



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE

Thursday 28 January 2016

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STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE
2nd Meeting 2016, Session 4

CONVENER

*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

DEPUTY CONVENER

Mary Fee (West Scotland) (Lab)

COMMITTEE MEMBERS

- *Cameron Buchanan (Lothian) (Con)
- *Patricia Ferguson (Glasgow Maryhill and Springburn) (Lab)
- *Fiona McLeod (Strathkelvin and Bearsden) (SNP)
- *Michael Russell (Argyll and Bute) (SNP)
- *Dave Thompson (Skye, Lochaber and Badenoch) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

The Minister for Parliamentary Business (Joe FitzPatrick)

CLERK TO THE COMMITTEE

Gillian Baxendine
Alison Walker

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Standards, Procedures and Public Appointments Committee

Thursday 28 January 2016

[The Convener opened the meeting at 09:31]

Interests

The Convener (Stewart Stevenson): I welcome members to the second meeting in 2016 of the Standards, Procedures and Public Appointments Committee. As usual, I remind everyone to switch off mobile phones because they may affect the broadcasting system.

Before we move to the formal agenda as published, I shall invite Michael Russell to declare his relevant interests. Before that, however, members will note that Michael Russell replaces Gil Paterson. It is entirely appropriate to thank Gil for his sterling work on the committee. We shall miss him, and we shall watch with interest how Michael Russell replaces him. I formally welcome Michael to the committee and invite him to declare any relevant interests.

Michael Russell (Argyll and Bute) (SNP): Thank you, convener. It is a pleasure to be back at this committee after almost 16 years. The only interest that I can think of that is even vaguely tangential is that I have a part-time appointment as professor of Scottish culture and governance at the University of Glasgow, in which role I do, on occasion, teach about issues connected with the proceedings of Parliament.

The Convener: Thank you. Your expertise on governance is much welcomed to our deliberations.

Committee Business

09:32

The Convener: The next item of business is for the committee to discuss whether to take items 3 and 4 in private. Item 3 is for members to consider a draft report and draft standing orders rule changes on the admissibility of petitions and some minor rule changes. Do members agree to take item 3 in private?

Members indicated agreement.

The Convener: Item 4 is for the committee to consider its work programme. Given recent interest in matters that are covered by the work programme paper, I am minded to propose that we take that item in public. However, I would like to suspend the meeting at the appropriate point for a short time before taking the item to the committee, so that we can receive a briefing from officials on the Sewel convention and how it relates to our standing orders. I suggest that we do that in private before we begin the public discussion. Do members agree to take item 4 in public, with a short suspension to receive briefings from officials in private?

Members indicated agreement.

Scottish Elections (Dates) Bill: Stage 2

10:28

Meeting continued in public.

09:34

The Convener: Next is the Scottish Elections (Dates) Bill. I welcome Joe FitzPatrick, the Minister for Parliamentary Business, to the meeting. We have no amendments to deal with, but standing orders require us to consider each section and schedule of the bill and the long title, and to agree to each formally. Before moving to the formal process, I invite Joe FitzPatrick briefly to put on the record the purpose of the bill.

The Minister for Parliamentary Business (Joe FitzPatrick): As colleagues know, this is a short and straightforward bill. To recap for the record, it will move the Scottish Parliament elections that are currently scheduled for 7 May 2020 to 6 May 2021, and it will move the local government elections that are scheduled for 6 May 2021 to 5 May 2022.

The Convener: Thank you for what you said and for the brevity with which you said it. We will now take the sections in order and the long title last. Standing orders allow us to put a single question where groups of sections are to be considered consecutively, so unless members disagree, that is what I propose we do.

Sections 1 to 4 agreed to.

Long title agreed to.

The Convener: That ends stage 2. Thank you, minister, for your attendance.

09:35

Meeting continued in private.

Work Programme

The Convener: Agenda item 4 is consideration of the committee's work programme. I invite the committee to consider correspondence from Mary Fee MSP, in which she asks the committee to consider a change to the legislative consent motion procedure in the standing orders.

