The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE

Thursday 27 March 2014

Session 4

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STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE
5th Meeting 2014, Session 4

CONVENER

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

DEPUTY CONVENER

*Margaret McDougall (West Scotland) (Lab)

COMMITTEE MEMBERS

*George Adam (Paisley) (SNP)
*Cameron Buchanan (Lothian) (Con)
*Cara Hilton (Dunfermline) (Lab)
*Richard Lyle (Central Scotland) (SNP)
*Fiona McLeod (Strathkelvin and Bearsden) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Claudia Beamish (South Scotland) (Lab)
Nigel Don (Angus North and Mearns) (SNP)
Kenneth Gibson (Cunninghame North) (SNP)

CLERK TO THE COMMITTEE

Gillian Baxendine
Alison Walker

LOCATION

Committee Room 6

Scottish Parliament

Standards, Procedures and Public Appointments Committee

Thursday 27 March 2014

[The Convener *opened the meeting at 09:30*]

Decision on Taking Business in Private

The Convener (Stewart Stevenson): Welcome to the fifth meeting in 2014 of the Standards, Procedures and Public Appointments Committee. I remind members and guests to switch off mobile phones.

Agenda item 1 is to consider whether to take in private items 3 and 4. Does the committee agree to do so?

Members *indicated agreement.*

Legislative Procedures

09:30

The Convener: Agenda item 2 is our inquiry into procedures for considering legislation. We are taking evidence from our panel: Claudia Beamish MSP; Nigel Don MSP, the convener of the Delegated Powers and Law Reform Committee; and Kenneth Gibson MSP, convener of the Finance Committee. Welcome, and thank you for coming to help us in our inquiry.

We will not start with opening statements but go straight to questions. There will be an opportunity at the end, if time permits, for the panellists to make a final concluding remark, to pick up any points that our questioning has not otherwise drawn out.

If possible—this may be a wee bit of a challenge—we want to focus and get information on outcomes from the legislative process that are less than optimal rather than simply to examine failures of process where it is uncertain whether the outcomes are suboptimal. When we talk about process or outcome failures, it would be helpful to get your views about how likely such things are to happen and what the impact is when they happen.

Each of you has written to the committee. We have that evidence before us and it gives us a starting point for our questioning. I hand over to Richard, who will open the questioning.

Richard Lyle (Central Scotland) (SNP): Good morning, lady and gentlemen. I have three questions to pose to you. First, the legislation process in the Scottish Parliament has three stages. In principle, is that model the right one, or are changes needed?

Nigel Don (Angus North and Mearns) (SNP): I seem to have been deputed to go first.

The model is perfectly workable and a fairly good one. I have not seen any evidence or come across any thinking in my time here or in my committees that says that the model is wrong. During this session, we will pick up all sorts of points of detail and, in particular, the time between the stages is a matter to which we will want to return.

As someone who must deal with bills but who does not sit on a committee that usually considers a bill's policy, I think that the stage 1 process is thorough and effective and gives the Parliament a lead committee that knows the subject very well. That means that the stage 1 report is instructive to everybody, in the Parliament and outside it. It makes very good sense that a lead committee looks at obvious amendments at stage 2, because it knows the subject. If you take the view that

doing that completes the process in principle, it is perfectly reasonable thereafter that stage 3 is in effect a ratification by the rest of the Parliament.

Inevitably, the Parliament wants an opportunity to amend things, and much of what I want to talk about derives from the fact that although quite a lot of amendment seems to occur at stage 2, the Parliament then thinks that it wants to make substantial changes at stage 3 when, with the greatest respect, we as a Parliament are not able to do that terribly well, because that is the role of the experts who are on the committee. The model Is very good, as long as the Parliament works with it and allows the committee to do its work, which, on most occasions it does very well.

Kenneth Gibson (Cunninghame North) (SNP): I agree with a lot of what my colleague Nigel Don said. First, I should say thank you very much for inviting me to your committee. It is very strange to be at this end of the table.

The Finance Committee's concern is not about the model, which I think is quite robust, although it could certainly be improved upon. The Finance Committee's view is that that could be done by extending the time that is available for stage 1. We sometimes have real concerns about the time that is made available at stage 1 for dealing with substantial and complex bills. It seems that a start date and a completion date are agreed, and things then work back from when stage 3 has to be finalised. Because of the issues around amendments at stage 2, taking into account recess dates and so on, we often find that stage 1 is squeezed. The Finance Committee would like that to be looked into and we think that greater consideration must be given to the needs of evidence gathering at stage 1. The basic model is robust, however.

Claudia Beamish (South Scotland) (Lab): Good morning. I, too, am pleased to have been invited to give evidence, which will be brief, as it is about a specific area of concern in relation to only one bill. I do not know whether this will form a picture in any way, but it is about the Regulatory Reform (Scotland) Bill, as is highlighted in the letter from Alex Fergusson, Tavish Scott and me.

I identify myself with the remarks of my colleagues. I am speaking, however, only in a personal capacity, not in any way for my committee—I wish that to be on the record. As an MSP with not very much experience of bills, and not having been a lawyer, I have found it quite challenging, as others perhaps have, to get to grips with the different stages.

At stage 2, the bill team and one's own committee's clerks provide a great deal of support, which is very much valued. I was interested in what Nigel Don said about stage 3 possibly being ratification. A bill must of course be ratified by the whole Parliament in order to become an act, but that is perhaps the only thing that I would take issue with. I do not view stage 3 simply as a ratification, but as an opportunity for the wider Parliament to be involved—although members may of course also be involved at the relevant committee at stage 2.

The concern that I and my colleagues who wrote to the committee had was that amendments being lodged only at stage 3—that may be inevitable; they might be required on the back of something that has occurred at stage 2—does not give what Nigel Don described as the experts, although I would not necessarily call myself an expert in rural affairs, the same opportunity to scrutinise those amendments that they get at stage 2. A number of Scottish Government amendments were lodged for stage 3 of the Regulatory Reform (Scotland) Bill and we highlighted that as a concern, as the committee was not able to scrutinise them.

