



OFFICIAL REPORT
AITHISG OIFIGEIL

Standards, Procedures and Public Appointments Committee

Thursday 30 May 2019

Session 5



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Pàrlamaid na h-Alba

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Thursday 30 May 2019

CONTENTS

DECISION ON TAKING BUSINESS IN PRIVATE	Col. 1
MINISTER FOR PARLIAMENTARY BUSINESS AND VETERANS (EVIDENCE)	2

STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE
9th Meeting 2019, Session 5

CONVENER

*Bill Kidd (Glasgow Anniesland) (SNP)

DEPUTY CONVENER

*Mark Ruskell (Mid Scotland and Fife) (Green)

COMMITTEE MEMBERS

*Jamie Halcro Johnston (Highlands and Islands) (Con)

*Tom Mason (North East Scotland) (Con)

*Gil Paterson (Clydebank and Milngavie) (SNP)

*Elaine Smith (Central Scotland) (Lab)

*Maureen Watt (Aberdeen South and North Kincardine) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Jonathan Brown (Scottish Government)

Alison Coull (Scottish Government)

Graeme Dey (Minister for Parliamentary Business and Veterans)

Steven Macgregor (Scottish Government)

CLERK TO THE COMMITTEE

Katy Orr

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament
Standards, Procedures and
Public Appointments Committee

Thursday 30 May 2019

[The Convener opened the meeting at 09:31]

Decision on Taking Business in
Private

The Convener (Bill Kidd): I welcome members to the ninth meeting in 2019 of the Standards, Procedures and Public Appointments Committee.

Are members content to take in private agenda item 3, which is consideration of the evidence that we are about to hear in this meeting from the Minister for Parliamentary Business and Veterans?

Members indicated agreement.

Minister for Parliamentary
Business and Veterans
(Evidence)

09:32

The Convener: Item 2 is evidence from Graeme Dey, Minister for Parliamentary Business and Veterans. I welcome Graeme Dey MSP; Jonathan Brown, from the parliamentary counsel office; Alison Coull, head of constitutional and civil law division; and Steven Macgregor, head of parliament and legislation unit in the Scottish Government.

I invite the minister to make a short opening statement.

The Minister for Parliamentary Business and Veterans (Graeme Dey): I welcome the first opportunity to attend a meeting of this committee since I became Minister for Parliamentary Business and Veterans, which was 11 months ago, although it seems longer.

These are challenging times as a result of the legislative pressure that is being placed on the Parliament and the Government, particularly as a consequence of Brexit. As I am sure members are aware, I have been heavily involved in taking steps to manage that situation. I reiterate my appreciation and admiration for the way in which members and committees have responded to the challenge that has been posed to us.

My job in all this is to work in partnership with the rest of the Parliamentary Bureau, the conveners and clerks to help manage the primary and secondary legislation in a way that has allowed us to deal, largely effectively, with what has been before us. We have established a pattern of information sharing with the committees, the Parliamentary Bureau and the business managers, so that we can better understand what work might be heading the way of the Parliament. In the case of the committees, that has involved monthly communication. Although that approach was initially prompted by us having to deal with the no-deal Brexit legislation, I intend to continue engaging, particularly with the conveners, in that way. Having been a convener myself, I understand the business planning issues that conveners and clerks face, so I am keen to maintain that collaborative approach.

Convener, I recognise that, when you have a minister in front of you, you will have a number of questions to shoehorn into the session. I will leave matters there and place myself at the disposal of the committee.

The Convener: Thank you very much, minister. We have a number of questions on areas that you

will probably have an understanding of. Indeed, there has already been a bit of correspondence between the committee and your office.

We will kick off with Gil Paterson, who will ask a couple of questions about Brexit as a lead-in to the session.

Gil Paterson (Clydebank and Milngavie) (SNP): Good morning, minister. What impact have the preparations for Brexit had on the Government and on parliamentary resources?

Graeme Dey: First, I would certainly stress that pressure has been put not only on the Government but on the Parliament, which has had to respond to the challenges that have come our way.

Brexit is likely to continue to impact on the Government's ability to deliver our domestic programme, but the extent of that impact is unclear. Although we had a full year 3 legislative programme in place, we had to pause half a dozen bills at one point, and we are now gradually reintroducing them in conjunction and agreement with the committees. We have also had to pause 38 domestic Scottish statutory instruments, which allowed us to clear the decks so that we could cope with Brexit. Obviously, any primary or secondary legislation that is deferred has to come back, by and large. Parliament thought that there might be a three-month period in which things would be extremely busy, but the reality is that that period will have to be extended as we reintroduce the instruments and bills that we had to defer. We are discussing with the relevant committees what that reintroduction will look like, and I am confident that we will get through everything that we need to get through. By way of illustration, I point out that we expect the number of bills to get royal assent this calendar year to be one more than in 2018, and that very much speaks to the work of the Parliament in responding to what Brexit threw at us.

