



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE

Thursday 17 January 2013

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STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE

1st Meeting 2013, Session 4

CONVENER

*Dave Thompson (Skye, Lochaber and Badenoch) (SNP)

DEPUTY CONVENER

*Helen Eadie (Cowdenbeath) (Lab)

COMMITTEE MEMBERS

Brian Adam (Aberdeen Donside) (SNP)

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con)

*Richard Lyle (Central Scotland) (SNP)

*Margaret McCulloch (Central Scotland) (Lab)

*Fiona McLeod (Strathkelvin and Bearsden) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Nigel Don (Angus North and Mearns) (SNP)

Euan Donald (Scottish Parliament)

Irene Fleming (Scottish Parliament)

Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)

CLERK TO THE COMMITTEE

Gillian Baxendine

Alison Walker

LOCATION

Committee Room 6

Scottish Parliament

Standards, Procedures and Public Appointments Committee

Thursday 17 January 2013

[The Convener opened the meeting at 09:30]

Decision on Taking Business in Private

The Convener (Dave Thompson): Welcome to the first meeting in 2013 of the Standards, Procedures and Public Appointments Committee. I remind members to turn off mobile phones, BlackBerrys and so on.

We have apologies from John Lamont, who is unable to attend the meeting today, and from our deputy convener, Helen Eadie, who has been delayed in her journey from Fife due to traffic difficulties arising from a road accident, I believe. I hope that she will be able to join us fairly soon.

Under agenda item 1, I ask members to agree to take agenda items 3 and 4 in private. Item 3 concerns a discussion of a procedure for considering complaints about cross-party groups and item 4 relates to a possible amendment to a recently published cross-party group report. Are members content to take the items in private?

Members indicated agreement.

Scottish Law Commission Bills

09:31

The Convener: Under item 2, we will take evidence on the law reform working group's report on the implementation of the Scottish Law Commission's reports.

We are joined today by Christine Grahame, the convener of the Justice Committee; Nigel Don, the convener of the Subordinate Legislation Committee; Irene Fleming, the clerk to the Justice Committee; and Euan Donald, the clerk to the Subordinate Legislation Committee.

I know that you have all seen the report, so we will move straight to questions on it.

Will the proposals from the officials' working group be helpful in improving the rate at which Law Commission reports are implemented? Are we moving in the right direction?

Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP): Good morning. It is frightening to be on this side of the fence for a change. However, I am here in happy circumstances—sometimes, I have been here under less happy circumstances.

The Law Commission reports are a spectrum across various committees, but we are mainly looking at the Justice Committee. There is no doubt that, as has been the case throughout the many sessions of the Scottish Parliament, the Justice Committee does not have sufficient capacity.

As a slight preamble to my answer, I should say that we are not thinking about splitting the workload and having a Justice 1 Committee and a Justice 2 Committee. Been there, seen it, done it, got the T-shirt. It was dreadful. I fought it and lost, and then we got rid of the second committee, thankfully. We are focusing narrowly on the Law Commission reports. The bills are practically off the shelf, if I may put it that way.

The Justice Committee does not have time even to do many inquiries. That was also the case when Bill Aitken, my predecessor, chaired it.

That is my general response. I will leave my more detailed response for our discussion of the criteria.

Nigel Don (Angus North and Mearns) (SNP): I note that you and I were members of the previous Justice Committee, convener, and will remember the regularity with which meetings went past 1 o'clock. We can impress on others the fact that, historically, the Justice Committee has a full agenda. We also need to recognise that most of the Scottish Law Commission's short reports are

justice issues. My simple answer to your question is yes, the proposals provide a mechanism, at the margins, to help with the implementation of some of the reports that would be relatively easier to implement but which might simply drop off the Justice Committee's agenda, due to the pressure of time.

The Convener: The report contains a number of issues that we would like to tease out. I ask Fiona McLeod to come in at this stage.

Fiona McLeod (Strathkelvin and Bearsden) (SNP): Thank you very much for those interesting opening remarks. Given that these bills are not going to the Justice Committee, do you think that the five criteria in paragraph 17 of the report will ensure that they go to the Subordinate Legislation Committee for consideration?