The Convener: Before we move off that subject, I wonder whether I am being led by what I have just heard to the idea that stage 3 is in fact two stages. There is the Parliament sitting as a committee and there is the Parliament debating the bill that it has decided on. Would it aid clarity if there were distinctly different names for those two stages? Those two parts of what is currently stage 3 do not have to happen adjacent to each other in the parliamentary timetable and it is only by habit that they do.

Nigel Don: I take what Claudia Beamish has just said. The final part of the process probably should be ratification, more or less. We have had our fingers burned by making substantial amendments at stage 3. The legislation on agricultural holdings, which we went through and signed off yesterday, exemplifies how things can go wrong at that stage, albeit rarely.

That suggests at least two alternatives, one of which, as you say convener, is to have two parts to stage 3. Another alternative is to encourage or perhaps ensure that members address their concerns in committee at stage 2, rather than when the bill comes to the Parliament after the committee has looked at it. Members who have any concerns at all about a bill would get into the stage 2 process and engage with the committee.

I have to be careful in saying that, because a lot of members do that, and it is fairly routine. However, if it was seen as being the right place to do the final amending, because members would by definition be engaging with the committee members, whom I still hold to be the people who become experts in the subject—

The Convener: Perhaps I should be more specific. Is the debate not actually stage 4?

Kenneth Gibson: I sometimes wonder whether there is any real purpose to that debate. It can be a big anti-climax. Often, we have battled through a load of stage 3 amendments and there is then a mass exodus of members from the chamber. We have all been there and spoken in the debate after stage 3 amendments. I wonder whether there is any need for that debate. I say that in a personal capacity and not on behalf of the Finance Committee. I sometimes think that it would be better to have a debate before the consideration of stage 3 amendments so that we can inform the debate on those amendments for members who are not on the lead committee or the Finance Committee, which will have dealt with the financial memorandum. I am speaking in an individual capacity, but I certainly do not think that there is a lot of value in the debate that comes after the amendments.

The Convener: Would the debate be of greater value if the Parliament had the amended bill before it when it had that debate?

Kenneth Gibson: That would certainly be better than having the debate immediately after consideration of amendments, because the dust would have settled and that would give all parties an opportunity to look at the bill.

The Convener: I do not want to put too much of my personal bias into my questioning, but you might see some of it.

Kenneth Gibson: I think that it is quite obvious and blatant, convener.

Cameron Buchanan (Lothian) (Con): As a relatively new member, I find it rather baffling when we get to the mass of amendments at stage 3 and we are given a piece of paper telling us how to vote. It has been suggested that we would get a better idea if we had a debate at stage 2, rather than at the end of stage 3. I think that that would be much easier to follow. I do not find it easy at present. Claudia Beamish's letter mentions an example in which three groupings came in at stage 3 and were just voted through en bloc, with no real chance to debate them. I wonder whether a debate at stage 2 would be the right way to handle it.

It is difficult when we have all these amendments and then, as Mr Gibson says, everyone just leaves the chamber. The debate goes on, but it becomes irrelevant and there is no point in staying, because everything just goes through. I wonder whether it is a better idea to have the debate at stage 2, rather than have a stage 4. To my mind, that would just prolong the process, although I am relatively inexperienced.

The Convener: To be clear, I was simply suggesting that we rename the debate as stage 4, not that we change what is done.

Kenneth Gibson: You have opened a can of worms, convener. We are all thinking on our feet about how we would like to change that. I am here to talk about the Finance Committee's concerns regarding other issues, so I am now speaking only in a personal capacity; I do not know how much value that has for you.

The Convener: Right. I will return the questioning to Richard Lyle.

Richard Lyle: I want to go back to a point that Cameron Buchanan just brought up. In the debate on a grouping, one member might speak on behalf of other members. That is what happened to me. John Mason and I had amendments in the same grouping, but John Mason spoke. I asked the Presiding Officer whether I could clarify something but was immediately told no. Given the point that Cameron Buchanan made, should we allow each member who has an amendment to make their point rather than just one member?

Kenneth Gibson: Again, I speak in a personal capacity, but I think that the issue with that is the complexity of the bill. The Presiding Officer has to get the amendments through in a certain timescale. I remember that, in the first session of the Parliament, the Housing (Scotland) Bill had about 769 amendments, 139 of which I lodged, as I was the housing spokesperson at the time. It can be difficult. If members have a specific point to raise, obviously, there can be debate on individual amendments, although it is important that the Presiding Officer is notified in advance. To be honest, the Presiding Officers tend to be quite fair if there is a point on which a number of members want to express a view. However, I do not think that every member who wants to speak on every amendment should have the right to do so, because we would be there for days and the Parliament has to get through its business. It is a judgment call, but members should convey their specific interest in an amendment to the Presiding Officer ahead of time so that it can be considered.

09:45

Richard Lyle: To what extent does the legislative process encourage engagement from interested parties?

Kenneth Gibson: You are giving me the stare, Richard; I suppose that means you want me to answer.

I think that it does. There is certainly an issue in that the Parliament has been here for 15 years and a cosiness has settled in. The Finance Committee thinks that when we put out calls for

evidence, we often get responses from what might be called the usual suspects. The same people tend to make submissions.

Obviously, much of our legislation impacts on certain groups, such as the national health service, local government, and so on, but we need to involve wider Scotland in giving evidence. For example, the Finance Committee is taking evidence on the Revenue Scotland and Tax Powers Bill. We have already heard from all the vested interests who have a specific stake in that legislation. Yesterday, however, we took evidence from two individuals who are not part of the edifice, if you like, but who might be impacted by the bill in a professional capacity, so they had a different outlook.

I talked to colleagues on the Finance Committee who agreed that it was refreshing to get from those individuals a completely different perspective on the evidence, as opposed to what we had heard from our witness panels in previous weeks. That evidence will have a significant impact on our report, because it looks at the bill from a different viewpoint and the witnesses raised points that committee members were not aware of and had not considered.

