



The Scottish Parliament
Pàrlamaid na h-Alba

Standards, Procedures and Public Appointments Committee

Mike Rumbles MSP
The Scottish Parliament

Room CG.07
EDINBURGH
EH99 1SP

By email

Tel (Clerk): 0131 348 5239
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20 June 2019

Dear Mike

I am writing again in connection with your email of 24 January 2019, which was about the rules governing Law Officers answering oral questions in the Chamber. I last wrote to you in March indicating that the Committee would seek the Scottish Government's views on the points raised in your email (and in the related correspondence I received from Adam Tomkins MSP) as well as your proposal that Standing Orders should be amended. I am sorry that it has taken such a long time to respond to you, but the Standards, Procedures and Public Appointments Committee (SPPA Committee) agreed that it wished to give full and proper consideration to the points raised by you and Adam Tomkins.

The SPPA Committee first considered the correspondence from you and Adam Tomkins at its meeting on 28 February 2019 and agreed to write to the Minister for Parliamentary Business and Veterans to seek his response to the issues that you raised (for ease, I have attached the letter to the Minister at Annexe A and his response at Annexe B).

Following the receipt of the Minister's response, the SPPA Committee discussed the correspondence at its meeting on 16 May and you attended the meeting and explained his position to the SPPA Committee (the extract from the Official Report is included at Annexe C). Following this initial discussion of the issue raised in your correspondence, the SPPA Committee agreed to raise the matter further with the Minister on 30 May when he was due to appear before the Committee (the extract from the Official Report from this meeting is attached at Annexe D).

The SPPA Committee concluded its consideration of your correspondence at its meeting on 6 June. The Committee agreed that it did not consider there was a case to change Standing Orders. In reaching this conclusion, the Committee took the following points into account:

- The argument made by the Minister that the current rules reflect the unique constitutional responsibilities of the Lord Advocate as set out in the Scotland

Act. The Lord Advocate is a minister but is independent in his or her capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland.

- The view expressed by the Minister that a rule change could undermine the principle of collective ministerial responsibility for Scottish Government policy, as set out in the Scottish Ministerial Code.
- A concern that, if the rules provided for questions to be answered by named Ministers, this could lead to delays in Members receiving a response if the Minister was unavailable. Ultimately this could undermine the accountability of the Scottish Government to the Parliament.
- The provision in the Ministerial Code that Ministers must not divulge who provided legal advice or its contents, whether it is from the Law Officers or from anyone else. This reflects the right to confidentiality of communications between legal advisers and their clients (sometimes referred to as legal professional privilege). The Ministerial Code refers to—

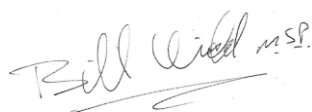
“The Law Officer Convention that the Scottish Government, like the UK Government, does not, other than in exceptional circumstances, disclose the fact that legal advice has or has not been given to the Government by or sought from the Law Officers, or the content of any such advice.”

- The argument made by the Minister that the Lord Advocate’s involvement in the EU Withdrawal Bill was the product of very specific exceptional circumstances in which the Presiding Officer had indicated that, in his view, provisions of the Bill would be within the legislative competence of the Parliament.

The SPPA Committee also agreed to include copies of all correspondence and links to the Official Reports for the relevant meetings on its webpage in the interests of full transparency.

Thank you again for bringing the issue to the attention of the SPPA Committee.

Yours sincerely

A handwritten signature in blue ink that reads "Bill Kidd MSP". The signature is written in a cursive style and is underlined.

Bill Kidd MSP
Convener
Standards, Procedures and Public Appointments Committee

Annexe A – Letter to Minister for Parliamentary Business 5 March 2019



The Scottish Parliament
Pàrlamaid na h-Alba

Standards, Procedures and Public Appointments Committee

Graeme Dey MSP
Minister for Parliamentary
Business and Veterans

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By email

5 March 2019

Dear Minister

Law Officers – Answering Questions in the Chamber

The Standards, Procedures and Public Appointments Committee recently received two pieces of correspondence, from Mike Rumbles MSP and Adam Tomkins MSP, about the rules governing Law Officers answering oral questions in the Chamber. This correspondence can be found annexed to this letter.

The Committee has now had an opportunity to consider this correspondence at its meeting on 28 February 2019.