I will inform the committee of my understanding of the timetable for the Trade Union Bill, which is the bill underlying Mary Fee's request. I understand that the bill will start its committee stage in the House of Lords on 8 February. That is expected to last until 25 February, although it could take longer. Following that, there must be a minimum gap of 14 days before the report stage, which is a further amending stage. That takes us to mid-March at the earliest.

I provided that outline of the timetable to indicate the time frame within which the committee might choose the way forward. I invite from members general comments on Mary Fee's letter.

I will put something into the mix first. Clearly an amendment to procedures of this kind, in the way that it is worded, could be seen to remove the Presiding Officer's power to interpret standing orders, and to place that power before Parliament. In effect, that outcome would deliver that power to the Government of the day. That is probably not what Mary Fee, intends so on that basis we should contemplate having a position paper brought to us next week. We can then consider the wider implications of the process that Mary Fee has asked us to undertake, and the specific wording of her amendment.

Michael Russell: Nobody is in any doubt that the Trade Union Bill is a particularly obnoxious piece of legislation, and that the Scottish Parliament opposes it. As a result of this week's debate in the Scottish Parliament, nobody is in any doubt that the majority of opinion in the Scottish Parliament is against the bill. I do not wish to commit lèse-majesté, but there is also a view that the Presiding Officer is—perhaps—not infallible.

There are different opinions regarding the eligibility of LCMs. It would be very dangerous to take a single instance of disagreement with a ruling and convert that into what you rightly called a rather interesting precedent in relation to a unique category of activity in this Parliament—legislative consent motions have no legislative function in relation to binding the Westminster Government—in order to produce a means of proceeding in cases where whether an LCM is

competent is basically a political decision. That is not true of any other legislation of great importance. At the very least, that would be problematic in future years.

We should be very careful about how we proceed on the proposal. It is quite right that we look at options for moving forward. To create a new law, essentially on the basis of a single instance of disagreement with the Presiding Officer's ruling, is a worrying thing to do. We should proceed with great caution. We have to be very careful about insisting on an urgent vote on a major change to standing orders in the last six weeks of Parliament.

Patricia Ferguson (Glasgow Maryhill and Springburn) (Lab): I would just like to correct one thing that Mike Russell said. We are not proposing a change to the law; we are proposing a change to the standing orders of the Parliament.

It is very important to remember that the letter that prompted our discussion came from my colleague Mary Fee, who is unable to be here today because of ill health. However, the greater will of Parliament is, in effect, pushing us to take action on this issue. Just this week, Parliament agreed to an amendment that gave that effect, and a paragraph was quoted from Mary Fee's letter in which she talks about a specific rule change. I think that we can make that amendment even better than the proposed draft version.

When we consider the matter next week, I hope that we bear in mind the fact that we are dealing with a completely and utterly bad bill—there is no other way to describe it. I hope that we also bear in mind that it is our duty to protect the people whom we have the power to protect from the worst provisions of the bill. That is the intent of Mary Fee's proposed change. I hope that we bear in mind the will of Parliament and the fact that, to protect people from the provisions of the bill, we have to have regard to the timetable for the bill. We have to act within that time frame.

That is not just my exhortation to the committee; it is what Parliament set out when it debated the bill this week.

The Convener: For clarity, Parliament directed the words of Mary Fee's proposal to the political parties, rather than to this committee. However, that does not in any sense block the committee from considering it.

Patricia Ferguson: I will add that it is the view across the parties—with one exception—and the Devolution (Further Powers) Committee, who have looked at this issue in detail, that an LCM should be produced. We have to give due weight to their opinion.

The Convener: Your point is well made.

Dave Thompson (Skye, Lochaber and Badenoch) (SNP): I agree with the comments that have been made on the Trade Union Bill, which is absolutely awful. Unfortunately, this Parliament does not have the power to prevent its being implemented, much as we would like to and much as a huge majority in Parliament would want to. However, we need to be careful that we deal with changes to the standing orders in a proper way; we must not allow politics to get in the way of procedures. When we are considering changes to the standing orders, we must take proper evidence, have proper consultation and give the proposals proper consideration rather than rush into anything. It would set a dangerous precedent if we did so. Parliament has expressed its opposition to the Trade Union Bill very clearly; perhaps we all need to reflect on the fact that we can do nothing about it.