When we are looking for evidence, wherever possible we should try to ensure that we look to involve other people and organisations that perhaps have given evidence to committees only rarely, if at all.

The Convener: Ms Beamish does not have 15 years of entrenchment, so she might bring a new perspective. Would you care to comment?

Claudia Beamish: The Rural Affairs, Climate Change and Environment Committee tries to ensure that we look at new groups, such as new charities like Nourish, which works across communities to develop good practice for local accessible food and which contributed to a recent evidence session. We try to look for new groups, and not always to ask the same businesses. For example, on zero waste, if we have already seen one business, even if it uses very good practice, we would ask the clerks to look for another. Suggestions also come in from different geographical areas. That is the only comment that I have on the question.

Nigel Don: I should make the point that, although I am here in a personal capacity, I will not attempt to separate my being a convener from my position as an MSP, although I have some specific issues to raise as a convener. I associate myself with the comments that my colleagues have made. In many circumstances, we find ourselves engaging with the usual suspects. However, those usual suspects are often obviously the right people, as I saw during my days on the Justice Committee. The witnesses who I saw represented the legal professions one way or another and they were the people with whom the committee had to engage, so building a good working relationship with them was very helpful. If we are worrying about the law as law, it pays to make sure that we have good working relationships with those who have to make it work.

Richard Lyle: We have strayed into the territory of my final question, which is mainly on timescales. What are your views of the timescales that are allowed for stages 1, 2 and 3 of the bill process, and of the time that is allowed between stages? Mr Gibson commented earlier and said that he felt that some stages are squeezed.

Kenneth Gibson: I do not think that stage 1 scrutiny is given enough time. In this parliamentary session, the Finance Committee has been the lead committee on four pieces of legislation and the longest consultation period that we have had was about nine weeks. As I mentioned, we are discussing the Revenue Scotland and Tax Powers Bill at the moment. Originally, the Scottish Government consulted for four months on the bill but it tried to give us only three months in which to consult and take oral and written evidence. We did not think that that was long enough, as that included Christmas and new year, so we had to go back to the Scottish Government and we were successful in having the Scottish Government move stage 3 from the end of June to the three weeks in which we will be back here in August.

When legislation is being considered, stage 1 scrutiny is crucial and must be given enough time. If we are talking about enabling different organisations and bodies to respond to us, rather than just those that have a regular dialogue with the Parliament and are able to see what is going on all the time, we must give them time to get involved. It is not fair to expect people to consider complex legislation in depth in a short period. Organisations have other things to do than wait for us to come up with bills and then look at how they impact on them. Stage 1 needs to be longer and we need more time to consult, more time for written evidence and more time to consider that written evidence in oral evidence sessions.

Nigel Don: I do not disagree with anything that has just been said. However, my perspective is more about the time between stage 2 and stage 3, which has considerably concerned the Delegated Powers and Law Reform Committee.

There are occasions—including recently—when a significant number of amendments are agreed to at stage 2. For example, in the case of the Children and Young People (Scotland) Bill, the number of amendments that we had to look at after stage 2 reached several hundred; 22 new or substantially altered powers were introduced at

stage 2 that the committee wanted to look at on behalf of the Parliament before stage 3, as we regard ourselves as gatekeepers regarding the legality and appropriateness of such powers.

The rules say that the delegated powers memorandum, which is the Government's explanation of what it has done, needs to be laid by the Friday of the week that is two weeks before stage 3 is scheduled to take place. Today is Thursday. If stage 3 of a bill were scheduled for next week, the Government would have had to produce a delegated powers memorandum by last Friday and the Delegated Powers and Law Reform Committee would have had to be able to consider it on Tuesday of this week. Our legal advisers would have had the weekend over which to look at it and communicate with us, and we would have had one meeting at which to work out what on earth we might want to do with it.

Under most circumstances the system works and, to be fair, the Government routinely brings forward its delegated powers memorandum in order to help. However, as the rules stand, when there are many amendments and a significant number of delegated powers it is just not possible to make that work. In the case of the Children and Young People (Scotland) Bill, the powers that be—which is, frankly, pretty much everybody who is involved in the Parliament—came to the conclusion that it was not going to work, and things were deferred to ensure that it did work. That was achieved only because everyone agreed that we needed to push things back. If the Government had decided, for its own reasons, that things were not going to be pushed back, it would have been impossible for the Parliament and my committee to have achieved what we should have achieved.

The system worked well, in the sense that the powers that be moved things. Therefore, maybe we do not need to change the standing orders—maybe we do not need to extend everything. However, there is an argument for saying that we certainly need to look at the situation, and that might be the right answer.

The Convener: You say that we may not need to change the standing orders but, if we were to do so, we would be able to suspend them if Parliament judged that that was necessary. Would doing that change the balance in a way that would be advantageous to good governance and the process of legislation?

Nigel Don: It depends which way we want to do it. If the standing orders were changed to make more time available, they could be suspended in order to bring things forward if required. However, we might end up routinely suspending standing orders to return to a normal timetable, because usually the process works. The exception seems to occur when a significantly large number of amendments are agreed to at stage 2, and the Delegated Powers and Law Reform Committee is not able to address them. Of course, an alternative solution would be to ensure that that never happens by ensuring that everything is on the face of the bill at stage 1.

The Convener: You referred to the Delegated Powers and Law Reform Committee's timetable for getting engaged in what is happening. Do you think that the process provides sufficient time for opportunities for engagement by the general public and the directly interested parties?

Nigel Don: The answer has to be no. Although I am worried about our internal processes, if the policy areas that are introduced at stage 2 are, in some sense, genuinely new, there is frankly no possibility of people in the outside world—apart from one or two well wired-in usual suspects—engaging with what is going on.

Fiona McLeod (Strathkelvin and Bearsden) (SNP): I will concentrate on stage 1. We have covered the issues quite extensively today but, from the written evidence and what I have heard today, a slight divergence of opinion seems to be emerging.