Christine Grahame: First, I should correct the member: the important point is that some of these bills might not come to the Justice Committee. I commend the working group for its attempt to come up with a formula in the criteria but, even though I agree in principle, we still need to look carefully at the issue. For example, criterion (a) in paragraph 17 refers to

"a wide degree of consensus amongst key stakeholders".

You might think that to be the case only to find it all falling apart when you take evidence at stage 1. Any examination of the issue will have to be rigorous.

As for criterion (b), which says that such a bill should

"not relate directly to criminal law reform",

I simply repeat that when you start taking evidence you find things taking an unintended direction. The same applies to criterion (c), which refers to "significant financial implications". How often have we sat in committees, looking at a bill, and suddenly thought, "Whoops—there's something unforeseen here that's going to have a cost"? Again, the same applies to the criterion on the European convention on human rights.

That said, given that the Scottish Law Commission will have carried out a very robust consultation and will have put together a report, I would hope that the bill will be produced as laid. Indeed, we will have a pretty clear indication in that respect. Of course, I am not saying that the Government does not consult robustly. Perhaps I should not have said that, but I have said it now. We might have a clearer indication that nothing that we did not know about is lurking in the woodpile or under a stone.

Basically, my answer to your question is yes, I agree in principle, but that agreement is subject to

another issue that I might raise in response to a subsequent question.

Nigel Don: As the five criteria cover the five areas that need to be covered, I am absolutely comfortable with the principle behind them. However, none of them is strict, except for criterion (e), which says that a bill is within the Parliament's legislative competence if

"the Scottish Government is not planning wider work"

on the matter. That is simply a fact; the Government will or will not be "planning wider work".

The criterion on having

"a wide degree of consensus"

is open to interpretation, as is the criterion that a bill should

"not relate directly to criminal law reform".

As for the criteria relating to "significant financial implications" and "significant ECHR implications", someone will have to decide what constitutes "significant".

What concerns me about the criteria is the need for a sensible interpretation of the terms and I suggest that the committee reflect on whether these are the right words or whether we can find better ones. Given all the work that has gone into this, I would not want to finish up in a position where those interpreting the criteria can never find a bill that the Subordinate Legislation Committee can scrutinise. That would obviously be counterproductive and would go against the intention. We just need to be careful that the criteria are interpreted in a way that makes sense.

Of course, that said, it might well be the case that there is no bill that we can scrutinise. I think—and hope—that we will be able to look at some of the relatively smaller ones, but we need to be careful not to interpret the criteria in such a way that nothing ever gets through the sieve.

The Convener: Are you concerned that the five criteria are too restrictive?

Nigel Don: The risk is that they might be interpreted in that way. They might not be; indeed, at the end of the day there might never be a Scottish Law Commission bill that meets them and we might be trying to set up a process that is never used because it simply does not fit. My concern is that it should not fit because there really is no bill that we can deal with, not because we have written the criteria wrongly.

That said, when I discussed the issue with my committee earlier in the week, members were extremely concerned about criteria creep and shared Christine Grahame's view that the Subordinate Legislation Committee should not

become a Justice 2—or indeed anyone else's 2—committee. That is not our purpose and I do not think that that is the objective of all this. We are not to be the committee that picks up the legislation that other committees cannot find time for. We have to understand the criteria and be fairly strict, so that we deal only with things that are essentially not policy issues. That is how we reduce it to one line.

The Convener: It worries me a wee bit that we are creating a procedure that, as you suggest, might not bring anything to the Subordinate Legislation Committee, as that would be a pretty pointless exercise. You are right that we have to get the process right and that it has to be realistic. It might well be that we will not know until the procedure is implemented just how it will work. That might be a difficulty.

