# PROCEDURES COMMITTEE

Tuesday 26 April 2005

Session 2

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## PROCEDURES COMMITTEE
**6th Meeting 2005, Session 2**

**CONVENER**

*Iain Smith (North East Fife) (LD)

**DEPUTY CONVENER**

*Karen Gillon (Clydesdale) (Lab)

**COMMITTEE MEMBERS**

*Richard Baker (North East Scotland) (Lab)
*Mark Ballard (Lothians) (Green)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
Mr Bruce McFee (West of Scotland) (SNP)
Mr Jamie McGrigor (Highlands and Islands) (Con)

**COMMITTEE SUBSTITUTES**

Robin Harper (Lothians) (Green)
Tricia Marwick (Mid Scotland and Fife) (SNP)
Irene Oldfather (Cunninghame South) (Lab)
Murray Tosh (West of Scotland) (Con)

*attended

**THE FOLLOWING GAVE EVIDENCE:**

Scott Barrie (Dunfermline West) (Lab)
Dr Paul Cairney (University of Aberdeen)
Professor Alan Page (University of Dundee)
Tricia Marwick (Mid Scotland and Fife) (SNP)

**CLERK TO THE COMMITTEE**

Andrew Mylne

**SENIOR ASSISTANT CLERK**

Jane McEwan

**ASSISTANT CLERK**

Jonathan Elliott

**LOCATION**

Committee Room 6

# Scottish Parliament

## Procedures Committee

*Tuesday 26 April 2005*

[THE CONVENER *opened the meeting at 10:33*]

## Sewel Convention Inquiry

**The Convener (Iain Smith):** Good morning, colleagues, and welcome to the meeting. I remind members that we agreed at our previous meeting to take item 3 in private. We have received apologies from Jamie McGrigor. Karen Gillon is running a bit late, but will be with us shortly. I do not know whether somebody is trying to tell me—as convener of the Procedures Committee—something, but there is a copy of "How the Scottish Parliament Works" on my desk. It is a good publication and I would recommend it to anyone.

The first item of business is oral evidence in our inquiry into the Sewel convention. I am pleased to welcome our two academic witnesses: Dr Paul Cairney from the department of politics and international relations at the University of Aberdeen and Professor Alan Page from the department of law at the University of Dundee. Thank you both for your written submissions. If you would like to add anything to your evidence, you may make a brief oral submission before we take questions from members.

**Professor Alan Page (University of Dundee):** Thank you for the invitation. In my paper, which you will have before you, I considered how a more effective procedure might operate. The case for more effective scrutiny of the decision to subscribe to Westminster legislation in devolved areas has already been made and amplified in the evidence that you have received. Rather than going over that ground again in my submission, I tried to set out the mechanics of the process and how a better procedure might operate.

There are two key ingredients. First, there should be more or better information than is available currently. I speak from personal experience, having gone through all the Sewel motions in the first session when, for an outsider, it was extraordinarily difficult to work out what was happening and to get hold of the Sewel memoranda, for example. The second ingredient is effective scrutiny of that information, which would go a long way towards defusing some of the controversy that surrounds the issue.

**Dr Paul Cairney (University of Aberdeen):** There are four themes in the submissions from Michael Keating and me. First, although the number of motions has been exaggerated, such motions have become routine, which might not have been envisaged. Secondly, the key to the issue is the relationship between the Executive and the Parliament, rather than the relationship with Westminster, which, in some instances, is a red herring.

Thirdly, on reading the submissions, I was struck by the fact that there is quite wide agreement about what to do about the Sewel process. There should be a degree of formalisation of the procedures—either the arrangements with subject committees should be formalised or a dedicated Sewel committee should be established. Fourthly, there seems to be an area in which partisanship is disproportionate to the importance of the issue in question. Any change to or formalisation of the procedures would have to take that into account. The consensus about the changes tends to be around the proposal for a dedicated committee to deal with Sewels. My only concern is that the partisanship that is involved might undermine that committee's remit and operation.

**The Convener:** Thank you both for those remarks.

**Richard Baker (North East Scotland) (Lab):** Both sets of evidence were extremely useful in putting the debate in context. There has been huge controversy about the number of Sewel motions that have been used. Am I right in thinking that in your evidence you suggest that some of the coverage of the use of Sewel motions has not provided a fair reflection of what has happened? Dr Cairney said that a large number of Sewel motions have related to small areas of legislation, so that, contrary to what has been suggested, the Executive has not been ducking out of legislating.

**Dr Cairney:** Yes. As I suggested in my submission, a lot of what has happened could be put down to the sensitivity of the Executive towards the Parliament in the early days. The Executive seemed keen not to be accused of subverting the process, so that, any time there was doubt about the Westminster role, it would ask the Parliament's permission to allow Westminster to legislate. The consequence is that minor and consequential changes to devolved legislation have been mixed in with fairly major changes. As Alan Page suggests, a few major policy decisions have been dealt with through the Sewel process. It is unfortunate that those decisions have been lumped in with all the minor changes, as that has tended to exaggerate the problem.

**Professor Page:** I have one slight qualification. I agree that, in the early days, the Executive set out to get the Parliament's consent on any legislation that touched on devolved areas. However, I believe that, more recently, it has taken

a more restrictive approach in practice and has not sought consent where consent is, in terms of the convention, not necessary—the Executive is adhering to the convention and not going more broadly than that. However, I totally agree with Paul Cairney about the excessive degree of controversy that has attached to the issue, which has been unfortunate. One of the most depressing features of going through the debates from session 1 was how rapidly the issue became polarised. Nothing new was being said.

**Richard Baker:** In some of the evidence that we have received, the issue has been not so much about the process as about the powers of the Parliament, which is a separate issue. One criticism has been that the process should be more Parliament to Parliament. However, although you have made some practical points, the fact is that, as the legislative programme at Westminster is set out by the Government, it is obvious that a lot of the dialogue has to take place at Executive level.

There have been calls for greater scrutiny in the Parliament of the Sewel motions. Could that issue be addressed by allowing more committee time to look at Sewel motions? Are there other changes to the way in which committees examine motions that might increase confidence that the issues were being scrutinised properly?

**Professor Page:** Committee consideration is crucial. However, I do not favour relying on subject committees to deal with the motions in the first instance, because they understandably struggle when they are suddenly faced with a new motion. I envisage a preliminary stage at which there is scrutiny by either a new committee or one of the existing mandatory committees. That stage would simply involve consideration of the appropriateness of relying on Westminster. The process would lay the basis for more informed consideration by a subject committee, if the issue was thought to be of such importance as to warrant it, or by the Parliament. That would allow for as close as one could get to a dispassionate examination of the case for relying on Westminster before subsequent consideration by the Parliament.

**Richard Baker:** I am not persuaded. I can see why the decision rests with the Executive at present and why that arrangement should continue, although I appreciate your argument. Dr Cairney, I think that you were more sceptical about the creation of a new committee. Is that correct?

**Dr Cairney:** If, as Professor Page suggests, the committee could operate in a dispassionate manner, I would favour that option. However, my concern is that, because the issue is so charged, the discussions will be charged. The advantage of allowing subject committees to consider the motions is that, although there will be a coalition majority and there will be partisanship, that partisanship is infrequent and generally occurs within the context of a good working relationship, as shown by the fact that, for example, in the committee's consideration of a large bill with perhaps 500 amendments, only 10 per cent of those amendments would go to a vote.

My concern with Sewel is that, if the intention was to consider only those issues that were charged, no matter what the subject, that might undermine the process, particularly if a committee was given the responsibility to forward the issue or to advise that it be debated further in the Parliament. The committee might have to cover itself and advise that all issues be debated. If the decision to prevent further discussion was made only because of a coalition majority, there would be the same controversy as is evident at present.