Nigel Don said that stage 1 is thorough and that the stage 1 report is useful to Parliament and outside bodies, but Kenneth Gibson said that the timings need to be extended to enable more consultation to be done. That split seems to be coming through in the written evidence, too. Six written submissions say that we need to do more pre-consultation before stage 1, and the Government and Professor Reid say that that already happens. Kenneth Gibson said that, for the Revenue Scotland and Tax Powers Bill, the Government had done four months' consultation before the bill process began.

Is the way to resolve this to ensure that the pre-consultations that are done by the Government or external bodies become part of the committee's stage 1 process in a more formal way, or do we have to extend timings for stage 1, as Kenneth Gibson suggested? That proposal worries me with regard to the knock-on effect that it would have with regard to the timings for stage 2, especially.

Kenneth Gibson: I do not believe that we should truncate stage 2 or stage 3; I want to make that categorically clear to the committee. However, I do not see any reason why we could not have more time to complete the process, from introduction to completion. For example, Cabinet Office and Scottish Government guidance recommend that a minimum of 12 weeks should normally be allowed for a consultation period. However, of the four important bills that the Finance Committee has dealt with as lead

committee this session—one bill concerning freedom of information and the others concerning tax—the total consultation period varied between five weeks and nine weeks.

I understand that the suggestion is that we should consult at the same time as the Scottish Government is consulting. I do not think that that is practical, because the Scottish Government's consultation is about whether legislation should progress and what the shape of that legislation should be, so the Finance Committee obviously has to come in at a later stage. It is important that we have the opportunity to issue a call for evidence, receive evidence from as many sources as possible, consider that evidence and decide who we want to bring to the committee for oral questioning.

We must also take into account the fact that, if the consultation period is too short, we sometimes receive written evidence after we have started the oral evidence sessions, which means that people who may have cogent arguments and good ideas are almost excluded from the process. If the committees have more time, the stage 1 report becomes more robust, and that feeds through to stage 2 and stage 3 and makes the whole process much more effective. That is why we think that extending stage 1, without having any adverse impact on stage 2 and stage 3, is important.

As I mentioned, for the Scottish Government to take four months for a consultation and then expect us to truncate the entire process for that bill from consultation to oral and written evidence into three months over Christmas and new year did not make any sense to us. Greater thought must be given to what lead committees do at stage 1.

10:00

Fiona McLeod: Is there a way in which any pre-consultations that have been done by the Government, or by anybody else, can be tied into a committee's stage 1 consultation?

Kenneth Gibson: There is no reason why a committee cannot look at evidence that has been given, but I still think that the lead committee has to make its own specific call for evidence. The lead committee will look at what the Government is trying to do, and often the Finance Committee is not looking at it from a lead committee point of view. The Finance Committee has considered only four bills as lead committee, but there have been loads of bills for which we have had to consider the financial memorandum.

Your suggestion would make the process more complex. The process that we have at the moment is clearer and more straightforward, but more time has to be given for consideration.

Nigel Don: It seems that what the Government is consulting on and what Parliament is consulting on at stage 1 can be quite different. In essence, the Government will look at a policy area and consult on whether something needs to be done and, if so, what, by whom, how and when, and it will present a range of options to consider in a broad landscape. That consultation will be wide ranging—it could be so wide ranging that most people do not feel able to engage with it, because they feel that it is beyond the remit of their normal lives.

However, once a bill is framed and introduced to Parliament, the Government has decided what it wants to do and why, and what the specific proposals are. At that point, a very different group in our society is able to engage with the process and will want to do so. Those people may bring a different perspective, although they might feel quite unable to address the higher, broader themes of the Government consultation, which may be multifaceted and couched in language that is, understandably and quite rightly, incomprehensible to many of those involved.

Kenneth Gibson: Or vice versa.

Nigel Don: Exactly.

Fiona McLeod: Before I move on to supporting documents at stage 1, I return to Richard Lyle's question about how we can engage the wider public. If we extended the length of time for stage 1, would we be able to engage more of the public?

Kenneth Gibson: It would certainly widen the opportunity. The more time that there is, the greater the opportunity for people to think about the proposals and decide whether to make a submission. As you know, a call for evidence can result in some detailed submissions and others for which people have just gone through the motions. We looked at the submissions for the Courts Reform (Scotland) Bill, some of which literally said yes or no to the whole series of questions that had been asked. That is not really what a committee is looking for when it is considering which people should be invited to give evidence. If there is more time, the quality of evidence will be better.

Fiona McLeod: The Delegated Powers and Law Reform Committee and the Finance Committee both think that we need to change some of the rules on the supporting documents that accompany a bill on its introduction. Can you talk us through that and give us suggestions on what needs to change?

Kenneth Gibson: From the Finance Committee's point of view, we really want more time to be allowed for consideration of financial memoranda. A financial memorandum looks at the finances that underpin a specific piece of legislation and whether they are robust. We have

to interrogate the bill team, and others, to see whether that is the case. The committee has to finish its work on the financial memorandum in order to inform its oral evidence session with the minister or, for a member's bill, with the individual who will give evidence to the lead committee.

In our view, the Government and the lead committee sometimes do not give enough consideration to the time that is required by the Finance Committee to perform adequate scrutiny in that regard. I mentioned the Courts Reform (Scotland) Bill, which the committee considered yesterday. The bill was introduced on the Thursday before the February recess and we considered our approach on 19 February. We had only four weeks before the closing date of our call for evidence. We had to take evidence yesterday because we have to report to the lead committee by 2 April. The process has effectively given us only one week in which to take oral evidence, and we have to produce a report by next week.

Members know that disputes sometimes arise in relation to reports—not that often in the Finance Committee, I have to say—and members might want to look at a draft report and hone it the following week. The process does not allow us any time to do that.