I am not going to sit here and say that everything from now on will be fine, because we simply do not know what lies ahead with Brexit. Considerable demands have been placed on the Government in terms of the resources to draft instruments, and we have had to second lawyers from elsewhere to cope with the situation. However, we have coped so far, and we will look to cope as we move forward.

As far as the future legislative programme is concerned, we will introduce a full programme for government in September with the intention of delivering on it. However, the caveat is that, if a no-deal Brexit comes our way, it will have an impact.

Gil Paterson: You seem to be comfortable with the resources that you have had available,

although you have had to second other folk. Are you reasonably comfortable with the suggestion that you have managed to do this successfully?

Graeme Dey: I would say that we have coped, but the organisation has been working flat out and we have had no spare capacity. Indeed, we have had to second additional legal resource to allow us to get through this. I would characterise the situation by saying that the Government, like the Parliament, has risen to the challenge, but it has not been easy.

Gil Paterson: So you do not know what is coming, but you know what you have been through. What is the likelihood of your being overwhelmed by things, or is it just a case of having to wait and see?

Graeme Dey: We will have to wait and see, but we should not underestimate the effect of the conversations that are taking place with the committees, particularly the conveners, to manage workload. As we go into year 4, we are mindful not just of the programme for government; we want to introduce the instruments that would normally have been introduced—in other words, the 38 SSIs—and we realise that the committees, too, have work that they want to do. Indeed, that has added to the challenge that they face.

I will bring in Steven Macgregor to give you some more detail about what we are expecting.

Steven Macgregor (Scottish Government): It is difficult to say what to expect. What we are trying to do is what we have had to do for the past several months, which is to plan as far ahead as we can and extend our planning horizon on the volume and type of legislation that might come so that we can work out the resource impact on the Scottish Government and have conversations with committees about what it might look like for them. That is what we are trying to do, and when we get better information about what is coming through on Brexit, we will include that.

Gil Paterson: So there is another element to this, and that is Parliament and the committees and so on. How has all this additional load that we never expected impacted on the Government's programme and how the Parliament proceeds with its business?

Graeme Dey: One example of how it has affected us is that, earlier this year, we had to pause six bills as well as the instruments that I referred to. That is probably the best illustration that I can give you, as that was a simple judgment that we had to make to allow us to cope. Although we have coped, it has come at a price. We are now planning to reintroduce the instruments, although I should say that not all the instruments will necessarily have to be introduced; we are also looking at that.

It is about pragmatism and taking a collaborative approach. If we look back, maybe it is a surprise that we coped with the load that came our way, but people stepped up to the mark, whether it be the parliamentarians or Government officials. We have got there thus far.

However, if there is another spike in Brexit-related challenges, there is no doubt that it will affect us all.

Gil Paterson: I want to take you down a slightly different line. Why has the majority of regulation to prepare for the devolved statute book for Brexit been done at the UK level, and what does it mean for this Parliament?

Graeme Dey: I used the word “pragmatic” earlier. We have shown pragmatism. Given the pressures that we were under, there was no point in duplicating work. If we could agree with the UK Government on some of the instruments involved, it made sense to accept them as the basis for proceeding.

I absolutely acknowledge that, on occasion, some committees have expressed concern about the amount of time that they have had to deal with instruments, and I am sympathetic to that. In fairness, however, in a number of instances when we have been in late receipt of instruments, that has been an error and in no way deliberate. You can imagine the pressure that is on the Government down south to cope with the situation. That is the reason why we took the decision that we did. If we did not accept that an instrument was in our interests, we would not accept it. That was the judgment call that we had to make, and we had protocols between the Government and the Parliament on how we would proceed.

If any committee has any concerns about the process, I am open to hearing those concerns and taking them on board.

Gil Paterson: The Parliament’s major function is to scrutinise the work of the Government. The fact is that the instruments that we are talking about never appeared in the Scottish Parliament. What is the Scottish Government’s view of the Parliament not being able to scrutinise something that happens elsewhere? Are you satisfied that the scrutiny that was done place elsewhere was up to what you would expect?

Graeme Dey: Do you want to talk about the process, Steven?

Steven Macgregor: The technical scrutiny of the statutory instruments was undertaken by the UK Parliament, but we put in place a protocol whereby, before those instruments would go to the UK Parliament and be passed there, the Scottish Government would set out to the Scottish Parliament why it thought that it was content within

the devolved interest to give the Scottish Parliament the opportunity to scrutinise the policy aspects of what the UK Government was doing, and the impact on Scotland. The protocol covered the technical scrutiny of instruments and the impact on devolved areas of having that protocol in place.

Gil Paterson: Now that you have had experience of that, are you satisfied that the scrutiny went the way that we expected it to go? I know that you have concerns about the volume and impact of the scrutiny.

