Thank you for inviting me to offer comment on the questions arising from the Committee’s review of standing orders and other practices in connection with the above.

As the Committee will be aware, I was elected as a DPO in the first Parliament in a mid-term election necessitated by the appointment of a then serving DPO as a Scottish Minister. I was also elected as a DPO at the outset of the second Parliament, and I have therefore been elected in both possible scenarios under the current rules.

The first election took place in the febrile atmosphere of a major re-shuffle of the government, with significant changes in personnel, intense politicking and extensive media coverage, and the outcome was portrayed as a riposte by MSPs to what was seen as undue Ministerial intervention in what most Members considered to be purely Parliamentary business. The second election passed with barely any coverage or excitement, and I remember much less about it.

I recall some of the questions posed by the Committee being raised during my terms in office, although most of them were not. I do not have firm recollections or experiences relevant to every question asked, but offer my comments for whatever value the committee might care to attach to them.

1. I believe that the PO and DPO elections should take place at the first meeting, if possible. It is important that there is a PO in place as soon as possible in every Parliament, as there is always business which must be attended to, and by the person who will carry the responsibility for that business over the coming term of office. Also, the PO needs to have DPOs almost immediately, certainly as soon as the first plenary sittings, to avoid his/her having to assume all the chairing duties as well as the other duties which face the POs from the outset.

The caveat is the qualification contained within the question: it is desirable that the POs are elected at the first meeting “where possible”. Where it is not possible, then a breathing space is needed, as provided for now. Nevertheless, I suggest that the standing orders to be developed by the committee should maintain the expectation that the POs are elected at the first sitting.

2. While I do not recall any problem in nominations in practice from 2003, the timescales for the DPO nominations do seem rather tight. Perhaps there should be a little longer for Members to consider the implications of the election of the PO. To some extent, DPO nominations must be contingent on the election of the PO, although to date the PO elected has been generally expected to be the successful candidate.

In the event that someone were to be elected unexpectedly as PO, there might require to be a longer time period before the DPO elections, to ensure that the
nominations tabled do reflect whatever rules are set to ensure party balance among the team of POs. It is possible that an MSP who had obtained support for a DPO nomination might be unable to proceed in the event that a Party colleague were to be elected as PO, and a fresh candidate might have to be sought from another Party in such circumstances. I suggest that it would be preferable to allow a time period for adjustments to be made than for nominations to fail by default in the event that the candidates did not conform to an unexpected party balance requirement; or for a Member with minimal support to be elected as a DPO because there were only two valid nominations received by the deadline.

3. The existing requirement is satisfactory. The correct democratic approach is to make nominations straightforward and let the electorate decide. If a nominated MSP has little support, he or she will not be elected (subject to my comments in response 2 above). It seems to me to be unhealthy to frame rules which restrict the choices before the electorate.

I do not think that there should be any requirement for candidates to obtain nominations from other parties. A candidate with no support from other parties will not be elected, unless, as in the current Parliament, his/her own party has a majority. It seems unsatisfactory either that any candidate supported by a majority of MSPs (even of his/her own Party), or who needed support from MSPs in other Parties and would in practice command the confidence of the Parliament, could be denied a nomination because of the effectiveness of whipping in opposition parties.

From my own experience, I suggest that the choice of nominees is something best left to the candidates. When I stood for election in 2001, I was nominated by Mike Russell and Tavish Scott, both in other parties, as it seemed to me to be useful to indicate the breadth of the support I felt I had. When I stood in 2003, it seemed unnecessary, and my recollection is that I was nominated by members of my own Party.

There is no rule currently about nominees obtaining support from member of other Parties, and such support has been obtained, when sought, by candidates who command respect among MSPs of other Parties. If such support is made a requirement under standing orders, it might become a matter for party discipline, and might therefore influence nominations and elections, and threaten the perception of impartiality which is essential for the POs to operate effectively.