**Mark Ballard (Lothians) (Green):** I want to follow up on the point made in paragraph 10 of Professor Page's submission. One of the key issues for us is the criteria for Westminster legislating in a particular area. If I recall rightly, Lord Sewel's evidence was that the criteria should be whether the legislation was a minor technical amendment that would more sensibly be made at Westminster and whether there was no sense in having separate legislative regimes north and south of the border. In your paper, Professor Page, you state that a test should be whether the issue is a matter of major political controversy and that, if it is, the presumption must be against a reliance on Westminster, no matter how difficult the issue is for the Executive. That criterion is quite distinct from what Lord Sewel proposed.

10:45

**Professor Page:** I do not think that it is inconsistent with what he proposed. There are two related paragraphs in my submission—paragraph 10, to which you drew attention, and paragraph 8, in which I condense the arguments for and against relying on Westminster. The arguments for are the justifications from the Executive's point of view. For example, relying on Westminster allows the Executive to achieve desirable outcomes—although what do we mean by "desirable"? Moreover, it does not disrupt the legislative programme, it prevents the possibility of evasion and it judge-proofs legislation. Those arguments are used time and again to justify relying on Westminster. The counter-arguments in the latter part of paragraph 8 are that the Parliament does not get the chance to consider the details of legislation, scrutiny may be inadequate and it is more difficult for the public to engage with the legislative process.

I go on to argue, and this reflects my own thought processes, that the way in which we

balance those considerations cannot be separated from the substance of the legislation—what is actually being proposed. If we just think about the substance of the legislation, my analogy of the spectrum is correct. At one extreme will be minor technical reforms on which we all agree; at the other extreme will be issues of major importance and political controversy, decisions on which we feel—regardless of the Executive's arguments about desirability—should be taken in Scotland by the Scottish Parliament. I see the process as a two-stage one.

**Mark Ballard:** So the first stage is an Executive stage and the second is committee consideration. Who should decide that something is such a political hot potato that it has to be discussed by the Scottish Parliament? Who should consider where it fits into the spectrum? Should that be the responsibility of the Executive or of the Parliament? Who should make the judgment?

**Professor Page:** The Executive will have taken a decision that the issue should be dealt with at Westminster and it will then be for the Parliament to scrutinise that decision. That is what I see the procedure being about. The committee would have to decide whether the Parliament should agree with the Executive's judgment that the issue would appropriately be dealt with by Westminster or whether the issue was so important that it ought to be dealt with at Holyrood.

To pick up on Paul Cairney's point on the degree of controversy, the committee may be unable to come to a view and may simply say to the Parliament—in committee or in plenary—"These are the issues and the competing arguments." However, I hope that, in time, we can get beyond what happens at present, so that the committee could say, with the confidence that the Parliament would support it, that it backed the Executive's judgment on the issue or—which is highly unlikely—that it did not. That would lead to more informed consideration than at present. Am I making myself clear?

**Mark Ballard:** You are, but an issue that could fulfil the criteria that you set out in paragraph 8 might, because of the Executive majority on the committee, fall foul of the criteria that you set out in paragraph 10, in which you suggest that Sewel motions should not be used for highly charged, politically controversial issues. What happens if the issue is embarrassing to the Executive? You do not propose a mechanism to enforce the rule, apart from Executive judgment.

**Professor Page:** I have not done that because, in that case, we are talking about matters of political controversy that cannot be resolved other than by voting. What I am looking to is a committee that would operate on the basis of consensus and what I am looking forward to is a situation in which the degree of consensus is much broader than that which currently exists. That may leave some issues on which there is no agreement, in which case it would fall to the Parliament to take a decision and for the normal political process to operate. However, the knowledge that that earlier process had to be gone through and that the Executive had to explain, justify and defend what it was going to do might in itself operate as a disincentive to relying on Westminster to deal with issues of major controversy. The Executive might ask itself, "To what degree of scrutiny are we subject in relation to this? Will it be a 15-minute debate, which we can weather, or will there be a more informed process?"

**Dr Cairney:** When I read Lord Sewel's argument that we should treat the minor and the major issues differently, I remember thinking that I would not like to make that decision. There are good examples of uncontroversial issues—for example, Westminster protecting the pensions of emergency services workers who go abroad or giving copyright status to the National Library of Scotland. However, there will be a few issues at the extremes and a big collection in the middle that are difficult to take apart.

That comes back to the relationship between the Executive and the legislature. I am not suggesting anything sinister, but it is in the interests of the Executive to present an issue as uncontroversially as it can. It does not just do that with Sewel; it is in the Executive's interests to do that with any piece of legislation or any amendment. If the appropriate information was not available, I am not sure that a new process would be any more fruitful than the process as it is just now.

If a coalition majority always prevented things from being discussed, perhaps a different procedure could be introduced. There were nine cases in the first session in which none of the members of the subject committee that dealt with the Sewel motion wanted the matter to go any further. Perhaps the mark should be not a vote, but whether one person wants to take the matter further, as happens with amendments—if one person objects, the matter goes to a vote. A similar procedure could be adopted with Sewel motions: if one person objected, the matter would go further. That is the most consensual process that I can envisage.

Finally, I should mention that powers have been given to Scottish ministers by Westminster that are just as controversial as anything that has gone the other way. A good example related to public pensions in local government, which is an incredibly controversial area. A reverse Sewel motion gave powers over those matters to the Scottish ministers, who have fairly wide discretion in that area.

**Karen Gillon (Clydesdale) (Lab):** I am interested in exploring the idea of a consensual committee. Given that there are parties in the Parliament that are fundamentally opposed to the use of Sewels per se, how could we possibly have such a committee? A lot of criticism is being levelled at the Executive parties in the context of this debate. As a member of one of those parties, I am probably quite partisan, but I could argue that the vast majority of issues that have arisen in relation to Sewels have been raised because of the concerns of Executive party members, rather than because of the obstinate opposition of other parties. I am interested in how you will bring about a consensual committee when there are parties that simply say no to any kind of Sewel.

**Professor Page:** I am entirely sympathetic to that point. Paragraph 10 says that

"For those who are not completely opposed to Westminster legislation in the devolved areas",

the answer depends on the substance of what is being discussed. I hope to go beyond the stance that says, "Never—this is Scotland's Parliament, so let Scotland legislate," and to work towards a consensus or a more consensual approach that says that, after considering the issues in detail, we can agree on and be happy about the matters on which it is appropriate for Westminster to legislate. I want to go beyond people saying, "Yes, you can," or "No, you mustn't," which has tended to be the position. By engaging with what we propose to do and by asking what the arguments in favour are and whether there are any good arguments against, we can try to build a shared understanding of the matters on which the Parliament is content for Westminster to legislate. That approach is optimistic.

**Karen Gillon:** That approach is very optimistic. I see the benefit in it, but we are almost halfway through the parliamentary session and will begin our election campaigns in some form after 5 May; it is unrealistic to expect to achieve such consensus ahead of an election at which people will argue about the Parliament's powers.

**Professor Page:** In the long term, the answer lies in drawing a distinction between scrutiny of technical issues and political scrutiny of policy, which will inevitably involve disagreement. However, more scope for agreement exists than is in some cases acknowledged.

**Cathie Craigie (Cumbernauld and Kilsyth) (Lab):** I will keep to the same point. I am sorry that you are having a hard time—all the questions seem to be channelled to you. You suggest what might be called a Sewel committee. Rather than scrutinising proposed legislation, would that committee decide in principle whether provisions should be Sewelled?

**Professor Page:** Yes. The committee would not go into the detail or scrutinise legislation. It would concentrate on one question—whether the use of the Sewel convention was appropriate and whether we were content for Westminster to legislate on a matter.

**Cathie Craigie:** It is clear from the evidence that the committee has taken and from what fellow members have said that parliamentarians want clearer guidance about what Sewel motions are and where they fit in. Does such thinking lie behind your suggestion?

**Professor Page:** Yes. I continue to be optimistic. The process is partly educational. Instead of taking a prepared position, not engaging with what is happening and saying, "We're against this," members could consider whether the proposed use of the convention is appropriate.