09:45

Graeme Dey: We do not live in an ideal world in which, of course, we would have a full scrutiny process. My judgment is that, by and large, and given the circumstances that we were in, we did what we could. We will also learn lessons as we go along. At the outset of the Brexit process there were a lot of issues between Scottish Government and UK Government departments, and the flow of information might not have been as we would have wanted. As the process has developed, that has generally improved, which will be helpful in the future. However, I reiterate that the situation has not been ideal. As a responsible Government, we had to look at the best way to deal with it to ensure that we had everything in place in the event of a no-deal Brexit, and that was the best way to do it.

Mark Ruskell (Mid Scotland and Fife) (Green): To follow up on that point, do you feel that, inevitably, because of the pragmatism that you have mentioned—which has been driven primarily by the situation that we are in—the quality of the legislation and of the collaboration and negotiation with Westminster is a lot lower for the Brexit-related SSIs that we are dealing with? I will give two examples: the registration, evaluation, authorisation and restriction of chemicals—REACH—regulation, of which you will be aware; and the replacement for the emissions trading scheme. There are huge holes in and uncertainties about those regulations, but committees have been put in the position of having to say, “Well, they are better than nothing.” That leaves me, as a member of the Parliament, feeling very uncomfortable. How do you feel about the quality of legislation that is going through and being passed?

Graeme Dey: Generally, the standard has been okay. I ask you to take it on trust that the Government would never go along with something that was not in Scotland’s best interests. I know that you were particularly exercised by the regulations on REACH, which I understand. However, a full explanation was provided by the UK Government about the late receipt of that instrument. That situation was quite queer, but

there was nothing sinister about it. As I keep saying, the situation is not ideal, and we could pick out examples, such as the regulations on REACH or the ETS, on which we would have wanted more time to interrogate matters in greater detail. However, we are where we are.

Jamie Halcro Johnston (Highlands and Islands) (Con): Good morning, minister. I recognise that parliamentarians and committees have stepped up to the additional workload. However, are you suggesting that the time for legislation that could be going through the Parliament might be threatened by the additional workload in dealing with Brexit?

Graeme Dey: As I said earlier, we had to pause six bills, which we are in the process of reintroducing. Undoubtedly, we will face further challenges as we move forward. We will still introduce a substantial programme for government in September, the volume of which will be in keeping with what you would expect, and we will look towards getting that through.

This is in no way a criticism of them, but I should say that we faced additional internal challenges when committees regularly asked for additional time—for stage 2, for example. That was probably because of the pressure that they felt under in other regards. In the spirit of co-operation, we have sought to go along with that whenever possible, but it has perhaps created a little issue. We are currently in the closing weeks of the parliamentary year. I know that it is normal to have a lot of stage 3 business now, but it feels as though we have rather a lot of it and that there has been a concertina effect because of that. It also places further demands on members' time. I keep saying it, but we are where we are. I am not going to point fingers here; we have to cope with what is in front of us. So far, collectively, we have been doing that.

Jamie Halcro Johnston: I take your point, and it might be a question of prioritising the Parliament's time. However, yesterday, the Government introduced the Referendums (Scotland) Bill, which may or may not be used or have an impact. Is that a good use of Parliament's time, given that we all recognise that there is increasing pressure?

Graeme Dey: I think that there is probably a political element to that question.

Jamie Halcro Johnston: The bill has been introduced, but you have suggested that there is already pressure and that prioritisation is taking place in relation to legislation, so I think that the question is valid.

Graeme Dey: I accept that. The Government considers the bill to be important, and it is factored into our planning. As long as there are no impacts

from Brexit, which would be outwith our control, we anticipate that we will get through our programme, which includes the Referendums (Scotland) Bill, and come out the other side.

The Convener: In session 4, the committee conducted an inquiry into legislation in the Scottish Parliament. We have a few questions about the legislative process, particularly on the quality of supporting documents.

Tom Mason (North East Scotland) (Con): We have made some progress with documentation, in that a bill's financial memorandum has been extracted from its explanatory notes. How have you improved documentation in this session? What has been the impact of your actions on new legislation coming through?

Graeme Dey: That issue has been a priority for me since I became a minister 11 months ago. As you will know, I was a committee convener in a previous life, so I entirely understand the—at times—legitimate concerns that committees have expressed about accompanying documentation and the general accuracy of what is in front of them. I note that, in effect, the conclusion of the session 4 report was that the current system is not broken in any way. It invariably produces high-quality legislation, but we should continually look to innovate and improve. That is the approach that I have taken in Government.

We have taken a number of measures. We have refreshed the key internal guidance documents, such as the bill handbook, which is an essential read but no page turner, it has to be said. There are more gateway reviews at critical points in the development of bills, and there is more emphasis on the need to ensure that accompanying documents are of a consistently high standard. We hold additional seminars with bill teams to go through what is expected; the next one will be in July. I have more direct engagement with lead ministers on the management of their bills. There has also been a general emphasis on responding to and taking on board the criticisms that were made prior to my appointment, which, to be fair, my predecessor responded to in the first instance.

If there is the view that we are still not getting it right, you will need to give me specific examples. I do not at all get the sense that there is a large-scale problem, but I ask members to please bring to my attention any specific examples, and we will take any criticisms on board.