The Committee agreed to write to the Scottish Government to ask for its views on the points raised in the two items of correspondence, and the proposal that Standing Orders should be amended. The Committee also agreed to seek information from the Scottish Government on how it is decided which oral questions are answered by the Law Officers and which by other Ministers.

I would be grateful for the views of the Scottish Government on these matters, which will inform the Committee's decision as to how to respond to this correspondence.

I look forward to receiving your response in due course.

Bill Kidd MSP
Convener
Standards, Procedures and Public Appointments Committee

ANNEXE A: Email from Mike Rumbles MSP

Dear Bill

You may be aware of the point of order I raised in the chamber yesterday and the advice I received from the Presiding Officer to write to you as Convener of the SPPA Committee. I am doing so because I am concerned that our standing orders are not fit for purpose in dealing with questions in the chamber to the Lord Advocate and Solicitor General and I am making a request of the Committee to examine standing orders to ensure they are fit for purpose.

As you know I was first elected to the Parliament back in 1999 and for nearly 20 years the Lord Advocate and Solicitor General have appeared on numerous occasions to answer questions in the chamber from MSPs. They have until last year restricted their appearances to dealing with legal matters as part of the prosecution service. Indeed I am sure that is exactly what the Scotland Act and our own standing orders envisaged. However this practice changed last year when the Scottish Government put forward The Lord Advocate to answer questions in the chamber on the Scottish Governments European Continuity Bill.

So, the convention established over the last 20 years of restricting the Lord Advocates role in the chamber to responding to questions in his role as head of the prosecution service changed.

Last week I lodged a question to the Scottish Government asking what the Lord Advocates view is of a particular issue. The Minister for Parliamentary Business answered my question in the chamber yesterday while the Lord Advocate was present. I had of course expected that the Lord Advocate would respond to my question.

Standing Orders make clear that any Scottish Minister can answer any oral question in the chamber. This is well understood but the purpose of our standing orders here is to ensure that if the particular Minister or Law Officer is not available then another Minister can respond for the Scottish government.

In normal circumstances this would not be a problem as I would have fully understood that the Lord Advocate might not have been available. However, the Lord Advocate was present in the chamber and was indeed available to answer my question. I said in the chamber that while this procedure did indeed conform to our standing orders the Scottish governments response was not in the spirit of our standing orders.

It is my view that our standing orders are not fit for purpose in this instance and request that the SPPA Committee which you convene examine this issue in order to ensure that MSPs can indeed have a direct response from our Law Officers when oral questions are lodged in the usual way.

I look forward to hearing from you.

Yours sincerely,
Mike

ANNEXE B: Letter from Adam Tomkins MSP

Dear Bill

I understand that Mike Rumbles has written to you in your capacity as Convener of the SPPA Committee following his points of order in the chamber yesterday (Wednesday 23 January). As you may be aware, the need for points of order arose after the Minister for Parliamentary Business and Veterans, Graeme Dey, responded to a question from Mr Rumbles during portfolio question time originally intended for the Lord Advocate, who was present in the chamber at the time and therefore in a position to provide a reply. I both witnessed this exchange and asked the minister a supplementary question on the same issue.

Having examined the Scottish Parliament's Standing Orders, I echo Mr Rumbles' view that further clarity is required over the participation of the Scottish law officers in parliamentary proceedings, but especially oral questions.

Mr Rumbles' question adhered to the Standing Orders, which explicitly state that the Scottish law officers can participate in any of the proceedings of the Parliament (rule 4.5), and that oral questions can be any member of the Scottish Government (rule 13.7, paragraph 1). This suggests that there is no procedural impediment to the Lord Advocate responding to oral questions from members. Mr Rumbles' question also did not seek to solicit the content of legal advice the Lord Advocate had provided to the Scottish Government. The loophole, then, seems to be that the Scottish Government can apply paragraph 1 of rule 13.7 to prevent members from questioning the law officers directly.

Especially given the Lord Advocate's involvement in the UK Withdrawal from European Union (Legal Continuity) (Scotland) Bill last year, it seems that there is scope to consider whether the Standing Orders are fit for purpose in ensuring that Members can question the law officers directly. I therefore seek the SPPA Committee's view on this matter, and look forward to receiving your response in due course.