Nigel Don: I will pursue that, because it is one of the issues. In the previous parliamentary session, the Justice Committee discussed whether we should try something like this on a pilot basis, but without changing the standing orders much. I suggest that, whether or not the word “pilot” appears in any of the proposals—assuming that they are agreed to and something happens—it is almost inevitable that the first bill that we do will be a substantial learning lesson and involve a pretty steep learning curve as we work through it, never mind afterwards. We will then be able to rethink how we did it and whether the process needs to be revisited.

Christine Grahame: I do not have a problem with a pilot bill, because that would allow us to monitor whether we have the criteria right. However, that is subject to the adoption of option 2 in the paper. I submit that the bureau should go to the subject committee first to ask whether the conditions are met and whether referring the bill to the Subordinate Legislation Committee is the most appropriate mechanism.

The Justice Committee would have before it the Law Commission's report, the bill as lodged and the Government's views and could then consider whether it envisaged any issues arising. There might be none. The committee might decide that the bill deals with a technical issue and so report to the Parliamentary Bureau that it has no reservations. There might be a middle way, in which the committee says that it sees no major issues, but is concerned about certain issues. Alternatively, the response might be, “Naw—this is not a good idea,” because the committee can see issues that mean that the bill is substantive and should be dealt with by it. It would then be for the bureau to make up its mind in the light of what the Justice Committee—or it might be another subject committee—has had to say on the Law Commission bill. We would have to live with that.

Once the bill has been referred to the Subordinate Legislation Committee, with or without qualifications or with some minor comments or even major ones, I hope that, if at any time during the process something arises that gives that committee or the Justice Committee concern, a mechanism would be in place whereby we could halt the process—in court, you would say “sist”—and refer the bill back to the bureau, which could then consider whether the bill should be referred back to the subject committee. I would hope that not just the Subordinate Legislation Committee, but the Justice Committee could raise such an issue. That is belt-and-braces stuff. The two of us are commonsense conveners—all conveners in the Parliament are full of common sense, including you, Mr Thompson. A commonsense approach would be taken, but just so that we knew where we were going, the framework would be that, if either committee had issues, it would be sensible to stop the process at that stage.

The process would be that the bill would be referred to the subject committee, which would consider it and make a comment or otherwise to the bureau and the bureau would then refer it to the Subordinate Legislation Committee. If issues arose at any point, either committee could ask for the process to be stopped if it thought that issues needed to be reconsidered.

Richard Lyle (Central Scotland) (SNP): Christine Grahame has touched on the point that I was going to ask about, but the report does not go along the lines that she suggests, as it suggests that the bureau will allocate the bill. The recommended option is option 1, which is for

“consideration by Parliamentary Bureau as to whether the Bill should be scrutinised by the Subordinate Legislation Committee”.

In essence, the Justice Committee will not even get to see or touch the bill; it will automatically be referred to the Subordinate Legislation Committee. The Justice Committee will not even be asked. How do you feel about that?

09:45

Christine Grahame: That is not a good idea, and I recall that the Justice Committee took that view as well. We might have nothing to say if a bill was referred to us under option 2, which I propose. We could say, “This is fine—the bureau should just refer the bill to the Subordinate Legislation Committee.” Expertise has been built up in the Justice Committee over a period of time, as it has been in the Subordinate Legislation Committee and the Standards, Procedures and Public Appointments Committee, and there is an important balance in the Parliament. We could say, “From our experience, we can see some

issues arising here”—or not, as the case may be. That would be helpful to the bureau and the Subordinate Legislation Committee, which would not find itself with a bill that had been referred to it which it would have to stop if the bureau had made a mistake. If a bill had to be stopped in the middle of stage 1 because something had arisen that we could have indicated in the first place, that would look messy.

Richard Lyle: So your contention is that a bill should go to your committee first and that it or you in conjunction with the bureau and the clerk would decide.

Christine Grahame: No.

Richard Lyle: Your committee would decide to pass any relevant bills to the Subordinate Legislation Committee.

Christine Grahame: “Decide” is the wrong word.

Richard Lyle: What about “recommend”?