The Finance Committee thinks that greater time must be given for the required scrutiny of a bill's financial memorandum. The financial memorandum sometimes looks pretty straightforward—there may not be a lot of money involved or any real controversy—and we often send a report to the lead committee to say that we will not conduct an evidence-taking session based on what we have. However, something can arise later that may mean that we want to take oral evidence, and if there is not enough lead time, it is almost too late for us to do so. All that we are looking for is greater consideration to enable us to examine as robustly as possible the finances that underpin bills.

As members will know if they have looked at what the Finance Committee does, we hold an evidence session with the bill team. Sometimes those witnesses have been first class and have given high-quality evidence in response to our huge range of questions about the way in which they assessed what the bill would cost the public purse and who it would impact on. At other times, the evidence has not been up to scratch and at least once we have felt the need to call people back. We need time in which to do that—I have no doubt that at some point in this committee we will discuss the use of the supplementary financial memorandum, which is an issue that needs to be addressed.

Nigel Don: The Delegated Powers and Law Reform Committee looks at a very different memorandum, which is the delegated powers memorandum that accompanies a bill. That raises some issues that I would like to address.

The delegated powers memorandum must address the reasons for giving ministers powers to generate statutory instruments, but it does not require any discussion about delegated powers; it is as simple as that. We find that delegated powers memoranda therefore address the issue of why Government is giving a power—

The Convener: For clarity, could you explain what sort of things are not included?

Nigel Don: Members will be well aware from sitting on other committees that they routinely consider statutory instruments, which are documents that are signed by a Government minister and which say something like, "By the power vested in Scottish ministers" in whatever act it might be, "I am changing the rules on this, that or the other", or "I am changing the court fees", for example—that is one of the instruments that comes through routinely every year. That is a statutory instrument, which has a number.

However, if legislation gives a minister a power simply to direct somebody to do something, that does not require a statutory instrument and it is a delegated power. As I said, a delegated powers memorandum addresses the former but does not address—and is not required to address; that is important—the delegated power, and it routinely does not.

The Delegated Powers and Law Reform Committee goes back to the Government and asks it to give us the reasons and the purpose for every delegated power. Our purpose as a committee is to ensure that the Parliament is being asked to give powers for good reasons. It seems to us that it would be sensible if the rules were changed so that the Government had to address that in the delegated powers memorandum. It will have to address it at some stage because we will keep asking it until it does, so why not just address it in the original document?

If something is introduced at stage 2, there will be a supplementary delegated powers memorandum. However, the same rules apply, so if the Government does not tell us about delegated powers, we will, again, have to go back and ask it what those are about. Sometimes, as I think happened a couple of weeks ago, I have had to ask that question of the minister at stage 3 because we have not finished the process beforehand. That comes back to timing, again, but all that could be avoided if something simply had to be included in a delegated powers memorandum. That is what we would suggest.

In the context of members' bills, there is no requirement to introduce the bill with a delegated

powers memorandum and to us that seems to be a defect. A requirement to provide a delegated powers memorandum might be seen as an added barrier to a member introducing a bill, but the member will have to address that at some point because, again, we will not let them away with it. It might therefore be more sensible if that delegated powers memorandum were one of the required documents at the introduction of a members' bill or any other public bill.

I also put on record what it is that we need. It is worth distinguishing between the purpose of a power and the reason for a power. I hope that an example might help. If I were to come up with a purely hypothetical education bill—I do not think that there is an education bill before Parliament at the moment—it might seem perfectly reasonable if that hypothetical bill introduced a power for the minister to maintain school buildings. However, on a moment's reflection, we would think, "Hang on, a local authority normally does that. Why would a minister want to do that?" The reason might reasonably be that where local authorities have failed to carry out their duties, it is relevant that the minister has a power to do it for them. That would be a good reason, but we would want to know what the reason was.

We would also want to know the purpose of the power, because if that power were ever to be invoked, it would be perfectly reasonable that the purpose might be to provide our children with adequate places where schooling could take place. On the other hand, it would be pretty clear that it would not be appropriate for the minister to exercise that power to, for example, preserve a building that was no longer in use because it was an ancient monument and the minister wanted to look after it. That would not be the purpose of the original power, so that is why we need to know not only why the Government wants to give a minister a power, but what the purpose of that power is. That is why quite a lot of detail is required in these things, so that we can see where the Parliament is giving the right powers for the right reasons to the right people.

Fiona McLeod: That gives us quite a lot of food for thought.

I do not know whether you have seen the Scottish Government's submission. It goes nowhere near what we have talked extensively about, but the Government asks in its submission

"whether the Delegated Powers Memorandum should be formally designated an accompanying document".

Would that be useful to your committee, Nigel?

Nigel Don: Forgive me, but I did not get the force of those words.

Fiona McLeod: The Scottish Government's submission says that the committee should give consideration to

"whether the Delegated Powers Memorandum should be formally designated an accompanying document".

Nigel Don: I am sorry. I have no idea what the effect of an accompanying document might be.

Fiona McLeod: Okay. There is also a suggestion about the financial memorandum and explanatory notes. Can I ask you to look at the Government's submission and come back to us on those points?

Nigel Don: I am very happy to do so.

The Convener: Before we move off the subject, I note that a financial memorandum has to be formally approved by Parliament but that changes to it do not. I wonder whether that is a satisfactory position to be in.

Kenneth Gibson: No, it is not a satisfactory position to be in.

I can give the committee some background information. Because of the Scottish Government's decision on 7 January to allocate Barnett consequentials in a certain way, the financial memorandum to the Children and Young People (Scotland) Bill was changed into a supplementary financial memorandum.

The problem with a supplementary financial memorandum—which is, in effect, an updated financial memorandum—is that it does not have to be scrutinised by the Finance Committee but can go straight through to stage 3. We decided to take evidence on the supplementary financial memorandum, and it came to us very late in the day. As a result, the only option that the Finance Committee had was to take evidence on the day of stage 3 itself. I do not think that that is acceptable.