Yours sincerely

Adam Tomkins MSP
MSP for Glasgow

Annexe B – Response from the Minister for Parliamentary Business and Veterans

Minister for Parliamentary Business and Veterans
Graeme Dey MSP



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20 March 2019

Dear Bill

LAW OFFICERS – ANSWERING QUESTIONS IN THE CHAMBER

Thank you for your letter of 5 March regarding the above.

Your letter advised that the Committee had recently considered correspondence it received from Mike Rumbles MSP and Adam Tomkins MSP on the rules governing Law Officers answering oral questions in the Chamber. I was grateful for sight of that correspondence and welcome the Committee's invitation for the Government to comment on the issues raised.

The Government would firstly wish to address the proposition that the Law Officers have a duty to answer in the Chamber any question which purports to be addressed to them, or that either Standing Orders as currently cast or indeed the statutory framework provided for by the Scotland Act 1998, imply that position. The Government considers that the existing frameworks for answering questions by a specific Minister reflect the fact that, while specific functions may be conferred specifically on the First Minister or on the Lord Advocate/Law Officers, functions of the Scottish Ministers are exercised by the Scottish Ministers collectively. In cases involving functions of the Scottish Ministers collectively it is for the Government to consider which of its Ministers is best placed to answer to the Parliament on any given issue.

As Mr Rumbles highlights in his letter, the primary reason for the Law Officers being able to participate in the proceedings of Parliament is because of the Lord Advocate's responsibilities as head of the systems of criminal prosecution and investigation of deaths (and the role of the Solicitor General for Scotland in that regard under the terms of the Law Officers Act 1944). As section 48(5) of the Scotland Act makes clear, these functions continue to be exercised by the Lord Advocate independently of any other person. That constitutional position is reflected in Standing Order Rule 13.7.1:

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

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".....An oral question concerning the operation of the systems of criminal prosecution and investigation of deaths in Scotland shall normally be answered by the Lord Advocate or the Solicitor General for Scotland but may exceptionally be answered by another member of the Scottish Government. Other oral questions may be answered by any member of the Scottish Government or a junior Scottish Minister."

And also in Standing Order Rule 13.5 (Written Questions):

"...A written question concerning the operation of the systems of criminal prosecution and investigation of deaths in Scotland may be answered only by the Lord Advocate or the Solicitor General for Scotland."

The provisions relating to the answering of questions concerning the operation of the systems of criminal prosecution and investigation of deaths enable the Lord Advocate to be account to Parliament for the exercise of those functions. The flexibility offered in Rule 13.7.1. allows for instances when a Law Officer may not be available to attend proceedings in the Chamber. The Government would also wish to point out the provisions of section 27(3) of the Scotland Act which empowers the Law Officers not to answer questions which might prejudice criminal proceedings or otherwise be contrary to the public interest.

In relation to other matters, there is no procedural impediment to the Lord Advocate or the Solicitor General for Scotland, as Ministers in the Scottish Government, responding to oral or written questions. However, it is generally unlikely to be appropriate for a Law Officer to respond on such matters. It is the relevant portfolio Minister who will normally answer to Parliament for decisions falling within that Minister's portfolio responsibilities - decisions which will have been informed by appropriate analysis of the relevant legal considerations.

The Law Officers give legal advice to the Scottish Government, not the Scottish Parliament. Legal advice is confidential for good reasons: it enables a client to consult a legal adviser fully and frankly. There is also a long-established convention, reflected in the Ministerial Code and FOI law, that the Scottish Government does not, other than in exceptional circumstances, disclose the fact that legal advice has or has not been given to the Government by or sought from the Law Officers or the content of any such advice. These principles have been repeatedly acknowledged by courts and tribunals; and it has been recognised that they support the Government's collective commitment, set out in the Ministerial Code, to acting lawfully. Questions about the Lord Advocate's view on any particular matter or legal question would tend to undermine both those principles.

