. However, such an approach would add complexity, by having different Bills proceeding under different Rules at the same time – a situation likely to obtain for a period of at least 6 months – and so would carry an attendant risk of confusion. In addition, if done across-the-board (i.e. for the whole package of Rule-changes being recommended) it would delay unnecessarily the Parliament’s ability to benefit from those Rule-changes whose immediate implementation would not cause any disruption to planned timetables. In any case, even those Rule-changes which do impact on such planned timetables do so only to a limited extent (primarily by virtue of the additional week required between Stage 1 and Stage 2).

5. We have therefore concluded that the best option is to fix a single implementation date, but to be prepared to choose what that date should be in close consultation with the Executive and with NEBU (and taking into account the position of any non-NEBU non-Executive Bills then in progress). That may mean fixing an implementation date that is up to (say) a month after the debate itself (perhaps during a short recess).

6. Executive officials have been consulted, and agree with the above.

7. The Committee is invited to endorse this approach.
PROCEDURES COMMITTEE

MINUTES

12th Meeting, 2004 (Session 2)

Tuesday 28 September 2004

Present:

Mr Richard Baker  Mark Ballard
Cathie Craigie  Karen Gillon (Deputy Convener)
Mr Bruce McFee  Iain Smith (Convener)

Apologies were received from Jamie McGrigor.

The meeting opened at 10.16 am.

1. Declaration of interests: The Convener welcomed Bruce McFee to the Committee and invited him to declare any relevant interests. Mr McFee indicated that he had no interests to declare. The Committee noted with thanks Bruce Crawford’s contribution to the Committee’s work.

2. Private Bills – witness expenses: The Committee delegated responsibility to the Convener for arranging for the SPCB to pay, under Rule 12.4.3, any expenses of witnesses in the inquiry.

3. Committee awayday: The Committee noted paper PR/S2/04/12/1 which recorded the main points discussed at the Committee’s awayday in Stirling on 13 September. The Convener said that he intended to present new proposals for the selection of questions for Question Time for consideration at the Committee’s meeting on 9 November, and that other members with ideas for how Question Time could be improved should contact the clerks in order to develop those ideas in advance of that meeting.

4. Private Bills: The Committee agreed to invite oral evidence from Scottish Executive Ministers, the conveners of the three previous Private Bill Committees, Scottish Natural Heritage, the Scottish Environment
Protection Agency, Historic Scotland, the promoter of the Stirling-Alloa-Kincardine Railway and Linked Improvements Bill and the Parliament’s Private Bills Unit. It was noted that written evidence was expected from the Society of Parliamentary Agents and that it and selected objectors were likely also to be invited to give oral evidence. The Committee agreed not to appoint an adviser for the time being and to seek authority to organise a fact-finding trip to Dublin.

5. Timescales and Stages of Bills: The Committee considered a number of outstanding issues in the inquiry. It agreed that a motion to allow a Stage 1 debate to go ahead notwithstanding the late publication of the Stage 1 Report should be capable of being moved by any member; that the minimum interval between Stages 1 and 2 should be extended to 11 sitting days (rather than 8, as previously agreed); that there should be a single lodging-deadline for all Stage 2 committee meetings taking place in the same calendar week; that the normal 4.30 pm lodging-deadline should be specified in standing orders; that any member should be able to move a motion without notice to extend Stage 3 timetabling deadlines by up to 30 minutes; that there should be no limit on the overall extension of time that may be achieved in this way but that disagreement to any such motion should prevent a further such motion being moved during that part of the proceedings; that an Executive memorandum on delegated powers should be required immediately after introduction but not as an accompanying document; that a revised or supplementary such memorandum should be required, in appropriate instances, a specified period before Stage 3; that revised or supplementary Explanatory Notes should be required for all Bills substantially amended during Stage 2; and that no changes to Chapter 9A should be recommended as part of this inquiry.

6. Timescales and Stages of Bills (in private): The Committee considered a draft report and draft standing order changes. Various changes were agreed to, including those consequential on decisions made under item 5 and minor additional changes to the standing orders. The Committee further considered the implications for later items of business (including Decision Time and Members' Business) of allowing the overall time available for consideration of Stage 3 amendments to be extended without notice, and agreed that it might be necessary to reconsider at the next meeting some of the decisions taken on these issues under item 5. It also agreed that the lodging-deadline for Stage 3 amendments should remain at 4.30 pm on the final lodging-day (rather than 2 pm, as previously agreed). The Committee agreed to consider a revised draft report and standing order changes in private at its next meeting.

The meeting closed at 12.06 pm.

Andrew Mylne
Clerk to the Committee