Christine Grahame: I do not know whether we would recommend. We would give our observations on issues that we see might arise—or not, as the case may be—in a bill that the bureau wanted to refer directly to the Subordinate Legislation Committee. The bill would have to relate to the work of our committee, of course. We would give our observations, and that would be it. It would be like a wee report that would go to the bureau.

The decision is always for the bureau. That would be the same if, say, the bill was passed to the Subordinate Legislation Committee, and it and the Justice Committee thought that something unforeseen had arisen that made it a bit difficult for the Subordinate Legislation Committee to deal with the matter within its remit. Again, all that the two committees could do would be to report back to the bureau, which could decide to leave the bill with the Subordinate Legislation Committee. The bureau is the powerful committee; it always decides where bills will go.

Richard Lyle: So you prefer option 2. What option—if any—does Nigel Don agree with?

Nigel Don: Our committee observed that option 1 is the reality, so we were quite comfortable with it. It recognises that the bureau makes those decisions.

On a personal level, I understand Christine Grahame’s reflection that it might be sensible if the subject committee had prior sight of what was suggested and that it might have comments to make, but I have a feeling that the bureau would probably recognise that beforehand and would work in the informal way in which most things are done in the Parliament. I think that it would ensure

that it took soundings before it decided to allocate a bill to us or anywhere else.

I remind folk that the bureau has done strange things in its time, and even in my time in the Parliament. In the previous session, the Arbitration (Scotland) Bill, which we turned into the Arbitration (Scotland) Act 2010, was manifestly a justice bill, but it went to the Economy, Energy and Tourism Committee simply because the Justice Committee did not have time to deal with it. I was on both committees, so I saw things from both ends. That worked fine. I imagine that there were private discussions beforehand with the Justice Committee’s convener, Bill Aitken, on what he thought about that but, at the end of the day, the bureau made a recommendation and, as always, the Parliament passed it.

I think that option 1 is de facto what happens, but we need to recognise that a subject committee should be consulted before something within its bailiwick is given away.

The Convener: I think that the difference in what you say is that you are suggesting that such consultation would happen in practice anyway.

Christine Grahame: I do not like bills not going to the Justice Committee, which is collegiate and whose members work very well together. I do not want to make decisions or representations as the committee’s convener without having the committee behind me.

There is also the contribution that the Justice Committee can make because three or four of us have law degrees—I think; I am trying to count how many—and there are two ex-police officers and ex-councillors on it. We have on the committee substantial people who can see issues in legislation because of their experiences from their previous professions and as politicians. I would want the committee to be able to have a say. If the Parliamentary Bureau simply said, “This bill will go to the Subordinate Legislation Committee because we say that it’s non-contentious and fits the criteria,” that would not be appropriate, although I do not think that that would happen very often. It is appropriate that the relevant subject committee considers a bill.

On quirky decisions that the Parliamentary Bureau has made, let us take the End of Life Assistance (Scotland) Bill. The subject of the bill was either a justice issue about capacity, or it was a health issue, but the bureau instead created a whole new committee for the bill. I had a big battle about that with the bureau. The committees—this is a committee parliament—should be allowed to be a counterbalance to the Government and the bureau. I would not be happy about there being behind-closed-doors discussions on whether a bill should come to the Justice Committee; I would,

instead, like the Justice Committee to be able to say whether it thought that policy issues relevant to it might arise. However, we are not going to create a war zone.

The Convener: Your position is that there should be a formal referral to the subject committee, as opposed to the informal discussion that Nigel Don feels would happen in any case. We have a little divergence of opinion there.

Christine Grahame: Indeed. Finally, let me say that the Subordinate Legislation Committee refers many matters to the Justice Committee and most of the time—in fact, all the time—we listen to what it has to say. If the Subordinate Legislation Committee raises a drafting issue with us, we take it up. A healthy relationship exists already between the Subordinate Legislation Committee and the Justice Committee.