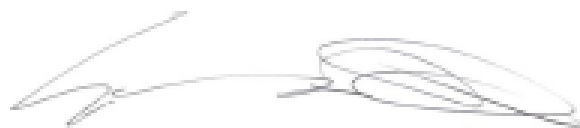
Mr Tomkins refers to the Lord Advocate's involvement in the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill last year. It is a matter of public record, in terms of paragraph 3.4 of the Ministerial Code, that when the Government presents a Bill to Parliament, the Minister's statement of legislative competence will have been cleared by the Law Officers. In that specific context, and in the exceptional circumstance that the Presiding Officer had issued a certificate to the effect that the Bill was not within competence, the Scottish Ministers considered that the Lord Advocate should make a statement to the Parliament setting out the basis upon which Ministers had nevertheless concluded that the Bill was within competence, and the Lord Advocate, for his part, agreed that this was appropriate in those exceptional circumstances.

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbyins.scot

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In conclusion, the Government considers that relevant Standing Orders are fit for purpose. They reflect accurately the constitutional responsibilities of the Scottish Law Officers and the accountability of Scottish Ministers to Parliament for the decisions that are taken in relation to their portfolios.

A handwritten signature in black ink, appearing to read 'Graeme Deay', is centered on the page. The signature is fluid and cursive, with a prominent initial 'G'.

GRAEME DEY
Minister for Parliamentary Business and Veterans

Annexe C – Extract from the Official Report of the SPPA Committee meeting on 16 May 2019

The Convener

Agenda item 5 is consideration of correspondence that the committee has received from Mike Rumbles MSP, who has joined us, and from Adam Tomkins MSP, regarding law officers answering questions in the chamber. The committee considered this correspondence previously, at our meeting on 28 February, and agreed to write to the Scottish Government to seek its views on the points raised.

Before I invite comments from members—and I believe that people will be comfortable with this—I ask Mike Rumbles to make a relatively short statement. We have a lot of business, but I think that it is only fair that Mike Rumbles gets an opportunity to speak.

Mike Rumbles (North East Scotland) (LD):

I thank the committee for the opportunity to speak about my request that a recommendation be made to Parliament to update rule 13.7.1 of standing orders.

The standing orders are the oil that helps the machinery of Parliament to work; I know that from being a member of the Parliamentary Bureau for two parliamentary sessions. The background is that, after the Lord Advocate made a statement to Parliament in February last year, he took 14 questions from members of the Scottish Parliament on matters not related to his role as head of the prosecution service. I waited 11 months to win a place on the ballot to ask an oral question at a portfolio question time session entitled, “Justice and the Law Officers”. Imagine my surprise and disappointment when the Lord Advocate did not answer my question but remained seated in the chamber—or imagine that you had asked a question of the Minister for Public Health, Sport and Wellbeing only to have it answered by the Minister for Parliamentary Business and Veterans while the health minister looked on.

That situation has exercised my mind for nearly four months. I would like to comment on the letter that you have received from the Minister for Parliamentary Business and Veterans. First, he says:

“The flexibility offered in Rule 13.7.1. allows for instances when a Law Officer may not be available to attend proceedings in the Chamber.”

I could not agree more with that point; I am absolutely relaxed about that. That is what standing orders are designed to do if the minister—or, in this case, the Lord Advocate—cannot make it to proceedings. However, the Lord Advocate was sitting in the chamber listening to what I had to say.

The minister goes on to say:

“there is no procedural impediment to the Lord Advocate or the Solicitor General ... as Ministers ... responding to oral ... questions”.

That is because the Scotland Act 1998 and the standing orders make it absolutely clear that the law officers are to be treated in the same way as other Scottish ministers, so, again, I could not agree more. That is how things used to operate until January, but it is not how things have operated since January.

In his letter to the committee, the minister writes at length about the law officers’ legal advice to the Government but that is not what my question was about; I had no intention of asking what the Lord Advocate’s advice to the Government was. If I had

asked about that, I would not have expected an answer. That is not what I was asking about and I subsequently told the Lord Advocate that.

In his conclusion—having gone off on a tangent about legal advice, which I did not ask about—the minister states that he believes that the

“Standing Orders are fit for purpose.”

My specific request to the committee is that it consider recommending the updating of rule 13.7.1. In the very last sentence, referring to the First Minister in this case, rule 13.7.1 states:

“An oral question selected for answer at First Minister’s Question Time shall normally be answered by the First Minister but may, if the First Minister is unable to attend First Minister’s Question Time or any part of it, be answered by another member of the Scottish Government.”

That is reasonable—that is how we have operated and it is how we should operate. I suggest replacing the second sentence in rule 13.7.1 with, “An oral question concerning the responsibilities of the Lord Advocate or the Solicitor General for Scotland should normally be answered by them but may exceptionally be answered by another member of the Scottish Government if they are unable to attend the chamber.”