**Cathie Craigie:** Dr Cairney has listed the various Sewel motions under headings. If the recommendations to the Executive in our report had headings and clear criteria showed under which heading a Sewel motion fell, would it still be necessary to have the committee that you propose?

**Professor Page:** If we are very optimistic, it might be decided in the fullness of time that the shared understanding was so clear that scrutiny was no longer needed.

**Cathie Craigie:** We are talking about what would happen if a committee decided on the principle of using a Sewel motion. We would still probably move on to the scrutiny element. If appropriate, a subject committee would surely still have to scrutinise a major issue.

**Professor Page:** I do not regard that as absolutely necessary, because it would involve consideration of the detail of the legislation. If there has been an initial sift of Sewel motions and a committee has said, "This is a minor technical issue and we can leave it to Westminster," what is the point of a subject committee engaging further with the legislation? It may be that on some issues —perhaps those in the middle ground, which Paul Cairney talked about—you will want to get a response from a subject committee. You might think, "This is one that could go either way. We might be content with the motion, but there are issues. What is the subject committee's view?" However, I seek to take some of the burden off subject committees, because it is not necessary for them to consider each and every Sewel motion.

11:00

**The Convener:** Does Paul Cairney want to add to that?

**Dr Cairney:** I always do this in conversations—I miss the window.

If I may, I will answer Karen Gillon's question. You must hate it when academics come to you and say, "You must be less partisan and you must do better," but in some ways you are doing yourself down. A good example is the amendment process. There may be some partisanship, but in the context of the whole process the percentage of instances in which questions are pushed to a vote is small: the figure is about 2 per cent in the subject committees, which is much less than the figure for plenary sessions. There is scope for consensus, particularly if matters are not controversial. We can see that from the first session of Parliament, when there were nine occasions on which a subject committee considered a Sewel motion and all the members—and all parties—agreed that the motion should not be discussed by the whole Parliament.

Perhaps the matter comes down to the Executive's respect for the Parliament. If there was a process or procedure in place that allowed that respect to be enjoyed, as happens with other legislation, perhaps there would be less partisanship on the principle of procedures and more focus on the substance. At a conference not long ago, Nicola Sturgeon said that even in an independent Scotland we might agree to a few Sewel motions if they made sense. It is the question of respect for the Parliament that pushes things to the boil. If that was addressed, there might be more focus on the substance of issues in committees.

**Karen Gillon:** I suppose that the counter-argument is that people have realised that the convention is potentially a political animal that they can use for party-political purposes rather than in the interests of the substance of the issue that is being discussed. The Sewel convention, rather than the subject that is being discussed, has become the focus of the debate, hence our inquiry. That is certainly the impression that people get from the press, who say that the convention is being abused but give no analysis of what has happened or why. I find your explanation and the table in your paper helpful, but people who have read the so-called informed press for the past year would not have read any such analysis. The press just say that we are giving up our powers.

If we are to move on, it is for everyone, not only in the Parliament but in civic Scotland, to grasp their responsibilities. On some occasions, people will not agree with the decisions that are taken. I do not agree with some decisions that are taken, but we have to move on. In the previous session, I was on the Education, Culture and Sport Committee, which hardly ever went to a division on anything. It had some of the most colourful characters in the Parliament as members but it found a consensus, so that can be done. The problem is that the convention itself, rather than the substance of what is being discussed, has become the subject of debate.

**Dr Cairney:** That might not be wholly the Executive's fault, but the Executive is giving the people who publicise the matter in that way the ammunition to do so. If there were certain little reforms that gave the Sewel process the same status as the legislative process enjoys, perhaps that ammunition would not exist and those people would be flogging a dead horse.

**The Convener:** I am sorry; I think that Cathie Craigie wanted to come back in.

**Cathie Craigie:** I have forgotten what my question was. I am fine. I will come back in later.

**Mark Ballard:** I have a question on the relationship between a Sewel committee and the subject committees. The Serious Organised Crime and Police Bill is a good example of a bill for which it was important to have the detailed scrutiny of a subject committee, as that brought out issues about the Crown Estate, the right to roam and so forth. Does that not suggest that the subject committees play an important scrutiny role that is separate from that which would be played by a Sewel committee in its discussions on the principles of a bill? I make that suggestion regardless of the criteria that might be considered by such a committee, including those that are set out in paragraph 8 of Professor Page's paper.

**Professor Page:** Yes, indeed. I was simply suggesting that a subject committee does not necessarily need to look at each and every Sewel motion. Some pieces of legislation occupy the middle ground, as you describe, and in those cases the view of the subject committee is important—the procedure would involve consideration by the subject committee as well as by a dedicated Sewel committee.

**The Convener:** The helpful table that Dr Cairney produced for the committee highlights the fact that virtually all the bills that have been the subject of the Sewel process contained elements of both reserved and devolved issues. If there was no Sewel process, how could the Scottish Parliament have dealt with those situations? How would the Parliament have coped? I take the example of the Civil Partnership Bill, which Dr Cairney cited as an example of cowardice. The Scottish Parliament could not have introduced civil partnership legislation on its own because reserved matters were involved. How would you deal with such issues?

**Dr Cairney:** If reserved and devolved elements were involved in a legislative proposal, the

Scottish Parliament would not deal with it; the Westminster Parliament would do so. I am thinking in particular of the minor and technical issues on which Westminster would just legislate without informing the Scottish Parliament. In that sense, there would not be much of a difference. A major issue such as civil partnerships is a tricky one—

**The Convener:** I do not want to go into the merits of the bill; I used it as an example of a piece of legislation that the Scottish Parliament could not have implemented without there being complementary legislation at Westminster. The situation is almost the reverse of what happens normally, which is that a reserved matter impinges on a devolved one.

**Dr Cairney:** I got the impression that the Scottish Parliament could have had a way out but that it decided to take a controversial route. It could have amended the Marriage (Scotland) Act 2002 and just called it the civil partnerships (Scotland) act. I think that it is possible for the Parliament to address reserved issues by doing something like that.

**The Convener:** Without going into the matter in detail, I think that it would have been dealt with in the Family Law (Scotland) Bill and not at Westminster.

You did not answer the question about reserved issues. How would the Parliament interplay with Westminster in that regard? Most of the legislative examples in your paper include a substantial element of reserved matters. How would the Scottish Parliament interplay with Westminster in relation to those pieces of legislation?

**Dr Cairney:** I am not sure.

**Professor Page:** The answer would be for the Scottish Parliament to agree to legislate—or not—on the devolved issues.

**The Convener:** So our legislative programme in the Scottish Parliament would be driven by the Westminster legislative programme.

**Professor Page:** That is one of the arguments in favour of relying on Westminster in relation to certain issues, but the question is whether the Scottish Parliament wants to do that. I am wary of saying that we have to rely on Westminster because these things are so inextricably mixed up. The reason why they are so mixed up is because we choose to mix them up. We should question whether that should be the case by asking whether we should legislate separately for the Scottish bits or rely on Westminster. That is the question that the Sewel process addresses.

**Cathie Craigie:** Obviously, we have to get the process right for Scotland and for the Parliament as a whole. The committee listens carefully to what members say. One of the areas on which we took evidence was that of the engagement between Westminster ministers and the subject committees that have scrutinised Sewel motions. Members who were involved in the Civil Partnership Bill recognised that that was an example that we might want to examine and follow in relation to other Sewel procedures.

Dr Cairney, your paper mentions the Civil Partnership Bill as well, but for different reasons. You say that it is

"one of the best (worst?) examples of political cowardice"

on the part of the Executive. However, members feel that the work that they did on the bill was productive and that they were engaged with and felt part of process. You have followed the evidence that the committee has taken. Do you think that the process that was followed in relation to the Civil Partnership Bill presents a way in which the scrutiny element of the Sewel process could be satisfied?