4. I think that this question does address a deficiency in the current procedures. I fully accept the criticism, as articulated by Christine Grahame MSP, that many new MSPs are unaware in voting of the merits of individual candidates; but I do not see how to avoid that difficulty altogether. I think that the Committee has to accept that new MSPs are inevitably relatively uninformed about the merits of people who emerge as PO and DPO candidates, and are likely to be influenced, whatever rules changes are made, by their senior colleagues, who are able clearly to make an assessment of the merits of the candidates.

Nevertheless, I do think that a public presentation or statement by the candidates would be useful. It would allow the electorate, and not only the new MSPs, to judge the candidates’ presence and personality, their views of the posts for which they are
standing, and how they would seek to develop both the roles and their own competencies. Of course, MSPs seeking election can make statements unofficially at present, and these may have an impact on the election, but a deficiency in the current position is that positions and attitudes can be attributed to candidates without their having any opportunity to make a formal presentation to their peers. A clear statement on the record might also clarify for commentators and posterity why individual candidates were, or were not, successful in the elections.

5. Clearly, the POs should be elected by a significant number of MSPs, but it would be unwise to set a threshold which was challenging. I do not think that experience to date suggests that the quorum has ever been an issue, and it seems to me unlikely that a plenary session to elect the POs would be poorly attended. If a higher quorum were to be specified, say 50%, the possibility at least arises that the election of the POs could be blocked by Parties choosing to absent themselves from the Chamber. The 25% requirement has worked perfectly well to date, and I see no compelling reason to change it. While a higher quorum might present no difficulties in practice, I question whether it would confer any greater authority on those successful in the elections. The PO’s authority is something earned in the discharge of the duties of the position rather than by the quorum set for his/her election.

6. I do not see that any change is needed to the current position, but it might be useful to specify a minimum vote share for any candidate to proceed to a second round of voting. If several MSPs with minimal support were to be nominated, they would have to be eliminated at present one at a time, whereas a minimum share, say 5%, might allow quicker progress through the rounds of voting without compromising the democratic legitimacy of the process.

7. I suggest that the current arrangements have worked satisfactorily. To an extent, there is a recognition that the PO posts should be spread across the Parties, out of an inherent sense of fairness. There has also been a sense, at least in my time, that the Parties have “sacrificed” MSPs nominated for the PO posts. Parties have given up a vote in the case of the PO, and probably a reduction in pooled financial resources; and have accepted a lesser contribution in the case of DPOs from Members who might otherwise have undertaken leading political roles, in or out of the Parliament.

It is difficult to imagine circumstances in which any Party would want to contribute two, much less three, MSPs to the PO team. On the other hand, if there were to be two MSPs in a single Party who offered outstanding qualities as a PO and DPO, or two DPOs, why would Parliament wish to deprive itself of the services of people with such qualities?

The current rules have worked well, and there is a strong case for allowing the status quo, well founded on informal practices, to continue. To enshrine instead in standing orders practices which have worked well on a voluntary basis risks introducing new rigidities and tensions, as well as definitional issues which the current consensus has not challenged, around the meaning to be placed on “party” in the current (and any proposed new) rules against the monopolisation of the PO posts by MSPs who “represent the same political party”.

The rules define meanings for neither “represent” nor “party”. Is a Party to be defined as the Party which nominated the MSP in the previous election, or the whip which he/she takes? Can an ambitious MSP resign from his/her party and sit as an independent in order to be electable as PO? There may be other definitional questions, and they may all be answerable, but it does not appear to me to be worth getting into a tangle over hypothetical questions which common sense and fairness have avoided to date. Also, if Standing Orders are amended to allow the creation of temporary DPOs, will they be subject to similar rules, and could the rules influence the decision as to whether temporary DPOs should be appointed?

8. I think it is essential that the PO never votes in any circumstances other than the exercise of the casting vote, which is a necessary mechanism to break a deadlock. The PO uses it only in circumstances where he/she has no discretion, and the practices surrounding its use are well understood and accepted. I see no requirement to change any current rule, or to enshrine in standing orders practices which work satisfactorily.