I am not making a political point at all. We can leave political points for the chamber. I am trying to make sure that we, as MSPs, have the right opportunity to question ministers of the Government. That is our role and standing orders should reflect that. Until now, or certainly until January, standing orders have been sufficient when the Government has recognised that. Although the minister says in his letter that there is no impediment to the Lord Advocate or the Solicitor General answering those questions, the Government chose not to ask them to answer them.

I would have thought that our job as MSPs is to make sure that we have standing orders that are fit for purpose and which make it clear what we intend. If an MSP asks a question of the Lord Advocate or the Solicitor General acting in their responsibility, he or she would expect an answer from them, in the same way as they would expect an answer from any other minister. If the law officers cannot be in the chamber, that is perfectly acceptable but, in this case, that would not have been an issue if I had not seen the Lord Advocate sitting in the chamber. If the Lord Advocate had not been there, I would have assumed—probably wrongly in this case—that he was busy elsewhere, which would have meant that it would have been fair enough if another minister had answered. That was not what happened, and I do not want that to have set a precedent.

In my view, in cases such as this, standing orders are not fit for purpose and we need to change them.

The Convener:

I thank Mike Rumbles for his contribution and invite comments from members.

Elaine Smith:

I have a comment rather than a question. The second sentence of rule 13.7.1, to which Mike Rumbles referred, starts:

“An oral question concerning the operation of the systems of criminal prosecution and investigation of deaths in Scotland”.

Are you saying that that is too limited? Was your question beyond that? Is it a question of who decides what the Lord Advocate’s remit is?

Mike Rumbles:

The Lord Advocate’s remit is as it is laid out in that second sentence of rule 13.7.1. The Lord Advocate is the head of the prosecution service, which is why it is in there. I have been here for 20 years, as you have—albeit with an intermission in my case—and, in those 20 years, that is how the Lord Advocate and the Solicitor General have operated.

However, that changed in February last year, which is why I think that we need to update our standing orders. It changed when the Government put forward the Lord Advocate to make a statement to Parliament and 14 MSPs asked questions of the Lord Advocate, which were not about the prosecution service, which is in the Lord Advocate’s remit. My question was accepted by the chamber desk, and I waited to be selected in the ballot. I asked the oral question, which was perfectly acceptable, and the Government—not Parliament—decided that the Lord Advocate should not answer it. That is why I think that the system has changed. In his letter to me, the Lord Advocate said that it was unprecedented that he has made a change, but the Government has now set the precedent.

It means that, at any time, the Government can decide whether to put the Lord Advocate in front of members if it wants to take questions. However, we should be holding the Government to account. It is the job of all MSPs who are not members of the Government, whether or not they are in the Opposition, to hold the Government to account, and the Lord Advocate and the Solicitor General are part of the Government. A change was made to the system in February last year that is not reflected in this paragraph in standing orders.

I am only making a suggestion. If the committee decides to go away with the clerks and suggest something else, I will be happy with that, so long as the issue is addressed.

It should be clear that the Lord Advocate and the Solicitor General should be able to answer questions on points under their remit.

Elaine Smith:

The issue—if there is an issue—lies in that sentence. That is what the standing orders say at the moment so, if a question is not on one of those two areas, it seems reasonable for the Government to decide who answers it. However, if the remit has changed, we need to look into that a bit further before we make a decision on it.

John Scott:

I agree with Mike Rumbles and Adam Tomkins, who raise a valid concern about precedent. The standing orders were breached in the context of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill. The Government cannot have it both ways.

Mr Rumbles suggested a different form of words for the second sentence in rule 13.7.1 on oral questions in the chamber. I did not catch or write down his words, but I am sure that he has a copy of them. There might be an opportunity for the committee, the

committee clerks and the lawyers of the Parliament to consider his form of words and perhaps even improve on them, bearing in mind the point that he raised, which I find myself supportive of.

Gil Paterson (Clydebank and Milngavie) (SNP):

On a point of order, convener. Are we in the general debate or are we still directing questions to Mike Rumbles? Is he going to participate in this debate?

The Convener:

Mr Rumbles has made his statement so we are now having our discussion.