**Dr Cairney:** Yes. The matter would still be passed on but there would be a sort of mirroring process.

**Cathie Craigie:** I do not think that we were suggesting that there would be a mirroring process. Committee members felt that they had the time and the opportunity to discuss with ministers from the Executive and Westminster any concerns that they had. They felt involved in the process.

**Dr Cairney:** I like the idea of that. However, the thing that most undermines subject committees appears to be lack of time. It seems that committees get bogged down in the volume of Executive legislation that they have to deal with and end up with no time for inquiries, which were supposed to drive the agenda-setting purpose of committees. There was supposed to be a lot of time for inquiries to be conducted free from party control.

My concern is that committees that deal with areas such as health, education and crime, in which there is a lot of legislation, cannot routinely find the time for inquiries. If, in an ideal world, committees could dedicate a certain amount of time per session to Sewel motions, that would be the best process. The point of subject committees is that they would have experience in the subject area and members would have developed working relationships during their meetings.

The time element is problematic, however. I am concerned that, given the amount of time that committees would have to spend dealing with Sewel motions and legislation, they would have no time for anything else and would therefore not do what they were set up to do, which was to set the agenda, rather than follow it.

**The Convener:** Although the Sewel convention is, theoretically, meant to be a mechanism whereby Westminster is supposed to seek the consent of the Scottish Parliament before legislating in a devolved area, the Scottish Executive is driving the Sewel process—as you say in your paper, the Executive identifies where Sewel motions might be required and puts that case to the Scottish Parliament. Therefore, would it not be better if we were more honest and said that it should be quite clear that the convention is between the UK Government and the Scottish Executive and set out in the standing orders the parliamentary procedures for the exercise of those powers?

**Professor Page:** Technically, the convention is an undertaking by the UK Government that it will not promote legislation in the devolved areas without first seeking the consent of the Scottish Parliament. The way in which it chooses to do that is through the Scottish Executive, which seeks the consent of the Scottish Parliament. That undertaking is of cardinal importance and should not be lightly dismissed. It is the basis of the area that we are talking about. I am hesitant to suggest that we should just forget about it.

**The Convener:** I am not suggesting that we do that. Instead, I think that we should be more honest about how we describe the arrangement. At the moment, it is seen as a convention between Westminster and the Scottish Parliament. However, it is more of a convention between the UK Government and the Scottish Executive, with the Scottish Parliament having the right to approve or reject the Executive's proposal. Would such an approach not be more honest?

**Professor Page:** I am not sure that that is the arrangement. After all, the convention allows the Scottish Parliament to say, "No, we don't give our consent."

**The Convener:** Well, I do not think that we are necessarily at odds over that matter.

11:15

**Dr Cairney:** There is something to be said for honesty; indeed, in that respect, we can draw a parallel with the way in which legislation is handled. Even the consultative steering group principles contain the idea that the Government governs. The Executive produces most of the legislation and the Parliament scrutinises and gives consent to it.

It makes sense for the Sewel process to run along the same lines. After all, the UK Government and the Scottish Executive do the donkey-work of producing legislation, whereas the Parliament's role is to take a step back and look at the whole of the legislation instead of getting bogged down in details. If we were being honest, we would say that the parliamentary system has its limitations; the Parliament cannot do everything and so has to take that step back.

I have one little qualification. There is a debate to be had about whether it is the Executive that initiates the Sewel process. Indeed, Barry Winetrobe in particular has criticised the Executive's argument that it picks and chooses Westminster legislation, suggesting that the Executive has not made it clear that there is an unavoidable impetus to sign up to that legislation.

**Karen Gillon:** Is that unavoidable impetus a result of the fact that the two parties with executive power in both Parliaments are similar? Would there be such an impetus if there were a Conservative Government at Westminster and a Labour and Liberal Administration in Scotland?

**Dr Cairney:** There would be a mix. As an academic, I want a change of Government somewhere so that we can test out these theories. However, I have not decided which one should change.

**Karen Gillon:** You will forgive me for not sharing your enthusiasm in that regard.

**Dr Cairney:** I should say that, in some areas, what you have suggested will be a consideration if we are talking about policy aims. However, the issue comes down not just to differences between parties but to differences between Scotland and England. In some respects, there is a strong need for Scotland to keep up with England—I cannot think of another way of saying that. If popular legislation is initiated in England, there is very great pressure on Scotland to follow suit. As a result, I do not think that a change in party would necessarily remove the unavoidable impetus that I mentioned. That said, I cannot give you any examples.

**Professor Page:** The statute book is, by and large, a UK statute book. The impetus for reform in many areas comes from UK departments, which inevitably raises the question whether we should be doing the same thing in Scotland. The Executive is responding to that very question; in fact, although not every Executive would respond to the question in the same way, there would still be the same pressure to sign up to UK reforms or at least not to pass up in Scotland the opportunity of introducing reforms that appear to be desirable.

**Karen Gillon:** Let me tease something out with you. I am closely involved with the issue of corporate manslaughter. A bill on that matter has been proposed in the House of Commons, and we are also looking at the introduction of such a bill in Scotland. Is there room for disagreement and difference between Scotland and England and Wales on that matter?

**Professor Page:** Absolutely. I do not see why there should not be.

**Karen Gillon:** I just thought that I would throw that into the mix.

**Professor Page:** With devolved matters, we always face the question whether we should go the same way or whether we should be different. However, what you describe must be a possibility.

**Richard Baker:** Surely the most vital question is whether the decision to lodge a Sewel motion on particular legislation is taken as a result of liaison between the Executive and Westminster. If such a decision is made at that level—which I think it should be—the key point is that there should be adequate parliamentary scrutiny. The key to inspiring confidence in the process would be for us to have debates about Sewel motions in the right context. It seems to me that the committee has to seek to provide a clear process and the parliamentary time to ensure that that scrutiny could take place.

I take Dr Cairney's point about the fact that the subject committees already have heavy workloads. However, as he said, the Executive has often played it safe with Sewel motions and has decided to seek decisions on quite innocuous—as he put it—areas of legislation. If the committee was given the power to allocate small amounts of time to innocuous issues and larger amounts of time to controversial issues, and if there was a clear process for that, would not that assuage some of the anxieties that exist about the process?

**Dr Cairney:** Yes, I think so. I keep saying that there are problems, but I guess that the only problem is that we do not know how innocuous a committee would decide that an issue was until it looked at it—although I may be wrong. I cannot see a specific problem with the proposal. A lot of minor Sewel motions take five minutes to talk about and are then pushed to one side. My only concern is that, if a Sewel motion proves to be more substantial than the Executive assumed, that may have a knock-on effect on the timetable for scrutiny and the committee's use of its time. However, if committees want to use their time to monitor Executive legislation and Westminster Sewel motions, who am I to complain?

**Professor Page:** I agree that the key is scrutiny. My concern about leaving the matter to the subject committees and telling them to do their best is that we would have a continuation of the existing ad hocery. That is why I see merit in telling either an existing committee or a specially constituted committee that it is its job to go through Sewel motions and give us an informed view of the appropriateness or otherwise of relying on Westminster. That can be the starting point, and the rest can be done through debate in committee or in plenary session. I agree about the need for scrutiny, but such arrangements are required in place of the existing ad hoc system.

**Richard Baker:** There has to be a clear process, not ad hoc arrangements. That is the key, however it is achieved.

**Professor Page:** Yes.

**Karen Gillon:** I am interested in the idea of having a separate committee to consider Sewel motions. The Parliamentary Bureau is a committee, although not in the same way as other committees of the Parliament. Is that a role that the bureau could carry out, or would you see the bureau as being too partisan to carry out that role?

**Professor Page:** It would not be transparent enough. As an outsider, I do not know what happens in the Parliamentary Bureau.

**Karen Gillon:** Neither do we.

**Professor Page:** The whole issue needs to be opened up and made transparent. That can happen only through some form of committee scrutiny.