As for the DPOs, I think that several people who have filled this role in the past would have been put under pressure from their whips, with possible disciplinary and re-selection implications, if accepting the position of DPO meant sacrificing their right to vote, or to participate in other Party practices. In my own time as a DPO, I did not speak in partisan debates, but did so quite freely in members debates and other debates which were relatively non-contentious. I did ask questions and signed motions which were party political in nature, and I paid a proportion of my allowances in to the Party pool. I played a role in my Party externally and I was clearly a party political figure in my capacity as a regional MSP. I do not believe that any of these threatened or gave rise to any challenge to my impartiality in chairing debates, selecting amendments, choosing speakers in debates and question sessions. If anything, I think I was suspected of over-compensating in my Parliamentary roles, and being over-severe on MSPs from my own Party.

I would argue that all of the individuals who served as DPOs in my eight years in the Parliament: did their best to be impartial, and to balance their various roles. I noted, indeed I recall, what Sir David Steel said about the way in which his then deputies, Patricia Ferguson and George Reid, had conducted themselves, and I believe that Trish Godman and I met the same standards. I suggest that the Committee should seek no changes in the role of the DPOs and the rules which apply to them unless it has evidence that these standards are not now being met and pursued by the individuals who have served as DPOs since 2007. Self discipline and self-policing have served the Parliament well, and I suggest respectfully that any attempt to define and enshrine in standing orders what works well in practice would at best be redundant.

The Committee might consider whether, in the event that its current review leads to a new role of temporary DPOs, Members might be reluctant to take on the role, and Party groups might resist their Members taking it on, if even the current self-restraint accepted by DPOs were to apply to temporary DPOs, and certainly if these restraints were to be codified and tightened. The role of and restraints on temporary DPOs might better be left to evolve, and this might suggest merit in leaving those of DPOs to be defined by custom and practice rather than by standing orders.
9. I recall some discussion of this issue from my own first term in office, as there was a period when the then PO, Sir David Steel, was receiving treatment which left him unwell, and worried about his ability to fulfil his duties. In the event, Sir David worked through his illness and, when he did have to take some time off, his deputies accepted the additional workload. The real issue was not the time spent in the Chamber, which two people can cover, but the overall workload, as there is a great deal which must fall on the PO, rather than the DPOs.

I was not enthusiastic about the idea of temporary DPOs, and would have been content to take on a heavier workload to avoid such a provision being used, had it been an option in my time. I can see, however, that there could be circumstances where someone was incapacitated for a significant time-period, or when two or all three POs became unavailable, and it is clearly in the interests of the smooth running of the Parliament for it to have the provision to appoint DPOs temporarily.

I suggest that, as well as practical questions, such as remuneration and specification of the terms of tenure for any temporary DPO, there are two considerations at least which the Committee might consider. Firstly, the mechanism for creating a temporary DPO would have to be a motion to Parliament tabled on behalf of the Bureau, but I suggest that the trigger for the Bureau to do so should be a request from the PO, or a DPO acting as the PO, as only the PO team will really be aware when they require the contribution of another person.

Secondly, the Parliament should be content for MSPs to come forward to fill any such vacancies in the current manner, rather than to fetter itself with rules made in advance. I do see that there could be an argument for the position to be filled by a serving committee convener, or even the convener of a specific committee; but that would run the risk of someone coming forward and being elected who was not the best person for the position. I suggest too that it might restrict the pool of good candidates if temporary appointments required adherence to an elaborate formula of party balance, or forced an MSP interested in being a temporary DPO for a month to give up other Parliamentary positions such as a committee convenership. It would be unacceptable, of course, for a temporary DPO to be a ministerial aide or to hold any post which compromised his/her impartiality, but I wonder if the standing orders would require to say so.

I hope that these responses might be of some assistance to the Committee.

Murray Tosh
23rd May 2013.