Nigel Don: Convener, I think that you have summed up the issue well, but before we leave the word “referral”, I wonder whether we ought to consider the prospect that, under the proposed standing orders, a bill might come to the Subordinate Legislation Committee which it found—this would not come as a huge surprise—involved policy issues that needed to be recognised. In the real world, there is no real possibility that there will be nothing that could be described as a policy issue; there will always be something about which we could think, “Well, that is a justice policy”, or a rural affairs policy or whatever the bill was about. We will be in the situation where lots of very small issues might emerge from the evidence, on which we will then have to make a decision. I do not think that that is a problem, as that is what we are being asked to do.

However, it is possible that issues will arise that we think are a bit bigger. I do not know quite how to define that, but we might feel that we would like help from the policy committee on such issues. I see nothing in the proposals that would give us any kind of formal opportunity to consult, for example, the Justice Committee as we went through stage 1. I just wonder whether that is an omission, although it may be that it is not. At the far end, we have the nuclear option, if you like, of saying that we no longer think that we can cope with a bill, telling the bureau that and handing it back. That is in the proposals, and it makes sense, but that is obviously not a desirable outcome.

This “formal versus informal” debate is to do with the possibility that we could refer to a subject committee as we go through the process. We could write into standing orders that the Subordinate Legislation Committee may write or report to the subject committee outlining the issues and asking for answers on them, so that we could continue based on its response, or we could

say that we know that there is an issue, establish informally what the Justice Committee thinks and then work on that basis. I happen to think—being sensible and reasonable, as all MSPs are—that we could do that. I do not have a problem with it, but we need to ask whether it would be appropriate to include something in standing orders, just in case.

Assuming that the proposals are pushed through as drafted, I would not want to feel that, although there was a policy issue on which we knew the subject committee would have a view, which we and the subject committee might feel should be the prevalent view, we had no mechanism for asking it for that view.

Christine Grahame: The Justice Committee is not looking for work. What we cannot have is Justice 2 Committee creep. If a serious policy issue came up, I would not be unhappy if the Subordinate Legislation Committee convener wrote to me, as Justice Committee convener, to say that it had arisen and to ask whether the committee wanted to look at it. However, I would want, when it was thought that there was a policy issue, a mechanism for referral to the bureau—not straight to the subject committee—on whether the bill process should be halted while it considered whether there was any substance to the issue. I would want a proper process with the bureau.

I am a very pragmatic person, but if the system were to be made too pragmatic, we would not have a structure for dealing with really difficult situations. As I have outlined, I would like us to have a structure. I would be quite happy if the convener of the Subordinate Legislation Committee wrote to us and said, “Something has come up in this bill. We think it might be a substantial policy issue or an issue that encroaches on your remit. Would you like to consider it?” We could then put the bill on our agenda, consider it and take a view on it. If we were to take the view that it was a substantial issue, there should be a mechanism for referral back to the bureau. We could say, “Here’s what we think. It’s up to you now, boys and girls.” At the end of the day, it is always the bureau that makes such decisions.

The Convener: There are, if I am picking you up correctly, two slightly different positions. I would have thought that the re-referral option would be for fairly big issues that might come to light after referral to the Subordinate Legislation Committee, but I think that the convener of the Subordinate Legislation Committee is saying that there might be a stage before that that needs a mechanism that would allow the Subordinate Legislation Committee to request information or whatever from the Justice Committee. Am I right?

Christine Grahame: No, I do not think so. I think that I picked up what the convener of the Subordinate Legislation Committee said correctly. I think that the convener of the Subordinate Legislation Committee would refer issues to the Justice Committee and ask for its views. It will probably be the case most of the time that the Justice Committee thinks that the Subordinate Legislation Committee can deal with issues, if they are not substantial.

However, if a substantial issue arose, I would not want us just to write back and say that we also think that the issue is substantial; there should be a mechanism whereby, when a substantial policy issue comes up that encroaches on our remit in a heavy-footed way, then my committee, the Subordinate Legislation Committee or both could ask the bureau to halt proceedings and look again at the matter. I do not think that Nigel Don and I are saying different things. If the issue was a minor one, the Justice Committee could just say to the Subordinate Legislation Committee, "No, you can keep the bill."