**The Convener:** As a former bureau member, I assure you that there is no secret handshake.

**Richard Baker:** Maybe there was not in your day.

**The Convener:** Things have changed, have they?

I have one final, brief question. Dr Cairney referred to the reverse Sewel motion, which transfers powers to the Scottish ministers, being subject to less scrutiny. I dispute that, as I was a member of the Local Government and Transport Committee when it scrutinised the Railways Bill for about 10 hours. I assure you that there was plenty of scrutiny on that occasion. If we were to introduce new procedures for dealing with Sewel motions, should we specify separately how we deal with Sewel motions that confer powers on Scottish ministers?

**Dr Cairney:** Yes, I think so. There is always a self-congratulatory atmosphere during the discussion of a reverse Sewel motion, which contrasts with the partisan, charged atmosphere that exists whenever a normal Sewel motion is discussed. There seems to be something in it for all the parties, and it is difficult to vote against and criticise a reverse Sewel motion because more powers are being given to Scotland. However, Sewel motions are about the Executive's legislative relationship, and reverse Sewel motions increase the burden on that relationship. There does not seem to be an adequate discussion of that when Sewel motions appear.

The key is subordinate legislation. I have nothing against reverse Sewel motions, but there should be an understanding that there must be scrutiny of what they mean at a later date. During debates, some MSPs suggest that they do not know the implications of the motions that they are supporting. My concern is that, if most public policy is implanted through subordinate legislation from the Executive, there should be some recognition of the fact that that is the stage at which things should receive scrutiny—not just at the headline stage of the Sewel process.

**Professor Page:** Proliferating procedures would be a mistake. As I have tried to argue, I see the need for more informed scrutiny that, by its nature, would pick up the distinction between the different kinds of Sewel motions. The difficulty is that the two are often combined in the same legislation, which involves Westminster legislating in the devolved areas and conferring powers on the Scottish ministers. It might, therefore, be artificial to separate out the latter aspect and have a separate procedure for it.

**The Convener:** I thank Dr Cairney and Professor Page for their useful evidence this morning. I suspend the meeting briefly while we change witnesses.

11:26

*Meeting suspended.*

11:29

*On resuming—*

**The Convener:** Our next panel consists of Tricia Marwick MSP, the business manager for the Scottish National Party, and Scott Barrie MSP, the chief whip of the Labour group. You have the opportunity to make a brief opening statement, after which we will open the meeting up to questions.

**Tricia Marwick (Mid Scotland and Fife) (SNP):** Thank you for inviting me to give evidence in this important inquiry. The SNP believes that the Scottish Parliament should legislate to the full extent of its powers but that, if consent is given for the UK Parliament to legislate on devolved areas, that consent should be informed.

When the Scotland Bill was being considered by the UK Parliament, Lord Sewel suggested a convention whereby the UK Parliament could legislate in areas that were devolved to the Scottish Parliament. He anticipated that that procedure would be used sparingly; I think that he talked about its being used once or twice a year. He clearly never anticipated that there would be such a large number of Sewel motions or that they would be used to legislate for matters on which the Scottish Executive wanted to avoid legislating in the Scottish Parliament, or on which it was more convenient for the UK Parliament to do so.

As the deputy business manager for the SNP in 1999, and now in my second spell as the SNP business manager, I have seen many changes in the way in which Sewel motions are handled in the Parliament; I am happy to discuss that with the committee. However, I want to concentrate my remarks on the parliamentary procedures for Sewel motions. Although the Sewel convention was supposed to be between the two Parliaments, it is in effect a convention between the Scottish Executive and the UK Government, with the Scottish Parliament, its committees and individual MSPs wholly dependent on information from the Executive, in the form of a memorandum, as to the extent of the impact that a UK bill will have on devolved powers. The timing of consideration is almost always in the hands of the Executive and the time that is given to committees and the Parliament is—again—almost wholly a matter for the Executive.

We believe that the present procedures are inadequate—I will leave to one side the question of whether Sewel motions should be considered at all. The committee is intent on examining the present procedures and it is my view, as the SNP's business manager, that what we have at the moment is inadequate and that over the years we have developed an ad hoc system of dealing with the convention.

Believe it or not, I think that the handling of Sewel motions has got better; it falls down at some points, but they are handled better than they were right at the beginning in 1999. However, I would like there to be greater assistance for MSPs on Sewel motions. It is not sufficient for the Executive to provide a memorandum about the implications for devolved matters of a UK bill. The MSPs and the committees should have independent assessment of such matters, which should be done through the Scottish Parliament information centre and given to all MSPs. Committees of the Parliament must be given more time to consider Sewel motions and there should be a delay of one parliamentary week between final consideration by a committee and a debate in the Parliament. Having agreed to the convention, the Scottish Parliament should also keep a watching brief on bills as they progress through the UK Parliament. At the moment, there is no way of knowing whether the scope and content of a bill is being extended. Again, SPICe should carry out that procedure on behalf of the Parliament.

I am happy to answer any questions.

**Scott Barrie (Dunfermline West) (Lab):** I, too, welcome the opportunity to give evidence on behalf of the Labour group of MSPs on what is an important inquiry into Sewel conventions.

I start by stating clearly that I am not a member of the Executive and that my comments are personal views that also reflect the collective view of the Labour group. It is also appropriate to say that I broadly support the process that is known as the Sewel convention, which I believe allows dialogue and scrutiny between the UK Government and the Scottish Executive. It also allows, in certain circumstances and with the Scottish Parliament's consent, for Westminster to legislate in areas that lie within the legislative competence of the Scottish Parliament.

However, six years into the devolution process, it is right that we as a Parliament examine how the convention has worked, and is working, and that we consider what, if any, changes or improvements could be made. I have read evidence that has been given to the committee previously and welcome the opportunity to answer questions. In particular, I am keen to look at how we can involve the Parliament as a whole in the Sewel process and how we can make debates on Sewel motions rigorous and beneficial.

We have already seen beneficial changes to the Sewel convention in the past six years, although it is unfortunate that the issue of Sewel motions has become clouded by arguments about the rights and wrongs of their use, rather than its being about the policy intent of any particular motion. We must examine process rather than the rights and wrongs of the convention, so I am glad that the Procedures Committee is considering that in its inquiry.

**The Convener:** I thank you both for those opening statements.

**Karen Gillon:** One of the biggest criticisms that we have heard from members is that there is inadequate time for debate in the Parliament when a Sewel motion is deemed to be controversial. Given that both of you have a role in the Parliamentary Bureau in one way or another, how do you think the process can be improved?

**Tricia Marwick:** There are two aspects: there is the problem of debating time in the chamber and the problem of the time that committees have to consider Sewel motions. The National Lottery Bill is an example of that. We were asked at the bureau to timetable the National Lottery Bill in the Parliament before a committee had had a chance to consider the bill's implications. A committee examined the motion on a Tuesday and had insufficient time to call for evidence; the Parliament then debated the motion on the Thursday. That is clearly not good enough.

As regards what happens with Sewel motions in the bureau, if they are on a non-controversial matter, the business managers of all parties will agree that time should not be set aside for a debate. The difficulty is when there is a big issue to debate—I am thinking about the Serious Organised Crime and Police Bill. Very little time was allowed for the debate on that Sewel motion. There had been agreement previously that if we were debating a Sewel motion in the Parliament, half an hour would be given over to the debate. The Minister for Parliamentary Business agreed to give a bit more time to that particular Sewel motion, but even at that, members of all parties felt that the time was inadequate. The difficulty for the Minister for Parliamentary Business is that we have so little time in the week for debate; we have only Wednesday afternoon, Thursday and Friday. At some point, the Procedures Committee will have to look at how much parliamentary time we need. I am sorry—I am giving you another job to do and you have not even finished the current one.