Gil Paterson:

We are in debate—okay.

Tom Mason:

Mr Rumbles has raised a point that requires detailed discussion and study. As always, getting it right is all about the detail and the small print, and we must spend sufficient time looking at the issue and reaching a conclusion at some point.

Mark Ruskell:

I have some sympathy with the point that Mike Rumbles raised. In particular, Elaine Smith's point about whether the remit has changed is worth looking at in more detail.

It could be dangerous for us to write into the standing orders exactly who should answer which question. I can give the opposite example to that of Mike Rumbles: I sometimes ask questions of particular cabinet secretaries and wish that another cabinet secretary would answer. In a way, it is a question about collective cabinet responsibility and joined-up government. There are times, particularly with cross-portfolio issues, when greater engagement from other cabinet secretaries would be good. I know that the question is specifically about the Lord Advocate, but there is a wider issue about pinning into the standing orders which bit of the Government must answer which question and when.

I appreciate the frustration that Mike Rumbles felt when he asked his question—it was palpable—but I am not convinced at the moment. On Elaine Smith's point, if the remit was changed, that would be—

Mike Rumbles:

Can I just—

Gil Paterson:

On a point of order, convener. If this is a debate with an external member—

The Convener:

It is not.

Gil Paterson:

Fine.

The Convener:

I am afraid, Mr Rumbles, that this will be discussed within the committee and we will come back to you. We cannot have an argument across the committee.

Mike Rumbles:

I just want to ensure that there is no misunderstanding.

The Convener:

I understand you, so I think that it is okay. Please do not be concerned.

Maureen Watt:

What we do not have here, unfortunately—I should have looked it up myself—is the answer to whether Mr Rumbles was unsatisfied with the answer to his question.

The Convener:

You cannot ask him a question. You should just make your point.

Maureen Watt:

We should either be asking questions, having a debate and then Mike Rumbles leaves, or we should all be discussing the issue. We are all over the place today.

The Convener:

This public discussion is an opportunity for members to make their points of view known. We will follow up the matter. We can have a bit of discussion about what Mike Rumbles has presented, but it is not open to him to take part in that discussion—this is about members making their contributions.

Maureen Watt:

Okay. Regardless of who in Government answered the question, the answer would probably have been the same. At stake is the legal advice that is provided to the Scottish Government, which normally remains confidential. As other members have mentioned, the other issue is what the standing orders say about what matters the Lord Advocate is in Parliament to answer.

Gil Paterson:

One of the primary issues at stake is the power of a Government to govern. If a member asks a question of the Government, it is for the Government to decide who will answer that question. The standing orders say not that the First Minister must answer an oral question at First Minister's question time, but that the First Minister will "normally" answer such questions. There is no imperative in that regard. It may well

be that a precedent has been set, although I do not take that as read. The Presiding Officer might have allowed the situation that has been raised to go ahead, but he should have ruled if it was not in the scope of any individual minister to make a response—that would be the point at which that should have been corrected. The fact that that may have happened does not mean that we need to change our standing orders. There must be protection for Government.

It is almost a precedent that Government would not divulge what legal advice it had sought and received. What if a question inadvertently elicits that information? Any Government and its ministers must be allowed to seek legal advice. They do so almost daily—those who have been ministers will know that. It is imperative that their right to refuse to divulge that legal advice—which they may well do—is protected, otherwise the matter could become politicised.

Having said all that—I hear what my colleagues are saying about looking at what has been presented about a precedent having being set—I am happy to look at the issue. Why not? This is a democracy. Let us look at the matter and see what we can come up with. However, there are principles at stake from which we should not shift.

If someone thinks that they want to change the standing orders now because doing so would be advantageous to them, they have no ambition to be the next Government. This is about protecting the future of this Parliament and protecting Governments' right to govern, make change, listen to advice and not have their position compromised because they have rejected the legal advice.

Elaine Smith:

I agree with a lot of what Gil Paterson has said, but Mike Rumbles said in his statement that his concern is not to do with the provision of legal advice—I think that he said that the Government response to the committee on those terms was a red herring. The question for us is whether we want to look a bit further at the standing orders. Rule 13.7.1 talks about the First Minister and other ministers and specifically mentions the Lord Advocate and the Solicitor General for Scotland. As I said at the beginning, we have to look at whether the only questions that they should be answering are on

“the operation of the systems of criminal prosecution and investigation of deaths”

and whether that remit has changed. If the answer is yes, do the standing orders need to be updated to reflect that? The rule says that such questions

“shall normally be answered by the Lord Advocate or the Solicitor General for Scotland but may exceptionally be answered by another member of the Scottish Government.”