Nigel Don: I do not think that I am disagreeing with Christine Grahame, but I note that, as I read the report, under standing orders there would be what I previously described as the nuclear option to hand a bill back. That does not worry me, except that I do not think that we ever want to get there. My concern is that we should ask the Standards, Procedures and Public Appointments Committee to reflect on whether some informal mechanism might help.

Christine Grahame: We would not be likely to get to that position if option 2 were chosen, because that would mean that the subject committee would have had a fairly good whack at seeing whether an issue would arise, in fairness to the Subordinate Legislation Committee and the bureau. That is why I prefer option 2, because it would involve early intervention, which would enable us to see whether the bill might have unintended ramifications and that it was not just going to be a skoosh.

The Convener: Thank you very much. I think that we have given that topic a good bit of time.

Margaret McCulloch would like to raise another issue.

Margaret McCulloch (Central Scotland) (Lab): Good morning, colleagues. What capacity does the Subordinate Legislation Committee have to deal with bills that would implement Law Commission reports?

Nigel Don: I think that our visible time capacity was probably why the suggestion was made in the first place. However, the timetabling of subordinate legislation requires us to do things on a very short fuse when we get there, which means that the

timing of our business from week to week is highly volatile.

I think that the *Official Report* will show that I closed the formal part of this week's meeting of the Subordinate Legislation Committee four minutes after I opened it. That is pretty close to the record. It would probably be fair to say that we do not normally go on for more than an hour. It is a pretty concentrated hour because, as one of my colleagues commented, we tend to look at things quite finely; we use a pretty fine sieve. Some concentrated work is done—much of it by our legal advisers and clerks before the meeting.

There is a substantial amount of thinking time involved in reading the papers and working out what is going on, but the time that is spent in the committee room is often quite short. Therefore, that gives us time capacity as a constituted committee that has a clerking team, a room available and so on. It means that we have the opportunity, purely in terms of time, to consider legislation or to do anything else.

The other positive thing, of course, is that committee members quickly build up expertise across many areas because we see subordinate legislation across every area—we go from marketing of bananas to road traffic acts and back via ports and harbours in five minutes. We get familiar with the workings of the legal system pretty quickly, so there is considerable expertise around the room that is well capable of dealing with Scottish Law Commission bills. I have no concerns about that being our normal kind of business—it is very definitely our normal business.

10:00

When you ask about the capacity of the clerking team or legal advisors, the answer is not so obvious. My response, on their behalf, is that that is for the Scottish parliamentary service to deal with. If any committee needs more resource in the context of its workload, that is the Parliament's chief executive's problem, rather than mine. The parliamentary authorities would recognise that, so we do not need to ask ourselves whether we have the clerking or legal capacity at the moment because if I had excess capacity—I probably should not—it should be somewhere else. If and when a bill appears, it is up to the parliamentary authorities to resource that and I have no doubt that they would.

The Convener: Fiona, would you like to come back in?

Fiona McLeod: I think that we have probably covered everything.

The Convener: Fiona McLeod thinks that all the points have been covered. Do any other members have questions?

Margaret McCulloch: The report envisages that some Law Commission bills may be suitable for introduction as members' bills or committee bills. Do you agree?

Christine Grahame: I am not bothered either way. However, there is an issue about the support that can be given to the member in charge of a bill. As I understand it, because such bills would come from the Law Commission, a member would not get support from the non-Government bills unit. It is no longer called NEBU—or the non-Executive bills unit—which I rather liked because it was easier to say than NGBU. I do not know what support would be provided. That is a practical issue so, in reality, we will be considering such bills as either committee bills—I think that I am right in saying that the committee would get support—or Government bills.

Nigel Don: The Subordinate Legislation Committee would much prefer that Law Commission bills be introduced by the Government because that is a standard mechanism that is properly resourced, and which appears to be the right thing to do, quite frankly.

It is clear that Law Commission bills can be managed in other ways. We certainly do not want a member of the Subordinate Legislation Committee to steer a member's bill through his or her committee—there is a strong feeling that that is not the right way. If a back-bench MSP can be found to steer through a bill, that is perfectly workable—it has been done many times—and would be facilitated.