Patricia Ferguson: In response to Dave Thompson's comments, I agree that it is important that we get this right, but I suggest that that does not mean that it has to take us a long time. It is also important to ensure that we do not allow process to get in the way of our doing the right thing.

Michael Russell: That is precisely the point. There is a process to which members are objecting—the ruling by the Presiding Officer. We are attempting to change that process to another process, which would be unique in the Parliament, whereby a political majority rather than the Presiding Officer would decide on the eligibility of an LCM. That would be politics getting in the way of process in a way that would damage what happens in the Parliament. Therefore, I think that we have to be very cautious indeed. I am as concerned as I was at the outset of the discussion. We should consider options urgently, but with caution.

The Convener: I think that members have adequately put their positions on the record. Are we agreed that we will invite the clerks to bring an options paper to the committee next week?

Members indicated agreement.

The Convener: There are a couple of other issues to address in relation to the work programme before we conclude the meeting. We have received a letter from the Delegated Powers and Law Reform Committee on statutory instrument procedures. I will invite members' comments on the letter. However, given that I am the member of the DPLR Committee who persuaded it to write to this committee, it might be useful if I flesh out what has happened.

The Government inadvertently laid an instrument under negative procedure when the power that it had allowed it to lay it only under

affirmative procedure. That laying of the instrument appears in the *Business Bulletin*. In the light of its appearing thereafter that the order was legally incompetent, it never existed in law; therefore, the legal position is clear and closed. However, we are left with a situation in which, in parliamentary terms, there has been no disposal of that instrument, which appeared in the *Business Bulletin* but with nothing subsequently saying that it is no longer before Parliament and that it will not come into effect after 40 days have elapsed, as it would have under the normal procedure. That is a lacuna in our processes that we need to address, and that is the issue that I sought to have the DPLR Committee bring to our attention.

How do members feel about the issue?

Fiona McLeod (Strathkelvin and Bearsden) (SNP): I am content with the recommendation that the matter go into our forward work programme and that we ask the clerk to consider possible options. I have quite a few questions on the issue, and I would need to have more of an understanding of the issue to ensure that my questions are sensible ones.

The Convener: As far as we are aware, this is the first time since 1999 that this has happened, so there may not be any urgency.

Michael Russell: One does get astonished that such a thing can happen, but it occurs to me on reading the letter that there might be a way to have standard clause within such legislation whereby, if it is subsequently found that an instrument has been laid under the wrong procedure, it would automatically be revoked. That would deal with the matter. That is only one possible solution, however. We had better examine several solutions—although it is not a matter that will cause us sleepless nights over the next few weeks.

The Convener: The DPLR Committee sought to persuade the Government to formally revoke the order and to lodge a motion suggesting that nothing further be done under the instrument.

Michael Russell: Yes. That is the issue.

The Convener: The Government argued that because that the instrument did not exist in law in the first place it was impossible to revoke it.

Michael Russell: I understand that. I am suggesting that that position might be added in words to subordinate legislation, which would have the effect of revoking instruments that were laid under the wrong procedure.

The Convener: Anyway, the proposal from Fiona McLeod, essentially, is that we incorporate the issue into our work programme. Is that everyone's view?

Patricia Ferguson: Yes—although, without wishing to prejudge the matter in any way, I hope that the Government is considering ways in which it might effect a change. It seems to be untidy at best to leave the provisions lying in the current situation. I do not know whether the Minister for Parliamentary Business could stand up and say something in Parliament or perhaps put something in the *Business Bulletin* on the matter. Surely that would at least explain what has happened, for future reference.

Michael Russell: You are right.

The Convener: The DPLR Committee has had a number of exchanges with the Government making suggestions of that character, but without receiving a positive response. That is why the matter has ended up before us.

Michael Russell: I think Patricia Ferguson is 100 per cent correct on this.

The Convener: So do I.