**The Convener:** That matter is already on our formal programme.

**Tricia Marwick:** Excellent—that is what I like to hear. I will come back and give evidence on that one, too.

There are difficulties in balancing what the Executive and the Parliament need. Although we were given 45 minutes or an hour for that debate—a bit better than half an hour—it was clear that we could have done with at least an afternoon's debate, but that was simply not available to us.

**Scott Barrie:** The bureau has a key role in organising parliamentary time, but we need to have a stage before the bureau stage to answer Karen Gillon's point. If we were to come up with a better process for dealing with Sewel motions, that would perhaps lead on to what sort of plenary debate might be needed. If we come up with a process that includes adequate pre-parliamentary plenary scrutiny of a Sewel motion, we will have a fairer idea of how much time might be needed in a plenary meeting to pass, or not to pass, a motion.

Until now, the difficulty has been that, because of timescales, the bureau might be meeting at the same time as, or in advance of, the committee that is considering the Sewel motion, before timetabling it for parliamentary debate. So, we must try to have the wisdom of Solomon to see how much parliamentary time might be needed.

Given the tightness of time in the Parliament, the worst thing that could happen would be that we would give too much parliamentary time and then find that the anticipated desire to discuss the motion in a plenary meeting did not exist. It is about getting right the process for taking Sewel motions through committee and into plenary meetings. Once we get that process right or make it better, it will be easier to timetable final debates.

**Karen Gillon:** Forgive my great ignorance on this subject, but I have not been on a committee that has dealt with a Sewel motion. How do such situations happen? Why do we get to a point where a committee is discussing a Sewel motion in the same week that the Parliament is discussing it? Why cannot we bring committee consideration forward a couple of weeks?

**Scott Barrie:** The problem arises when the bureau is planning not that week's business but the following week's. A committee may debate one week a Sewel motion that is timetabled for parliamentary debate in the following week. It is about how much time is given. The example was given in the previous evidence of the amount of time that the Local Government and Transport Committee had to discuss the Railways Bill. Time also had to be given to debate that Sewel motion in the Parliament, but when we were discussing that in the bureau we did not know what the Local Government and Transport Committee was going to say on the motion. To some extent, the Sewel convention is driven by Westminster's legislative needs; we must fit in with timescales that are not our own. We also have to fit in with committees' timescales for their other work. To some extent, it is up to committees to address their workloads.

**Tricia Marwick:** Karen Gillon raises a good point. We have difficulties with timing. I cannot tell you why that is the case or who to blame, but committees are clearly not getting enough time to decide whether they want to call for evidence; the National Lottery Bill was a good example of that. The issue may result from Executive and parliamentary officials failing to highlight to committee clerks or committee conveners that a Sewel motion is coming up, and failing to provide a memorandum on it. Failure properly to timetable may lie with parliamentary officials rather than with Executive officials.

There seems to be a breakdown and there does not seem to be a smooth process for the committees, which is one reason why I suggest that there must be a delay between a committee finalising its consideration of a Sewel motion and a debate on it in the Parliament. It is simply not acceptable that we sit at a bureau meeting on a Tuesday afternoon, while a committee of this Parliament is examining a Sewel motion, and timetable it for debate in the Parliament on Thursday, with no knowledge of the committee's decision.

It is not a huge problem, but it is a problem that could and should be addressed, not just for the benefit of committee members, but for the benefit of all members of the Scottish Parliament, because one of the other failures is that the only members who know about Sewel motions and who get the memoranda are those who are on the relevant committees. How on earth can the other members of the Scottish Parliament debate a motion two days later when they have had no access to any of the information?

**Karen Gillon:** They could print it from the internet.

We have faced peculiar circumstances in the past three months because we are in the run-up to a UK election and legislation has to be passed. Members will not know when the Executive knows that a bill will require a Sewel motion—that is a matter for the Minister for Parliamentary Business. When does the bureau decide about Sewel motions? It is clear from the Sewel motions that have come through that some are weighted towards the justice committees, which seem to carry an increasing burden, not only because of Sewel motions but because of our own legislation. How can we improve that situation? Timetabling of Sewel motions has not been as good as it could have been. I do not know how we can find out why that is, but we need to find a process that will improve the situation.

11:45

**Tricia Marwick:** The first notification that the Parliamentary Bureau members get about a Sewel motion is a draft timetable for the business that is coming up in the following few weeks. The bureau does not refer Sewel memoranda to the committees; that is somehow done between Executive officials and parliamentary clerks, who consider memoranda. The business managers on the bureau are not entirely sure when that happens. Our consideration extends only to the Parliament; for example, a forward plan might tell us that a motion is coming up for debate in the following week.

**Scott Barrie:** Karen Gillon raised an important point about the legislative workload of certain committees. It is striking that some of our subject committees are able to scrutinise legislation and to conduct inquiries, whereas other committees do not have time to do that because of the amount of legislation that emanates from the Parliament or because of their consideration of Sewel motions. The point that was raised by Karen Gillon is valid; we need to consider that if we are thinking about formalising the process for dealing with Sewel motions.

**Tricia Marwick:** Scott Barrie is right that some committees are heavily involved in Sewel motions while others are not; that is the nature of the beast. The justice remit was under severe pressure in the first session because of the amount of Scottish legislation, which was why it was split between two committees. Justice committees will always get more legislative work

than, say, education committees, and unfortunately they seem at times to get a series of Sewel motions. I do not know how to solve that problem.

It has been suggested that we should have a separate committee to examine Sewel motions. Although I have not made up my mind, I am not inclined towards that proposal. People who have already developed expertise in particular areas—education, justice, health or whatever—can make judgements about whether Sewel motions are appropriate. I would be hesitant about establishing a separate committee just to look at Sewel motions because it might not be as informed as a subject committee.

**The Convener:** It is clear that the problem of timetabling is driven not by the Executive or the Parliament but by the fact that the timetable for legislation is Westminster's. The present practice is that a memorandum is not produced until the bill is tabled, although the Executive suggested in evidence to the committee that discussions with the Government meant that it was aware well in advance of what legislation was coming up. Obviously, following the Queen's speech the Executive knows which bills are likely to require Sewel motions. Should the Executive be more proactive with the Parliament ahead of publication of bills? Should it provide information about upcoming legislation to allow committees to plan further ahead?

**Scott Barrie:** I am not an expert on the workings of Westminster, but I foresee potential difficulties with that procedure. In the Queen's speech, the Government outlines its intentions in the areas for which it will legislate, but the detail of bills is not known until they are published. The Scottish Parliament or Executive cannot consider the detail of Sewel motions until they see a published bill. Although I accept from the evidence that there is clear discussion at an early stage between officials of the two Parliaments, I am not sure that anything can be formalised or published until the bill is published at Westminster.

**The Convener:** I accept that point in terms of the total detail. Obviously, the final memorandum would have to await publication of the Westminster bill. However, the Queen's speech might indicate to the Executive that, for example, there would be implications in respect of certain parts of the Gambling Bill. Surely, with the agreement of the Westminster Government, it would be possible to provide at least a broad policy intention so that committees could determine slightly further in advance whether they are likely to want to take evidence. That way, when the relevant committee got the memorandum, it would be able to start work immediately, rather than wait a couple of weeks while it sorted out what it wanted to do. Part of the problem at the moment is that the Sewel motion has to go through the process in only four or five weeks. By the time committees get a memorandum, they do not have much time to decide what to do with motions.

**Scott Barrie:** The devil is in the detail. We want to act as early as possible, but we do not want unnecessarily to set hares running; we need to wait to see the detail. The Gambling Bill is a good example. A lot of information was in the public domain at one point, but the information changed when the bill was introduced and began its abortive passage through Westminster. We have to be careful about setting up committees to do things, because they might find that they do not have to do them or that they have to do them in a different way when they see the finished product.

**Tricia Marwick:** When the Queen's speech is made, the Executive indicates in what areas there are likely to be Sewel motions. That information should go to the committees as soon as possible. It would be helpful if at that stage Executive ministers indicated likely timetables for motions going to committee, which would not impinge on the detail.