That brings me to another point that I should have made in answer to the previous question. The volatility of the Subordinate Legislation Committee's programme and the fact that we must always do everything within a two-week timescale—that is just how subordinate legislation must be dealt with—might mean that we have a heavily workload of subordinate legislation when we consider a bill. It might therefore be necessary for us to work with slightly more flexible timetables than bills normally have when they go through committees. I mention that simply because it might happen. I do not think that it is a problem because asking for extensions from the bureau is not difficult; it is within standing orders and would probably be granted. However, that might be one of the consequences.

Christine Grahame: I want to correct the record. I have been advised that no support would be given to the committee if the legislation is dealt with as a committee bill because the Law Commission would have drafted the bill. The

committee would therefore be in the same position as a member: the Law Commission cannot give support.

The Convener: So, the same problems would arise.

Christine Grahame: Really, the Government would have to take up such bills.

Richard Lyle: Christine Grahame mentioned earlier that several legal people are members of her committee. I am interested to hear her take on the following. The report suggests that neither the Scottish Government nor the Parliament's non-Government bills unit nor the Scottish Law Commission would be able to provide support to back-bench members or to committees during the passage of such bills—for example, with respect to amendments and speaking notes or legal issues that arise from them. Would that impact on committee scrutiny of such bills?

Christine Grahame: I have just made that point, Mr Lyle: members would not get such support. Previously, the first session's Justice Committee did a committee bill. We had support, but that bill was wholly born and bred within the Justice Committee.

The point is that upcoming bills are tailor-made, in a sense. They are already drafted and they will be laid in that form; that is why there would be no support. Therefore, unless something changes in the rules, those bills have to be Government bills.

The Convener: Okay.

Nigel Don: Certainly my perspective—our perspective—is that it is of no consequence whether the Government wants to introduce Law Commission bills as Government bills with ministers or get a back bencher to take a bill as a hand-out bill. However, if such a bill were not to be a Government bill, it is extremely difficult to see how the resources could be provided to a member who was handling the bill.

The Convener: It strikes me that that is another restraint on Law Commission bills making their way through the system. We talked earlier about the criteria being fairly restrictive and, as I said, I am worried about our setting up a mechanism that would make it so difficult for anything to happen that nothing would happen. There is no point in developing a mechanism—and, to be blunt, wasting time doing that—if it will not work, at the end of the day.

Nigel Don: Most of the work has probably already been done, so we do not need to worry too much about that. If we are wasting our time, we have probably wasted most of it already. I think what is suggested will be a helpful mechanism and that the Government will see it as a helpful mechanism.

There are some important reports out there; the Scottish Law Commission is a venerable group of extremely skilled and experienced people who are not playing at it; they are producing draft legislation that really should be on the statute book, which is why we started this process in the first place. The Government can probably be persuaded to see that this is an important mechanism. If Law Commission bills are not Government-sponsored, they will not be resourced. On the other hand, we are also talking about relatively small bills, so the resource that would be required would not be huge, so the Government should probably be able to find it.

The Convener: The problem with some bills is that we might not, when they are introduced, realise what will be involved. I remember the Justice Committee looking at the Long Leases (Scotland) Bill. Everyone thought that it was pretty simple and straightforward and that it would be a doddle. It was a nightmare—it raised all sorts of questions. Would times such as that be when the re-referral process would come in? Do you envisage, if it suddenly turned out that there was an awful lot more work involved than had been expected, that there would be the possibility of a bill's being abandoned?

Nigel Don: That would be highly embarrassing.

The Convener: Indeed.

Nigel Don: I am sure that nobody would want to go there. I was on the committee at which it was suggested that the long leases bill would be straightforward. However, I do not think that the Long Leases (Scotland) Bill would ever have met the criteria, because it involved how far back we were going to take the provision on 170 years or 250 years or whatever the numbers were—forgive me, I have forgotten—and it was always going to be contentious.