10:15

The issue does not come up very often, so it must be put in perspective. It is the first time that it has happened in this parliamentary session. It comes under rule 9.7.8B of the standing orders, and the Finance Committee is keen that that rule be amended to say that any supplementary financial memorandum should be lodged no later than the end of the second week before the week in which stage 3 is due to start. The rule should also stipulate that it must be lodged no later than on the penultimate sitting day of that week. The change would bring the deadline forward by only one day in a normal week, but it would mean that the new financial memorandum could be issued on the Friday, along with committee papers for the next meeting. That would allow the committee to consider it in the week preceding stage 3 proceedings.

The only reason that the Finance Committee was able to consider the supplementary financial memorandum to the Children and Young People (Scotland) Bill was that stage 3 was on a Wednesday. If stage 3 had been on the Tuesday of that week, we would not have been able to look at it because the committee meets on Wednesdays.

There are two things to consider. First, there must be adequate time for us to consider a supplementary financial memorandum. Secondly, we must have to agree to any supplementary financial memorandum before stage 3. At the moment, a financial memorandum that could involve millions of pounds can sail through. That is a hole in the standing orders that must be addressed.

The Convener: I well understand the point that you are addressing in relation to scrutiny in committee. Are you also saying that any supplementary financial memorandum should be agreed to by the Parliament?

Kenneth Gibson: Of course it should be if there is a substantive change to the financial memorandum, as there was for understandable and good reasons in the case of the Children and Young People (Scotland) Bill. If a supplementary financial memorandum bears no real resemblance to the original, it should have to be agreed to by the Parliament.

The Convener: Should it also have the same force, so that, if a supplementary financial memorandum is not agreed to, the bill will not proceed?

Kenneth Gibson: Yes, and it should be agreed to before stage 3.

Margaret McDougall (West Scotland) (Lab): I have a couple of questions about amendments that are lodged at stages 2 and 3. How effective are stages 2 and 3? Are any changes needed to the rules on the deadlines for the lodging of amendments? In excess of 100 amendments can be lodged, often at the very last minute.

Kenneth Gibson: I will speak in a personal capacity, as it is not an issue that the Finance Committee has considered.

I am of the view that anything that allows greater scrutiny and time for consideration is a good thing. It must be said, though, that some bills are not particularly complex and do not attract a lot of amendments. Many of the amendments tend to be technical and are not of any real issue between MSPs in a political sense. Therefore, my view is that there must be flexibility at stage 2.

I have been talking about extending stage 1, but we must be careful that we do not establish a process that goes on for ever. There is a balance to be struck, so we need to look at the complexity of the legislation from the start. Nevertheless, I take on board what you have said. For some pieces of legislation, we have to consider a substantial number of amendments in a fairly short time, and that must be considered at the outset. Any increased flexibility in the process would be positive.

We want to get away from the situation in which minimum periods for stages 2 and 3 become the norm. That is something that we do not want. We also want to have greater flexibility wherever possible.

Claudia Beamish: I agree with Kenneth Gibson that the issue is one of balance, but I hope that the committee agrees that scrutiny is one of the major roles of an MSP in committee and at stage 3, albeit not as an expert.

There is a balance to be struck. We could encourage members not to lodge amendments at the very last minute, but we all love a deadline and that makes things difficult. At least there is the daily list whereby amendments come in gradually, but other than pointing out to members what the challenge is for a committee if amendments are all lodged at the last minute, I cannot really see any way around it.

Margaret McDougall: In your submission, you mentioned additional powers or policies being added at the amendment stage. Should there be some sort of ruling on that?

Claudia Beamish: I do not see how there could be a ruling to say that that cannot happen. It might be that, in exceptional circumstances, something has happened as a result of stage 2. The Scottish Government should be encouraged to put in everything that it can possibly put in at stage 2 so that the committee can scrutinise it and so that there can be discussions between the committee and the minister. It would give more time for committee members prior to stage 2 to hold dialogue with experts from outside Parliament.

During the passage of the Regulatory Reform (Scotland) Bill, the three of us who wrote to this committee felt that there was a rush and, frankly, a slight panic about the implications. We should not be put in that position unless it is absolutely necessary.

Nigel Don: I endorse that view. During the Public Bodies (Joint Working) (Scotland) Bill, stage 3 amendments did not come through out of order, but they were sufficiently late that the Delegated Powers and Law Reform Committee was not in a position to get satisfactory answers. That was one of the occasions on which I had to ask a question during the amendment stage and get a suitable answer on the record. That answer was forthcoming, and we knew that it would be,

but it should have been addressed to the committee rather than being discussed during stage 3 proceedings.

During the consideration of regulations on agricultural holdings in the past few months, we have had a reminder that things that are introduced at stage 3 can go wrong. We know that that can happen: it happens rarely, but it has happened.

I will make a personal suggestion, which the Delegated Powers and Law Reform Committee has not discussed. This committee might like to consider changing the rules in such a way that substantial amendments and new policy areas cannot be introduced at stage 3, that such things must be proposed and completed at stage 2, and that stage 3 amendments have to be consequential and minor.

The Convener: I am just going to put my convener's hat to one side for a second on that subject. I was involved at the time of the original agricultural holdings legislation, and I recall that it was agreed by all three stakeholder parties and across the Parliament that what was proposed made sense and should be done. There was a degree of urgency about it.

We have to be cautious about having a blanket ban on responding to something that emerges through the bill process and which has secured the agreement of all the disparate but key stakeholders. The problem was that, in law, after a period of 10 years it was decided that the legislation did not meet the proper requirements of the European convention on human rights. The courts are entitled to make those decisions, and I suspect that we cannot—and would not wish to—legislate to stop them doing that.

I now put my convener's hat back on.

Nigel Don: I have no mandate from anybody else to say this, but might I just observe that the very circumstances that we have just spoken about could have been regarded as consequential to what was going on?

Claudia Beamish: If it is not appropriate to say that something new cannot be introduced at stage 3, a possible way forward could be robust guidance about setting expectations.