The Convener: Mark Ruskell has a question about the timescales for consideration of legislation.

Mark Ruskell: Minister, you have already touched on this subject, but how have you engaged with committees on timetables for stages of bills? How have you been incorporating, or

responding to, committee preferences on timetabling?

I do not want to focus too much on your old committee, but there was a debate in the Environment, Climate Change and Land Reform Committee around the time when we needed to deal with stage 2 of the Climate Change (Emissions Reduction Targets) (Scotland) Bill, particularly in the light of the amendments and a possible requirement for discussions with the Government on some technical aspects of the bill. There was a feeling that we needed to get the stage 2 process right, which led to a request for an extension. That is one example, and there might be others. As well as reflecting on the pressures that you face, will you consider how to accommodate the needs of committees in that regard?

Graeme Dey: There is an interesting statistic showing the number of sitting days used by Parliament over the sessions to take bills from introduction through to the stage 3 debate. In the current session it is 124 days, compared with 111 days in session 4. That demonstrates that committees are getting additional time, as far as it is possible, to scrutinise as they feel is necessary. All the judgment calls that are made when requests come in are a matter of compromise because we have to stick as closely as we can to the timetable to get bills through, otherwise the concertina effect will become even more pronounced.

I can give a number of examples of requests that we have received in recent months from committees for a little more time to deal with issues. The Justice Committee asked for an extension to stage 1 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill in order to hold some additional evidence sessions, and that happened. The Equalities and Human Rights Committee wanted a delay on the Age of Criminal Responsibility (Scotland) Bill to accommodate two additional evidence sessions ahead of stage 2, and we worked that out. The Rural Economy and Connectivity Committee had an extension to the stage 1 deadline for the Transport (Scotland) Bill to prepare its stage 1 report, which was entirely justified by the enormous workload that that committee is carrying. The Environment, Climate Change and Land Reform Committee, when it was at stage 2 of the bill that Mr Ruskell mentioned, legitimately delayed that to take account of the further evidence that was to come from the United Kingdom Committee on Climate Change.

When we can accommodate such requests, we work collaboratively, and we often reach a compromise. However, we have pretty much managed that.

Mark Ruskell: You mentioned some figures: 124 days in the last session and 111 days in this session—or was it the other way around?

Graeme Dey: It is 124 in this session, it was 111 in session 4 and, if we go back to session 3, it was 106 days.

Mark Ruskell: Is that an objective—a target that you are working towards—or are you looking at it from the perspective of the needs of Parliament and the complexity or simplicity of the legislation? For example, the Planning (Scotland) Bill has ended up being a lot more complicated than the Government perhaps originally envisaged, but we hope that, due to the extended timescale, particularly the time that the Government has had for negotiating with parties and members both on and outside the committee, the legislation will be of better quality. If the time had been constrained, what might have happened?

Graeme Dey: I do not want to give the impression that we have a target. Far from it. That statistic simply illustrates the average time that has been given to committees.

You are absolutely right that no two bills are the same. You and I could go back to the Wild Animals in Travelling Circuses (Scotland) Bill that we were involved in; we would hardly compare that with the Planning (Scotland) Bill, complicated though it got at times.

The Planning (Scotland) Bill is a good example of us finding time to work through the issues around a bill. Stage 3 will be pretty intense and extended, but there is no way that the Government would seek to constrain any bill process. We take a genuinely collaborative approach with committees and conveners. Before bills are introduced, we sit down to look at the breadth of the bill and what we think is likely to be required by way of evidence sessions, and we take on board points from the committees.

Tom Mason: Is not some of the pressure on timing a result of the bills not being thought through and negotiated before they start? If there were fewer amendments—in other words, if there was more consensus on the bill—we would not need the time.

Graeme Dey: I do not accept that. No bill is perfect when it is introduced and there will be times when, shortly after a bill has been drafted and introduced, the Government recognises that points will need to be amended. However, the scrutiny process is about taking on board the views of stakeholders, who, having seen the bill, might take a view that they had not flagged up in the Government's initial consultation. We also take on board the points made by the committee; the stage 1 report will flag up some issues that legitimately have to be addressed. The

parliamentary process exists to ensure that, when we finish a bill, it is in better shape than when it started. There is an inevitability about that.

Tom Mason: But if it started off better, it would go through more easily.

Graeme Dey: I invite you to define what you mean by “better”, Mr Mason.

Tom Mason: Obviously, it is subjective, but in general, doing more work at the front end of the process will speed up the whole process.

10:00

Graeme Dey: I assure you that a great deal of work is done prior to the introduction of a bill. There is an extensive process that carries on for many months before a bill goes to the Presiding Officer and is introduced in Parliament. Sometimes, when I am timetabling bills, I wish that the process were quicker, but there is a very extensive process involving consultation with stakeholders, drafting, and consideration of what we are looking to achieve before the bill comes to the Parliament. I do not therefore accept your argument.