I suspect that some of the issues, such as rights of way or wayleaves or underground leases—or maybe they were underground licences—could be seen coming: we never did resolve the law on that, as I recall, so I do not think that that is a bill that the Subordinate Legislation Committee would ever have got.

Christine Grahame: That is why option 2 is such a sensible option.

The Justice Committee has huge sympathy for the Scottish Law Commission's having done a lot of work, but then just having bills sitting for years. We considered putting some of the bills on our agenda—even picking up one as a committee bill—but we simply did not have the time.

In no way do we want to impede Law Commission bills becoming law. Nigel Don is quite right that a lot of good work and a lot of hard work

is being done by very venerable and experienced people, which is why I prefer option 2. When a bill is introduced following a Law Commission report and the Government's position is known, it should be pretty clear whether there would be issues if the bill was referred away from the Justice Committee to the Subordinate Legislation Committee. That is an important thing to note.

Helen Eadie (Cowdenbeath) (Lab): Good morning, colleagues. Could this committee take any additional steps to increase the rate at which Law Commission reports are implemented?

Christine Grahame: As the Subordinate Legislation Committee convener suggested, there should be a pilot. I hope that the SPPA Committee would try option 2. Pick a bill and let us see how that works.

Conveners would have informal discussions among themselves; indeed, we have already had them; conveners are sensible if they have been in the job for a while. However, I still feel that committee input is important. Let us try a pilot and see how it works.

A pilot would be conditional on points that I have made. If anything came up, I would want an opportunity to refer back to the bureau if the issue was substantive—even after hearing from the Subordinate Legislation Committee or the Justice committee, “Whoops! Something's come up.” There would be exchanges and then, if necessary, there would be a referral to the bureau.

That is the way to find out, but I have to put a marker down and I will keep saying this: I do not want to see Justice 2 Committee creep—not because I am precious or because I am building a little empire for the Justice Committee, but because I watched it happen previously. I do not know of any other Parliament on the planet that had two justice committees. I do not want to see that happening just for the sake of getting legislation through some kind of legislative sausage machine that Parliament might turn out to be. That is not what the Subordinate Legislation Committee wants and it is certainly not what the Justice Committee wants. I do not want to see it even begin to happen.

Nigel Don: The obvious answer to the question about what the Standards, Procedures and Public Appointments Committee could do is that you could reflect on what has been said this morning and what you have heard from other people and get Parliament to introduce a procedure, then we will see what we can do.

I started from the position that the Subordinate Legislation Committee can do a little more than currently would be done. I recognise that it is always at the margins, but that is always where you start.

I reiterate my agreement with Christine Grahame. We do not want to become a Justice 2 Committee or an anything else 2 committee. When we discussed this, members of the Subordinate Legislation Committee suddenly became very protective of the nature of our committee. If you were to look at the record—indeed, if you were to be a fly on the wall at our private discussions—you would see that we do not work in a party-political way if we can possibly avoid it; our committee is absolutely the exception. The members of my committee do not want to end up doing this kind of policy stuff and finding themselves in what might be a politically contentious country for part of a meeting, before suddenly having to put the other cap back on to scrutinise the current regulations and subordinate legislation.

I think that people understand that we work in a particular way. We want to guard that jealously.

The Convener: That emphasises the non-controversial aspect of the bills that would be considered.

Nigel Don: Yes.

The Convener: Do members have any final points?

Helen Eadie: I would like to come back in, as Christine Grahame has triggered a thought in my mind. We cannot compare legislatures absolutely, because other countries have different institutions and organisations, but has there been any research undertaken with other Parliaments in, say, Scandinavian countries such as Denmark or Sweden to see whether they have had similar issues and, if they have, how they have resolved them?

Christine Grahame: I am not aware of any. It would be up to this committee to look at that.

Helen Eadie: Thank you. That is very helpful.

The Convener: Those are all the questions and points that we wanted to raise with our witnesses; thank you very much for coming along. The session has been very useful and we have teased out a number of points that we will need to discuss before we come to a decision on what we will recommend.

10:15

Meeting continued in private until 11:14.

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