I referred to the Executive memoranda: we are wholly dependent on the Executive for the memoranda. If the Parliament is scrutinising a Westminster bill, we need more independent analysis of that bill's implications as quickly as possible, so that the two things can be considered together. More could be done to alert committees to the possibility of a Sewel motion coming before them, which I do not think happens at the moment.

**The Convener:** At the time of the Queen's speech, the answer to an inspired parliamentary question here gives the list of bills that are likely to require Sewel motions. There should be a more proactive arrangement between Parliament and Executive officials to discuss the detail of what is likely to be required and the timetable. The committee clerks could then start planning for that in committee programmes.

**Tricia Marwick:** Indeed.

**Mark Ballard:** I want to follow up something that Tricia Marwick said about the potential for a dedicated Westminster legislation committee, for which Professor Alan Page argued strongly in his paper. It seems to me that there are three distinct decisions. First, there is the decision whether to grant parliamentary consent, which is made by the whole Parliament. Secondly, there is detailed scrutiny of the subject matter of the bill that is up for Sewel consent. Thirdly, there is consideration of the principle whether it is appropriate to use the Sewel convention to deal with a particular bill.

On the proposed Westminster legislation committee, paragraph 13 of Professor Page's paper states:

"it is suggested that the Committee concentrate on the appropriateness or otherwise of relying on Westminster and not the detail of the legislation itself which seems better left to the legislative process itself."

Do you see any merit in leaving detailed scrutiny to subject committees and leaving the question of the appropriateness of using the Sewel route to a Westminster legislation committee, which would develop expertise in that area?

**Tricia Marwick:** We are in danger of making the process much more complicated that it should be. We should not go to the extent of having a separate committee that considers only the appropriateness of using Sewel motions and, simultaneously or not simultaneously, asking a subject committee to carry out detailed scrutiny. I presume that the subject committee could not carry out such scrutiny until the other committee had considered the appropriateness of a Sewel motion. We were talking about tight timescales. If we are complaining that committees do not have enough time, to put another committee into the mix will at least halve the time that is available.

We are in danger of making the system too complicated. It probably surprised some people that I said in my opening statement that, between 1999 and now, we have become better at handling Sewel motions, but we are not there yet. We have relied on an ad hoc procedure and on business managers working together. It is time to enshrine some of that in standing orders. However, we must be careful not to over-complicate the system or to put more obstacles in the way of consideration of Sewel motions.

**Scott Barrie:** I have a fair degree of sympathy with what Tricia Marwick said. I do not say that we should not have a dedicated committee, because I have not thought everything through, but I am not sure whether for a committee to consider solely whether Sewel motions are appropriate would be good use of a committee's time. That committee would have to be staffed, and we already have difficulties in staffing the subject and mandatory committees and the committees that have had to be established for major public works.

The proposed committee's sole job would be to consider the merits or otherwise of using the Sewel convention. As the Sewel process is contentious, would such a committee work in the non-partisan way that people would hope for? Such a committee might give people an awful lot of work but not create much extra clarity. It would be better to concentrate on achieving a more concrete process, rather than the ad hoc process that has developed.

**Mark Ballard:** There are questions about whether it is appropriate to use Sewel motions. If a dedicated committee is not the appropriate place to take such decisions, where is? Tricia Marwick seemed to imply that convenience should not be a criterion, so what would she like the criteria to be?

**Tricia Marwick:** I opened by saying that the SNP believes that the Scottish Parliament should legislate to the full extent of its powers. In the past few years, the Executive has allowed Westminster to legislate on the Scottish Parliament's behalf either on matters that the Executive did not want to discuss, such as civil partnerships, or on matters for which it was said that having our own bill would not have been the best use of Scottish parliamentary time, because Westminster was legislating. The latter argument does not stack up.

I have looked through the comments to the committee from previous witnesses and another issue concerns me. Way back in 2001, we discussed the Outworking Bill, which was a private member's bill that was introduced in the UK Parliament. Sewel ruled out using the Sewel convention for private members' bills and Donald Dewar backed that. For me, the use of the Sewel convention for not even a Government bill but a private member's bill that legislated on a devolved matter was inappropriate but, unfortunately, the Executive parties disagreed with me at the time. It is right that some matters are more appropriate than others for Sewel motions, but the Executive is not using the Sewel convention as expected.

12:00

**Karen Gillon:** Forgive me if I think that a democratically elected Parliament should decide when it uses the convention, rather than an unelected member of the House of Lords. It is for the Parliament to decide when that is appropriate. Others may pass comment, and the situation might not be how they thought it would be, but nobody knew what devolution would bring. Lord Sewel himself said that he was looking into an abyss and did not really know what would come.

Would it be helpful if the Executive provided a better document to say why it was going to Sewel a bill? The rationale could be presented to the committee, which would decide what it was considering and how it should do so, but ultimately it would be the decision of the Parliament whether the Sewel motion was appropriate, with a vote of the Parliament following detailed scrutiny by the committee. We are in danger of making the process unduly cumbersome, but I would welcome an explanation from the Executive—to which everyone would have access—of why it thinks that a Sewel motion is appropriate on each occasion. That document could be read alongside the information for the committee.

**Scott Barrie:** That would go a long way towards resolving the current difficulties. As Tricia Marwick has said twice this morning—and those who were

members from 1999 to 2003 will agree—we have moved on and the process is now better than it was. It may not be perfect and it may not meet all our ambitions, but at least it is a lot better than it used to be. That is because the Parliament itself was dissatisfied with it. Most people—if not everyone—in the Parliament were dissatisfied with the way in which some of the early Sewel motions were dealt with; however, we have moved on. If we can get a document such as Karen Gillon has suggested, which sets out the Executive's reasons, that would go a long way towards giving the committee the steer that it needs to give the Parliament the advice that it requires.

**Tricia Marwick:** There is absolutely no reason why the Executive cannot produce such a document alongside the memorandum that it produces. That would be helpful. That is not to say that Opposition members would necessarily believe what the Executive said, but it would be useful to have that in writing. For example, I would have loved to read the justification for not discussing the Civil Partnership Bill.

We need to move on. Things have improved, and the committee has a responsibility to all members of the Parliament to ensure that Sewel scrutiny is as good as it can be. There are areas where it falls down, but we should not make the process more cumbersome or more difficult for us than it is at the moment. Some flexibility should be built in. It would be nonsense to timetable automatically an hour's debate for every Sewel motion, as there might be Sewel motions on which none of the parties wants a debate because they feel no need for one. Equally, it would be silly for something as important as the Serious Organised Crime and Police Bill to have only an hour's debate timetabled for it if there is the possibility of having a two-and-half-hour debate on it. We must be careful, and some flexibility should be built into the process. Nevertheless, we need to formalise the ad hoc arrangements that have developed since 1999.

**Cathie Craigie:** Most members will agree that the most important outcome of any Sewel motion is the improvement of people's quality of life through UK legislation. I do not know whether the Outworking Bill, which Tricia Marwick mentioned, became legislation, but I remember the debates in the Parliament. I was happy to support that Sewel motion and did not see why home workers south of the border should have any greater protection than home workers here. Another Sewel motion that came to us on a private member's bill was the one relating to the Fireworks Bill. Again, we were happy to support that.

The evidence that we have taken from members indicates that they want a degree of scrutiny and clarity. Some members have strongly suggested that there should be time for debate in the chamber so that MPs who read the debates of the Scottish Parliament might have an idea of what Scotland feels about a certain piece of legislation. It is easy for back-bench MSPs to ask for that time, but it is not as easy for those of us who have the responsibility of timetabling business to find it.

As Dr Cairney says in his paper, it is a question of priorities. If the Scottish Parliament wants to consider a Sewel motion, it has to stop considering another issue. I ask Tricia Marwick, as a representative of the Opposition, whether Opposition parties would be willing to agree with the Executive parties arrangements for giving up equal amounts of time so that back-bench members could have an opportunity to discuss Sewels.