The Convener: On the issue of timescales, Maureen Watt has some questions about a pause mechanism for stage 3.

Maureen Watt (Aberdeen South and North Kincardine) (SNP): The Planning (Scotland) Bill might serve as a good example of what I want to ask about.

Graeme Dey: Or perhaps not. [*Laughter.*]

Maureen Watt: A recommendation in a previous SPPA Committee report, which was endorsed by the commission on parliamentary reform, was that it might be a good idea to pause between consideration of stage 3 amendments to a bill and the final debate before that bill is passed. Might the Government consider such a mechanism for some bills?

Graeme Dey: As a parliamentary business manager, I might, at this point in the parliamentary year, be a bit resistant to that suggestion. There is no doubt that we face real challenges with workload at this time of the year.

However, on your question about having a pause at stage 3, we think that a flexible rather than prescriptive approach would be more appropriate and that we should consider the merits of splitting stage 3 proceedings over multiple days on a case-by-case basis. We have done that, on occasion, and it is a conversation that I have with the business managers on the Parliamentary Bureau to address the specific demands presented by a bill.

We have sometimes considered stage 3 amendments and then had the stage 3 debate the following week. However, you will appreciate that the members who have been immersed in the whole process of considering a bill will often want to deal with it in one day, if that option is viable, given the number of amendments and the need for the stage 3 debate. We routinely consider the best approach to individual bills.

As for your example of the Planning (Scotland) Bill, it will come as no surprise to anyone that an unavoidable and compelling case has been made for it to be considered over multiple days. Indeed, in that case, we looked very specifically at whether the best course of action was to stagger it over a weekend or whether we could do it in one week, and we have taken some soundings from members of the committee and others who we expect will be heavily involved on their preference.

Flexibility is the best approach here, but I can give you our commitment to keep looking at this issue on a case-by-case basis and taking on board views, where that is possible.

The Convener: On the issue of accompanying notes to packages of amendments, during the fourth parliamentary session, the committee recommended that amendments that are linked in some way, or which form a package that achieves a policy intention, should have accompanying notes to make things easier for members and the public, and to make the whole process more transparent and accessible. Could accompanying notes make the amending stages more transparent and accessible, and, if so, how could that best be achieved?

Graeme Dey: At this point, I will bring in an expert on amendments and notes to amendments.

Jonathan Brown (Scottish Government): We all accept that textual amendments to a bill can make the picture quite confusing, and we have done a lot of thinking on the matter. We have been working with parliamentary authorities on the best way to present packages. In the interim, to make them more transparent, we send purpose and effect notes on almost every Government amendment to the relevant committee. That is the best way of showing which amendments naturally fall together and explaining the sometimes cryptic changes. We make the information available to members in advance so that they have a chance to know what they are voting on.

The Convener: Thank you. Does a similar process take place with SSIs?

Graeme Dey: No, not to that extent. With SSIs, we have tried to take on board the legitimate criticism from some of the committees about the explanatory notes not being as clear and easy to understand as they might be. We have tried to

strike a balance by having a summary of what the SSI is seeking to achieve. I am not saying that we have got that perfect yet but we are trying to do it. We genuinely try to take on board the concerns of committees and work with them.

The Convener: Good. The reason that we are asking that is that you wrote to the Justice Committee in the autumn to address its concerns about the quality of policy notes that accompany SSIs. In the letter, you emphasised your commitment to ensuring that documents of that type should be accessible. Has that situation moved on? Has it improved?

Graeme Dey: The lack of feedback that I have had suggests that it has improved. We are not complacent. It is not just the Justice Committee. I used to sit on the conveners group and I have heard concerns from a number of former colleagues. We have taken them on board and we continue to work through them.

It is about getting the balance right between having the detail in the note and an explanation. We have all sometimes read the notes, re-read them, and still not been clear about what they are seeking to achieve. We have tried to set about that shortcoming. The credit for that belongs to my predecessor, Joe FitzPatrick, who began the process. However, if members have specific examples in which that has not been the case, please give them to me and we will use them to improve our internal processes.

The Convener: It is good of you to put that on the public record. Thank you.

Graeme Dey: I might live to regret it.

Elaine Smith (Central Scotland) (Lab): The CPR recommended that Parliament establish a legislative standards body to provide

“a Scotland-wide approach and understanding of what constitutes good legislation.”

The committee took a different view. Because a range of initiatives to improve the quality of legislation and the opportunities for stakeholders to engage was already under way, it did not recommend the establishment of such a body. However, the committee felt that developments in promoting legislative standards should be monitored.

In that spirit, have there been any new initiatives on the part of the Scottish Government or the parliamentary counsel office to promote legislative standards?

Graeme Dey: We share the committee's view that there was no need to establish a legislative standards body. There are many ways for the public, stakeholders and Parliament to engage with the Government as it develops its legislative

programme. Once legislation is introduced, Parliament also has a comprehensive framework for its scrutiny. It is important to maintain a proportionate approach, but I am happy to consider ways in which existing practices can be used to improve engagement on certain proposals in the Government's programme and more generally.