Margaret McDougall: Could stage 3 perhaps be constructed differently, with a longer gap between consideration of amendments and the debate? Kenneth Gibson said that his preference was that the debate would be first. Do you have a view on that, Claudia?

Claudia Beamish: I have not thought about it before today. I have wondered what the point is of the debate after consideration of amendments, but frankly I would not see there being much point in a stage 3 debate immediately before consideration of amendments either.

I do not know how this could work with regard to parliamentary business, but perhaps the debate could take place a few days before consideration of amendments, so that if things came forward they could be aired and debated prior to the different parties' business managers discussing the amendments with their parties and drawing up whip sheets. By the time they do that, we are all in a place where we are stuck, to some degree.

Margaret McDougall: That would interfere with the timings for lodging amendments.

Claudia Beamish: Yes. I am sorry if I am not clearly thinking it through.

Margaret McDougall: It is a complex issue.

Kenneth Gibson: The point of having a debate beforehand is so that political parties—or individual members if it is a member's bill—can set out their stall. Members could say, in effect, "This is the overall thought process behind the amendments that I will present."

At the moment, amendments are grouped and are dealt with in isolation. A debate beforehand would be a better philosophical approach to what will happen in the consideration of amendments. All members have to be in the Parliament for stage 3 and they would get a better picture of what has to be debated and discussed.

Fiona McLeod: Would it be helpful to have longer periods to debate amendments at stage 3?

Kenneth Gibson: That would depend on what interest there is. Richard Lyle talked about this issue. All bills have some key amendments on which maybe eight, 10 or 12 members all want to have a say, and the decision on that is up to the Presiding Officer. I suspect that whoever is in the Presiding Officer's chair would want to involve as many members as possible, particularly if the amendment relates to a controversial or key issue.

Other amendments might be fairly run of the mill and standard, so there has to be a suck-it-and-see approach. The Presiding Officer has to look at the level of interest in an amendment—outside bodies might have lobbied members to submit amendments, for example—and timings must be appropriate to each amendment. We cannot have an open-door policy whereby every amendment can be debated by whoever decides to press their request-to-speak button on the day. There has to be a wee bit more control; otherwise, timings go awry and consideration of amendments can take days.

I referred to the 2001 Housing (Scotland) Bill earlier, which you will remember, Fiona, because you, too, were a member during the first session of

the Parliament. Consideration of amendments started at 9 o'clock on the Wednesday and went on until half past 7 and on the following day started at 9 o'clock and went straight through to half past 7. We have not had those kinds of times in this session. It was seen that stage 3 consideration of amendments took a huge amount of time, so it was decided that not every amendment should be debated by whoever wanted to contribute. Again, the word "balance" is important.

10:30

Cameron Buchanan: Is not it the case that many amendments are consequential and therefore fall? Such amendments are not debated.

Kenneth Gibson: Yes. Consequential amendments are an issue. When amendments would work only if the lead amendment were to be agreed to, the consequential amendments should automatically fall if it is not agreed to. It is daft to have people plodding through and demanding that an amendment go to a vote when it cannot be agreed to. That is a nonsense.

Cameron Buchanan: Is that not done just to put the member's name on the record?

Kenneth Gibson: I do not see the point in that. If the lead amendment is not agreed to, I do not see any point in pressing consequential amendments. It is up to individual members to decide whether to press amendments.

Cameron Buchanan: Should the Presiding Officer decide that?

Kenneth Gibson: That is a good suggestion. The Presiding Officer who is in the chair could decide. If there is any doubt about whether an amendment is a consequential amendment, it should proceed, but if you have knocked away the foundations—

Cameron Buchanan: —there is no point in building the structure.

The Convener: Consequential amendments—this raises a bigger question—may be voted on before the substantive amendment because we vote as we go through the bill. One of my little hobby horses is that we should vote on amendments in the order in which we debate them. What is your view on that?

Kenneth Gibson: That would provide clarification on exactly what was being voted on—not so much for the members who are sitting there with the marshalled list, but for people in the gallery, for interested outside organisations and for members of the public who may be watching on TV. To have a debate, followed by another debate, then another debate, before the vote on an amendment is not helpful.

The Convener: During the passage of land reform legislation one of my amendments was debated in June but voted on only at the end of October.

Nigel Don: I seem to recall that the original question had something to do with debates, so I will return to that issue.

Why do we have the stage 3 debate? That is an extraordinarily good question. What on earth is it trying to achieve when we have decided what we are going to do, the amendments are over and all we need to do is either pass the bill or let it fall. I do not recall that any bill in my time in Parliament has been voted down at stage 3, although it may have happened in the past.

The routine is that, at stage 3, we are just congratulating each other on what we have done or rehearsing an argument that we have lost. To my mind, the stage 1 debate is the important one, just as it is the stage 1 report that informs Parliament about what to do. I invite the committee to think seriously about the purpose of any subsequent debate.

On how the Presiding Officers work out timings, we should give them a round of applause and three cheers. They have tried very hard to ensure that everybody is allowed to speak on every issue on which they want to speak. They have routinely allowed debates to run over and we quite regularly have standing orders suspended or a motion moved to allow debates to run over the prescribed times.

Groupings seem to me to make a great deal of sense. If amendments are on the same subject, it is appropriate that that area should be debated, rather than all the amendments being pored over at different times.

I will return to Richard Lyle's original point about the fact that a member whose amendment is in a group, but is not the lead amendment, is unable to come back in in the debate. I share the frustration that the member who has the lead amendment in a group gets to wind up but nobody else gets another shot. Sometimes that does not seem to be appropriate. The committee might want to consider that issue, too.

A lot of what we do at stage 3 is whipped; indeed, a lot of what we do in Parliament is whipped. The SNP has a majority in this session, but life in the previous session was more interesting, and before that a coalition existed that could get legislation through. An awful lot of what goes on in a stage 3 debate is members putting things on the record knowing that the argument is

not likely to affect the results. I do not particularly enjoy saying that, but that is the on-going reality.