**Tricia Marwick:** You are going into different territory. The Parliament's standing orders make it quite clear that the non-Executive parties are entitled to X amount of time. There is a bigger debate about who parliamentary time belongs to. The Executive seems to think that there are X number of days for non-Executive party debates and that the rest of the time belongs to it and may be used for its legislative priorities. If the Executive believes that all the other time belongs to it, it should find the time for consideration of Sewel motions.

We need to consider the wider question of the amount of plenary time that is available. The problem is that there is simply not enough plenary time. The Outworking Bill, which Cathie Craigie mentioned, never became legislation even though one of the justifications for its being Sewelled was that it would be quicker to use the Sewel process than for the Scottish Parliament to consider the issue. The bill fell because of lack of parliamentary time at Westminster and the Executive has not introduced a bill on the matter, so there is still no protection for home workers.

I do not think that we are in a position to give up non-Executive time, but we need to consider the amount of plenary time that is available to the Parliament.

**Scott Barrie:** There are three aspects to plenary time: Executive business, non-Executive business and committee business. I do not think that we would want to eat into committee business either. We have to protect parliamentary time. Whether we want to make better use of parliamentary time is a different debate, which I will leave to your good selves to consider.

**The Convener:** A further issue is reverse Sewel motions, which confer on Scottish ministers powers in reserved areas. Should there be a separate procedure for considering such motions or will they be adequately covered by any

improvements that we make to the general Sewel procedure?

**Scott Barrie:** We do not need to set up a separate system for what have become known as reverse Sewels. They can be considered along with normal Sewel motions. Again, it is a question of process, parliamentary scrutiny and parliamentary time. Whatever procedure the committee recommends could encompass both Sewel motions and reverse Sewels; they are two sides of the same coin. It is a question of getting the right procedure, ensuring that people are involved in it and ensuring that there is parliamentary scrutiny, rather than coming up with a different system.

**Tricia Marwick:** I am sure that I will be corrected if I am wrong, but I think that another process is open to Westminster. It can introduce an order in council to give more powers to ministers, rather than a bill that we then reverse Sewel. I am not sure how many orders in council have been made, but I cannot see a great deal of difference in how they are scrutinised. I suppose that the outcome might be different, in that the SNP will tend to support anything that will give more powers to Scottish ministers or the Parliament—as we did in relation to the Railways Bill—but would not necessarily support ordinary Sewel motions. However, once the decision has been made to Sewel something rather than to make it the subject of an order in council, the process should just be the same. There is an argument about whether a reverse Sewel motion is the right mechanism to use at the previous stage, but I think that that is the subject of other discussions.

**Scott Barrie:** That gets to the nub of the difficulty. Although both Tricia Marwick and I have agreed that we do not think that we need separate procedures, Tricia Marwick has suggested that the SNP and other parties that think that we should not really be using the Sewel convention will almost always oppose a Sewel motion. That goes back to what I was saying earlier. When we debate a Sewel motion, we rarely discuss the issue that the legislation concerns; instead, we discuss whether we should be using the Sewel process. Increased parliamentary time would be good but, if all that we were to use that time for was to wrangle continually over whether we should be Sewelling, it would not matter how much time the Parliament had. People hold extremely strong and opposing views on the issue and I do not think that that will ever change.

**The Convener:** Do you think that the Labour group's position would have been different if there had been a Conservative Government in power in Westminster?

**Scott Barrie:** I am not entirely sure about that. I am also not certain that there will be a Conservative Government in the foreseeable future. The fact is that devolution is a moveable feast. We will have to wait and see what happens if the day comes when the Executive and the Westminster Government are controlled by different parties. At the moment, we are trying to come up with a procedure that will work for the benefit of the people of Scotland at the moment. That is what the Procedures Committee should wrestle with at the moment rather than conjecture about what might happen if various scenarios were to occur.

**Tricia Marwick:** If the party in government at Westminster was different from the one in government in Scotland, the Sewel convention would still be the Sewel convention, and if the Westminster Government wanted to legislate in devolved areas, it would do so and it would not matter whether we gave our consent. There would be a different dynamic if there were a Government of a different hue south of the border, and Scott Barrie is right to say that, for the sake of the Scottish Parliament, we need to formalise the process for dealing with Sewel motions. However, we should not do so to the extent that it makes life an awful lot more difficult for everybody. The process must be more transparent. All MSPs need to understand how it works. I am not sure that they all do at the moment.

**The Convener:** I thank Tricia Marwick and Scott Barrie for their evidence. That concludes today's oral evidence session. We have one more oral evidence session timetabled at the moment, which will be with the Minister for Parliamentary Business. Paper PR/S2/05/6/8 contains a list of those who have submitted written evidence. If any member desperately wants to hear oral evidence from anyone who has given written evidence, they should let me know now, otherwise our meeting with the Minister for Parliamentary Business will be the final oral session.

**Karen Gillon:** I am content to read the written evidence and to bring it to bear in my questioning of the Minister for Parliamentary Business.

# Public Petitions (Admissibility)

12:14

**The Convener:** Item 2 on our agenda concerns two issues relating to the admissibility of public petitions that the Public Petitions Committee has requested us to consider and an issue relating to consultation that has been raised by the Scottish Council of Jewish Communities.

**Karen Gillon:** I am sympathetic to the points that the Public Petitions Committee has raised in relation to the lodging of petitions by MSPs and the resubmission of petitions. I appreciate that some of the issues in relation to the resubmission of petitions are valid. Having been on committees that have received a number of petitions that are similar or identical to petitions that have been rejected or closed, I believe that the process is time consuming and has the same end result.

Consultation is a matter for the Public Petitions Committee and nothing should be set down in the standing orders in that regard. The committee will simply have to exercise its judgment.

**Mark Ballard:** I agree with Karen Gillon's points about petitions being lodged by MSPs and about it being best to leave the question of whom to consult to the discretion of the Public Petitions Committee. However, I am slightly concerned about whether a formal ban on the resubmission of petitions is needed. If the committees that Karen Gillon mentioned are being subjected to repeat petitions on the same subject, that is a failure of the Public Petitions Committee, which should not be referring those petitions to the committees, rather than a failure of the system. Surely the Public Petitions Committee should act as a filter.

**Karen Gillon:** Given the number of petitions that the Public Petitions Committee deals with, having to consider repeat petitions will prevent it from being able to spend sufficient time considering other petitions that have not already been considered. The proposal that is before us would enable the Public Petitions Committee to act as a filter by saying that people would not be allowed to resubmit a petition for a year after the initial petition has been closed. That would allow new petitions on different subjects to be considered by the Public Petitions Committee and subject committees.

**The Convener:** There is general agreement that there should be a prohibition on the lodging of petitions by MSPs because, essentially, we would be petitioning ourselves, which is a strange thing to do. We can agree that in principle today.

The second issue is more complex. We could invite Michael McMahon to come to the Procedures Committee to talk about the Public Petitions Committee's reasons for pursuing that proposal. That would enable the points that Mark Ballard has raised about the Public Petitions Committee's current ability to act as a filter to be addressed. At the moment, the Public Petitions Committee clearly feels that it cannot do so properly. Do members agree to invite Michael McMahon to give evidence to us when he is next available to do so?

**Members** *indicated agreement.*

**The Convener:** The third issue relates to a point about consultation that was raised with the Public Petitions Committee by the Scottish Council of Jewish Communities. Karen Gillon has said that the decision about whether individuals or bodies that are directly referred to in petitions should be consulted should be a matter for the Public Petitions Committee's discretion. Do members agree with that position?

**Members** *indicated agreement.*

**Karen Gillon:** That is the same situation that any other committee is in.

**The Convener:** We will now move into private session to consider a draft report.

12:18

*Meeting continued in private until 13:06.*

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