There is no lack of scrutiny leading to substandard legislation. The Parliament has become good at dealing with legislation and getting it right. Jonathan Brown will give you some details.

Jonathan Brown: With regard to some of the initiatives, members might have seen that we updated “Drafting Matters!”, the drafting guidance that we publish. We extended it, expanded on it and tried to make it publicly available so that people can understand what we are working with and use it to hold us to account.

We have also worked with drafting officers in the UK, Welsh and Northern Irish Governments to put together the policy document, “Guidance on Instructing Counsel: Common Legislative Solutions”, which looks at how we might help policy makers to approach recurring issues in legislation and what the solutions might be when similar questions arise. We try to engage regularly with users of legislation and stakeholders. We have good ties with the likes of the Law Society of Scotland and the Faculty of Advocates, and we maintain a dialogue with them about what they find useful and interesting. We also talk to other users of legislation to get feedback with a view to improving things.

We have a variety of links with other drafting officers around the world. We talk to them about how they assess quality and how we can learn from one another. That is a really strong source of information for us. Closer to home, we work very closely with the legislation team in Parliament on what we are doing and how we can keep the dialogue going on how we can improve. We want to have the highest possible standards when it comes to the quality of legislation and the processes around that.

Elaine Smith: That was helpful. It is important to have that on the record, given our commitment to monitoring. What you said helps to answer Tom Mason's question about standards of legislation. I do not think that we will ever get away from the amendment stage, but I am sure that the approach that you described helps to reduce the amount of amendment that is necessary.

Post-legislative scrutiny also exercised Parliament during the previous session. That must be also taken into account. How is that going?

Does that fit in with the need—if there is a need—for a legislative standards body?

Graeme Dey: You are absolutely right. Post-legislative scrutiny is another key component of what we do. If a pattern were to emerge that suggested that legislation needed to be substantially amended, we would have to reflect on that.

I know that there have been times when committees have wanted to carry out post-legislative scrutiny of individual pieces of legislation in their areas of interest, but have not been able to because of the time pressures on the Parliament. We should encourage committees to carry out post-legislative scrutiny when the opportunity arises; we should never be complacent.

I entered Parliament in 2011. For the first year and a bit, it felt as though we revisited quite a lot of previous legislation to improve it but, latterly, when I was on the back benches, we did not do anywhere near as much work of that kind. As the Parliament has grown up, it has developed and improved its processes. By and large, we produce a high standard of legislation, but you are right that there must be a place for the amendment process, because it is a key component of what we do.

Elaine Smith: Post-legislative scrutiny is important, and it is a pity that there is not more time for it. Obviously, no one can foresee unintended consequences of legislation, but they can be explored through the post-legislative scrutiny process.

The CPR's recommendation about a legislative standards body could still come back on to the table at some point in the future, which is why it is important that we monitor the situation. Ultimately, such a body might have to be the answer.

Graeme Dey: Given the interest that Elaine Smith, in particular, has expressed in the issue, we will undertake to update the committee on any further measures that we take to improve our internal processes so that members are kept up to speed on that.

The Convener: You have stirred some interest, minister, but our time is limited. That commitment to provide more information might help Tom Mason, to whom I must apologise, because Mark Ruskell was already down to ask a question. We will have to move on to questions on the Scottish law officers fairly soon.

Mark Ruskell: My question is about answers to written questions. The committee wrote to you to suggest that the quarterly returns should specify how many questions had not been answered substantively at particular milestones. You wrote back to say:

“No accurate timescale can be given to members regarding the delay of substantive answers.”

Can you explain that, because it seems to be quite a puzzling response? Does the Government not track how long it takes for members to get answers? Can you provide more reasons for your statement?

10:15

Graeme Dey: If I remember correctly, part of the problem with that is the volume of work that would be generated for members of my team. We collate certain statistics; for example, I can tell you that in the first quarter of 2019, 1,441 written questions in total were lodged, with 93.5 per cent answered on time, which is above the 80 per cent target. I am not offering that statistic as a way of dismissing your question; it is just an illustration. If I remember correctly—and I will write back to the committee with further detail on this—the issue is the sheer volume of work that pulling all that together would create for us. In general, we seek to answer parliamentary questions as quickly as possible, but with some that are complex or which require information from other agencies, we will simply not hit the target.

Mark Ruskell: If, as you have said, 7 per cent of questions are delayed substantively, we would not need to analyse the other 93 per cent. All we would need would be some understanding of whether any particular themes were emerging across the various departments in the reasons for delay in that 7 per cent. Is that not worth considering?

Graeme Dey: I get your argument about emerging themes, so let us take that away, look at it and write back to the committee.