If a question was to

“exceptionally be answered by another member of the Scottish Government”,

which is wording that I think must stay, I presume that the Scottish Government would be able to justify the exceptional nature of another member of the Government answering the question, rather than the Lord Advocate.

It would not have been an issue had the Lord Advocate not been in the chamber, because I suppose that we would all have presumed that there were exceptional circumstances, and we would not have wanted to delve into them in case they were personal circumstances. However, the issue arose, because the Lord Advocate was in the chamber.

I think that we need to have a closer look at the remit. Is it just

“the systems of criminal prosecution and investigation of deaths”

or is it wider than that? If it is now wider, perhaps that sentence needs to be tweaked to reflect that.

John Scott:

I agree. I think that there is a piece of work to be done here. It may be that parliamentary lawyers, having looked at the matter, will come to the view that there is no change to be made, but I think that Mr Rumbles and Mr Tomkins have raised a very valid point. It is worth having a look at it, and if there is a recommendation to be made and brought to this committee, they will be able to evaluate that advice at that time.

The Convener:

Tom, do you agree?

Tom Mason:

Yes.

The Convener:

Mark, do you agree as well?

Mark Ruskell:

Yes.

The Convener:

Right—thank you. I did not want us to get into a long, twisting discussion and argument. It has been useful to hear members’ feelings about what has been said, and it is all on the record. The subject will be brought back to us in a further paper. At our next meeting, we will have a general catch-up evidence session when the Minister for Parliamentary Business and Veterans comes to speak to us; we could discuss the issues further with him then, if that seems reasonable to everyone.

Members indicated agreement.

The Convener:

We will do that. I thank Mike Rumbles for coming along today.

Mike Rumbles:

I thank members for listening so carefully to what I had to say.

Annexe D – Extract from the Official Report of the SPPA Committee meeting on 30 May 2019

The Convener:

That is very kind. We will move on.

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

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

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

Graeme Dey:

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

I fully appreciate that the committee wants a further explanation of the role of the law officers in Parliament. The issue is not straightforward, but the key thing to bear in mind is the unique constitutional position and responsibilities of Scottish law officers, as reflected in the Scotland Act 1998. Under that framework, a law officer wears two hats: first, they are a minister and a member of the Government, and, secondly, they have a role in the criminal prosecution system and in the investigation of deaths in Scotland. Their formal status as a member of the Scottish Government is no different from that of any other member of the Government. Their responsibilities in relation to the prosecution of crime and the investigation of deaths are additional to their roles as ministers, and they exercise those functions entirely independently of Government or any other person.

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

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

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

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

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

The Convener:

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

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

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

Graeme Dey:

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

Elaine Smith:

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

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

wonder whether that is where the answer lies in terms of deciding what is competent for the Parliament and what is not.

Graeme Dey:

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

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

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

Elaine Smith:

Thank you.

Alison Coull (Scottish Government):

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

Elaine Smith:

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

Alison Coull:

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

Elaine Smith:

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

Alison Coull:

Yes, and that happened with the continuity bill.

Elaine Smith:

It is important to put that on the record.

Alison Coull:

Absolutely.

Graeme Dey:

It is not a like-for-like comparison.

The Convener:

I thank Elaine Smith for bringing out that information, and I thank Alison Coull. Gil Paterson will round off our questions.

Gil Paterson:

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

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

Graeme Dey:

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

Alison Coull:

No.

Graeme Dey:

I am sorry; you have stumped us.

Gil Paterson:

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

Graeme Dey:

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

Gil Paterson:

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

Graeme Dey:

Again, I suspect not.

Alison Coull:

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

Gil Paterson:

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

Graeme Dey:

That would be very difficult.

Gil Paterson:

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

Alison Coull:

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

Graeme Dey:

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

Gil Paterson:

I have, but I cannot remember it.

Alison Coull:

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

The Convener:

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

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

Bill Kidd MSP

Convener

Standards, Procedures and Public Appointments Committee