I wonder whether the committee needs, therefore, to consider two scenarios. One is the circumstance that I have just described. The other circumstance, in which we might well find ourselves, is where no party has an overall majority, which is bound to be the norm. There may not necessarily be a coalition, and individual members or groups voting at stage 3 and elsewhere might be more important than is the case now—not numerically, but in as much as it could change things and the debate will be meaningful. We might like to get what is currently called the stage 3 debate to a place where it will affect the outcome. At the moment, it will not.

Margaret McDougall: That gives us lots of food for thought. Do you think that the procedures for considering amendments are clear enough and understandable, both in committee and in the chamber? I am referring, in particular, to the marshalled list and the groupings. Is there an alternative way to present amendments? Nigel Don has already said that it would be better if Individual amendments were considered as they come. How do we get around it, and how do we present amendments?

The Convener: You may wish to comment on that excellent document headed "This is not the marshalled list", which is my brainchild.

Kenneth Gibson: I would never have guessed.

Margaret McDougall: Do you think that the marshalled list—or indeed "not the marshalled list"—is useful?

Kenneth Gibson: To be honest, I do not, really. The marshalled list can be confusing—we all find it confusing at times. I have been a convener at stage 2 on a number of occasions. All we really need is the list of amendments. The way in which amendments are grouped can often be confusing. Instead of going through amendments from 1 to 100, we have amendments 1 and 2, then whatever else happens to be in all the different groupings.

The purpose is quite clear, however: it is to keep the amendments in some kind of order whereby the subjects are grouped together at stage 2. For example, if I lodge an amendment on a Monday, Nigel Don lodges an amendment on the Wednesday, and then Claudia Beamish lodges one on the same subject as mine on the Friday, mine and Claudia's have to be grouped together, because we will be debating them together as they are on the same subject.

It is easy to be critical and to say that the system is confusing and not very helpful, but it is hard to see how we could have a more logical way of doing it. I might look at the marshalled list and think, "My God, what does this mean?" but, at the same time, we know that there are groupings so that we can deal with one topic and then go on to the next one. The marshalled list is based on the structure of the bill, which we go through section by section. Although that might seem to be a bit confusing at times, it is based on logic and a structure. Off the top of my head, I cannot think of a better way of doing it.

Margaret McDougall: Are you all in agreement on that?

Nigel Don: The confusion is a consequence of the numbering of amendments in the order in which they are lodged with the chamber desk. Thereafter, what is a random set of amendments—albeit that they run numerically 1, 2, 3, 4, 5, 6 and so on—must be organised in such a way that we can deal with them according to the structure of the bill. I think that it works very well, and I am not sure that we can find a better system. However, is it confusing? It certainly is.

The Convener: I suspect that we may have already covered the subject of the next question, but do you wish to make any further points, Cara?

Cara Hilton: Yes. As the convener suggests, the question that I was going to ask has been answered, but I will ask it again for the record. Kenneth Gibson in particular has spoken a lot about the time constraints that affect the process. How effective would you say the involvement of secondary committees is in the legislative process? How could we improve it?

Kenneth Gibson: Secondary committees' involvement is important. When the lead committee and the Scottish Government sit down to decide how they are going to proceed with a bill, the Finance Committee should also be consulted at that point, if it is going to be involved with the financial memorandum. As I said, we must inform oral evidence sessions, but we cannot consider and agree our approach until the lead committee has decided on its approach, because we need to know the deadlines to which that committee must work. If we were involved at that early stage, that would be helpful.

The Finance Committee's scrutiny of financial memorandums is evidence based, so it is difficult to predict the bills on which we might be required to report formally. The earlier we and other secondary committees are consulted, the better.

Ultimately, we all benefit from effective scrutiny. All of us in this room want to secure robust high-quality legislation.

Nigel Don: The Delegated Powers and Law Reform Committee has a good working relationship with the Government, because our legal advisers have a good working relationship

with the Government's lawyers. I would not say that arrangements are seamless, but they work very well. We know what is coming down the track, and the people who need to talk about things do so.

The Convener: I suspect that Mr Don has helpfully reminded us that we 129 legislators are supported by a highly effective team of advisers who have the professional skills that are fit for purpose and to whom we are all immensely grateful.

That concludes the questions that we wanted to ask. I ask the panel whether there are matters that we have not covered that you wish to make us aware of. You are permitted to respond that there are not.

Claudia Beamish: There are not.

Nigel Don: There is one issue, which is in my submission and which I would like to ensure is on the record. I do not think that it is quite what the convener asked for, but it is important. The issue that has reared its head is that, in a couple of cases, Parliament has passed statutory instruments that appeared to be perfectly reasonable but on which we discovered subsequently from court rulings that we did not get it right, one way or another.

The cases involved complex transitional provisions—statutory instruments that changed one way of doing things in a public body to another way. Inevitably, cases that are already in the system need to be handled. That sums up both cases.

It is quite easy, in formulating statutory instruments, for things to fall between the cracks. We asked the Government to recognise that that happens, and it did so. We also asked it to note, when complex transitional instruments are required, to register them in the Government's mind and in our minds, and to allow us longer to ensure that we have got the instruments right. The Government has helpfully done all that. It now routinely tries to ensure that there are 40 days before such instruments come into force.

It is fair to say that all that is working well. We never know until afterwards whether we have missed something, but attempts to correct an obvious process difficulty have been well managed.

This is no criticism of anybody, but I wonder whether the rules should encapsulate that. Perhaps the Standards, Procedures and Public Appointments Committee could find a way of looking at whether complex transitional instruments should be in a class of their own and be treated differently. That might be appropriate.

Kenneth Gibson: The final point that I was going to make was covered in responses to Cara Hilton's questions, so I have nothing further. I thank the committee for taking evidence from me, on the Finance Committee's behalf.

The Convener: I thank all three panellists for attending and for what I am sure we will consider was useful input.

As we are moving into private session, I ask the press and the public to leave.

10:44

Meeting continued in private until 11:27.

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