Mark Ruskell: Okay. Are you generally content with the quality of written answers? Again, let me give you an example. For some questions that I have asked, I have eventually ended up with an answer pointing me to something that has appeared in the public domain in the interim between my asking the question and getting a parliamentary answer. Clearly that is not acceptable, and I do not know whether that is occurring in only a minority of the 7 per cent of questions that are not being substantively answered within the timescale, but it seems to be quite bad practice just to be signposted to a website when as a parliamentarian I had expected an answer at the appropriate time.

Graeme Dey: If you have specific examples of answers that you have felt were not appropriate, I will be happy to look at them. I should say that we will get PQs asking for information that is already in the public domain—for example, it might have been published by the Scottish Parliament

information centre—and when that happens and comes on to my radar, I have encouraged officials to provide that information anyway, just to be helpful. Sometimes, though, there will be an answer that says, “That information is already in the public domain—and this is where it is.”

I think that you were talking about an answer referring to information that had been published between your asking a question and getting the answer. I am happy to engage with you and anyone else on such issues and look at what we can do about that in the future.

Mark Ruskell: I will bash them out and send them off to you.

Graeme Dey: Oh, good—something to look forward to. [*Laughter.*]

The Convener: We still have quite a considerable amount to get through, but I want to say that this session with the minister is proving to be extremely useful. So that we can judge how many more questions we can ask, minister, can you tell us approximately how much time you have left?

Graeme Dey: I have time, convener.

The Convener: That is very kind. We will move on.

The committee has been considering correspondence from Mike Rumbles MSP and Adam Tomkins MSP on the Scottish law officers answering questions in the chamber. On 23 January, Mike Rumbles asked the following question during portfolio question time:

“To ask the Scottish Government what the Lord Advocate’s position is on its competency to authorise another referendum on Scottish independence without another section 30 order.”—[*Official Report*, 23 January 2019; c 12.]

You answered that question, minister, but Mr Rumbles hoped that it would be answered by the Lord Advocate, who was in the chamber at the time. Now that you know the background, I wonder whether you can give us a short rundown of the issue, as that will allow us to follow on with some questions.

Graeme Dey: An attempt to explain the situation might not be so short.

I fully appreciate that the committee wants a further explanation of the role of the law officers in Parliament. The issue is not straightforward, but the key thing to bear in mind is the unique constitutional position and responsibilities of Scottish law officers, as reflected in the Scotland Act 1998. Under that framework, a law officer wears two hats: first, they are a minister and a member of the Government, and, secondly, they have a role in the criminal prosecution system and

in the investigation of deaths in Scotland. Their formal status as a member of the Scottish Government is no different from that of any other member of the Government. Their responsibilities in relation to the prosecution of crime and the investigation of deaths are additional to their roles as ministers, and they exercise those functions entirely independently of Government or any other person.

In practical terms, the work of the law officers within the Government will naturally concern matters of a legal nature. However, such matters will inevitably also concern the policies and actions of the Scottish Government. It is a well-established fact that the Government does not disclose its legal advice or, indeed, whether law officers have advised on any matter. To do so would be contrary to the ministerial code and the civil service code.

Given that background, as stated in the letter of 20 March, the Government does not consider the current standing orders to be unfit for purpose, because those rules quite correctly take account of the unique role of the law officers and do not place any restriction on their participation in proceedings as Scottish ministers. The rules also reflect the constitutional position of the Scottish Government, which is collectively accountable to the Scottish Parliament.

Usually, it would be appropriate for a question relating to a particular minister’s sphere of policy and responsibility to be answered by that minister, who would reflect the Government’s position in relation to the relevant legal considerations. However, as the committee will be aware, occasions arise when another minister might answer in place of the minister with the relevant portfolio.

The issue has come to the committee’s attention after a member argued that a member should be able to require that their question be answered by a specific member of the Government. We believe that that is wrong. The Government argues that such a requirement on responses in the chamber would be unnecessary and would, in practice, erode the Government’s ability to be held accountable, given the potential for the provision of an answer to be delayed if the minister whose response was requested was not available. The requirement would also be incompatible with the constitutional position, which is that ministers are collectively responsible to Parliament. The opinions of the law officers relate to matters that are for Government collectively, so the response that a law officer would give would be no different from the answer that any other minister would give. Questions that ask for the law officers’ views on specific legal questions would undermine the long-standing convention on legal advice.

I recognise that the situation that triggered the issue being discussed occurred in December 2018. We argue strongly that there were exceptional circumstances in that case. The Lord Advocate did not provide detail on the legal advice that he had given, but answered questions regarding the Presiding Officer's position on competence in relation to the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill.

The Convener: Thank you for that fairly comprehensive answer. Mr Rumbles suggested replacing the second sentence in rule 13.7.1 with:

“An oral question concerning the responsibilities of the Lord Advocate or the Solicitor General for Scotland should normally be answered by them but may exceptionally be answered by another member of the Scottish Government if they are unable to attend the chamber.”—[*Official Report, Standards, Procedures and Public Appointments Committee*, 16 May 2019; c 14.]

I think that he is suggesting that that is the normal procedure for any other Government minister.