Michael Russell: There has to be a statement of some sort.

Fiona McLeod: I proposed that the matter form part of our work programme, with a detailed paper, because we are beginning to get suggestions. I would like to see a paper so that I can work out whether my suggestions make sense.

Patricia Ferguson: My point, Presiding Officer—

I am sorry—I mean convener. I am promoting you.

The Convener: Promoted already!

Patricia Ferguson: Although we might consider a process and include a recommendation in our legacy paper for the future committee, there is nothing to stop the Government doing something about it in the meantime. I think that it should, just in the sense of making everything tidy.

The Convener: I can only report.

Patricia Ferguson: I understand that.

The Convener: It is not my duty directly to report from the DPLR Committee, but it has had a number of exchanges with the Government, and the Government is sticking rigidly to the line that it has legally disposed of the matter. The issue for us is not the legal issue; the DPLR Committee has accepted that the matter has been legally disposed of. The issue for us is whether, in parliamentary terms, it has been properly disposed of. I think that the DPLR Committee is firmly of the view that it has not been, so we need to address that.

However, the DPLR Committee is not recommending how that be done. The point is that

we should not make decisions on the hoof here and now. We just cannot do that.

Michael Russell: The point that Patricia Ferguson raises is a significant one. I do not think that it is incompetent for this committee to say that it is a significant issue if there is a Scottish statutory instrument floating about that has no validity whatever. Also, the instrument relates to an area of some importance. I think that it might strengthen the DPLR Committee's hand to know that this committee believes the same.

Fiona McLeod: As we are now having a conversation about it, I will ask one of my questions, and perhaps the clerks can reflect this in their paper.

The letter from the convener of the DPLR Committee says:

"some confusion may still arise. For example, stakeholders ... may read the Parliament's official report of the consideration of SSI 2015/397".

Surely the *Official Report* of the Parliament's consideration of the instrument says that it was laid under the incorrect procedure. Did the DPLR Committee not say that?

The Convener: Yes, but—

Fiona McLeod: Therefore, it is in the *Official Report* that it does not exist.

The Convener: Yes, but I will lead you to a slight complication, if I may. In essence, the DPLR Committee's report records that the Government said that the instrument was laid under the wrong procedure—under negative procedure rather than affirmative procedure. That has not actually been tested by parliamentary process, as such. Therefore, it is a unilateral decision by the Government that it has used the wrong procedure. I do not think that anybody is debating that.

At the end of the day, however, we are left with a legal position that is almost certainly clear, but with a parliamentary position that remains open. The matter is not in the gift of the DPLR Committee. It would be only for Parliament, not the DPLR Committee, to take the instrument off the *Business Bulletin*.

Patricia Ferguson: Presiding Officer—I have done it again. Perhaps I am seeing into the future, convener.

Michael Russell: A dystopian one.

Patricia Ferguson: It has always struck me that the Minister for Parliamentary Business plays a very interesting role, given that he or she has a toe in both camps: the parliamentary and the political or governmental. If the minister were to make a simple statement, at least something would be on the record to make the situation clear. I do not

even think we need to discuss that: after all, this has only happened once.

The Convener: That proposition has already been put to the Government and has been rejected. I also proposed in the DPLR Committee that the Government could simply lodge a motion noting that the error had been made and so on, but it is not willing to do that, either.

Michael Russell: An inspired parliamentary question would do it.

Patricia Ferguson: Indeed. Any mechanism would do it.

The Convener: I think that with the DPLR Committee there might have been three or four interchanges without any resolution.

Patricia Ferguson: That is just disappointing.

Michael Russell: Could this debate be drawn to the attention of the Minister for Parliamentary Business? I do not know whether that would tip the balance.

The Convener: It is fair to say that the matter will not be news to the Minister for Parliamentary Business.

Michael Russell: I am sure.

The Convener: Does the committee wish, without closing the issue, to draw the matter to the minister's attention, as its immediate step?

Members *indicated agreement.*

The Convener: We will see where that takes us.

That concludes today's meeting. Thank you for your support and assistance.

Meeting closed at 10:46.

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