Graeme Dey: We contend that, if rule 13.7.1 were to be made more proscriptive, the consequent loss of flexibility would run counter to the proper operation of the constitution and the interests of the Parliament. That is our position.

Elaine Smith: The Lord Advocate was in the chamber when the question was asked, so I presume that that is why Mr Rumbles feels that it might be in order to change the standing orders to what he has requested. When he was at the committee, he expressed the opinion that, had the Lord Advocate not been in the chamber, he would not have thought any more about it. If a minister cannot be there, any member of the Government can answer a question.

In the end, Mr Rumbles's question was about competency. I just want to press you a wee bit further on that. When the Lord Advocate answered questions on the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, were they not about competency? Is the matter of the competency of a bill more for the Presiding Officer rather than the Lord Advocate? All that seems to be slightly complicated, so I wonder whether that is where the answer lies in terms of deciding what is competent for the Parliament and what is not.

Graeme Dey: The issue in 2018 was very specific. The Presiding Officer had issued a certificate to the effect that the bill was not within the competence of the Parliament. The Lord Advocate expressed a different view, so he made a statement to Parliament to set out the basis on which ministers had nevertheless concluded that the bill was within the competence of the Scottish Parliament.

Our position is that that was an exceptional set of circumstances. They were different from the set of circumstances that we had with Mr Rumbles's question. I read his comments to the committee and, with due respect, it is hard to believe that he was not seeking to tease out what the advice to the Government had been. They were two different sets of circumstances.

On the other question, there is a collective responsibility element here. It is for any minister of the Government to answer a question. The set of questions that day sat in the portfolio that I am part of, so I answered that question.

Elaine Smith: Thank you.

Alison Coull (Scottish Government): It is a matter of public record, in the ministerial code, that ministers are advised on the competence of a bill by the Lord Advocate. That is another reason why it was appropriate in the specific circumstances of the continuity bill for the Lord Advocate to explain the Government's view. That followed on from Mr Russell's statement about the bill.

Elaine Smith: But it has been deemed that that is not the case with the bill that has been introduced this week. Is that what you are saying?

Alison Coull: It is a matter of public record that the Lord Advocate will have advised ministers that that bill is within the competence of the Parliament. The Presiding Officer has not issued a negative certificate. If the Presiding Officer ever issues a negative certificate again, the Lord Advocate would consider it appropriate to come to the chamber, but we are not in that situation with this bill.

Elaine Smith: To clarify, even if the Presiding Officer issued a negative certificate, Parliament could still agree to pursue a piece of legislation.

Alison Coull: Yes, and that happened with the continuity bill.

Elaine Smith: It is important to put that on the record.

Alison Coull: Absolutely.

Graeme Dey: It is not a like-for-like comparison.

The Convener: I thank Elaine Smith for bringing out that information, and I thank Alison Coull.

Gil Paterson will round off our questions.

Gil Paterson: I have a couple of questions on the generality of what happens elsewhere.

Do you know of any other jurisdiction where the Opposition gets to say who will answer a question rather than the Government?

Graeme Dey: That is an easy question. I will look to my officials, but I suspect that the answer is no.

Alison Coull: No.

Graeme Dey: I am sorry; you have stumped us.

Gil Paterson: For this exercise, it would be useful to know that and I would be grateful if that could be looked at and you could let us know. Perhaps we need to do that research ourselves.

Graeme Dey: We will take a look at that and see whether we can find anything for you.

Gil Paterson: In a similar vein, does any other jurisdiction insist that advice that is sought by the Government from legal officers is released on demand to the Opposition or to the Parliament?

Graeme Dey: Again, I suspect not.

Alison Coull: I am not aware of any jurisdiction where that happens. It is part of the rule of law and fundamental to civilised democratic countries that legal advice is confidential. The ministerial code reflects that position, albeit with the caveat of exceptional circumstances.

Gil Paterson: In the light of that answer, if the standing orders were changed, would it be possible for the Government to perform efficiently and effectively? Would it mean that a law officer could divulge advice that was given to the Government?

Graeme Dey: That would be very difficult.

Gil Paterson: This is my last question. Since 1999, how many times has advice that a law officer has given to the Executive or the Scottish Government been divulged to Parliament or to the Opposition? Has it ever happened?

Alison Coull: I am not aware of any circumstances in which it has happened.

Graeme Dey: None of us has been around since 1999. It is highly unlikely.

Gil Paterson: I have, but I cannot remember it.

Alison Coull: I do not think it has been done deliberately, if I can put it that way.

The Convener: Thank you. When the minister says that none of us has been around since 1999, he does not quite mean in all areas.

That was extremely helpful and interesting. I thank the Minister for Parliamentary Business and Veterans, Graeme Dey. We have also had some helpful contributions from the Government advisers. We will welcome you back again when we decide to invite you.

Graeme Dey: We undertook to get back to you on a couple of things and we will do that.

The Convener: That is very kind.

10:31

Meeting continued in private until 11:04.

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Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

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