

4. CONSIDERATION OF COUNCIL AMENDMENTS

**4.1. Communications Bill 2018 –
Council amendments considered**

Mr Malarkey to move.

210 **The Speaker:** Item 4, Consideration of Council Amendments. I call on the Hon. Member for Douglas South, Mr Malarkey to move.

Mr Malarkey: Thank you, Mr Speaker.

215 I start by thanking you for circulating the email yesterday to try and clarify what seems to be quite a complicated issue in front of us this morning, as to whether we are pressing a green button or red button, and how you would do it.

I also understand that we are going to do items 2 and 4 together, so I am going to start with that, Mr Speaker, as advised by yourself.

220 Before I start, and when I finish, I will emphasise that these are the recommendations of the Commission, of the board which I am relating now to the House. These are not my personal views they are that of the board and of the Commission.

Mr Speaker, the Commission has no objection to the majority of the amendments made in the Legislative Council. However, the Commission does not agree with the proposed amendment that puts in place a sunset clause in respect of political chairmanship.

225 Hon. Members, the Commission has consistently stated it is not opposed to change. I realise that there is an appetite for change. It is ready to implement any changes that are in the best interests of the Manx consumers and the industry as a whole.

230 The Commission asks Hon. Members to allow the appropriate time to consider any changes to its structure and the effect it might have, in an orderly and evidence-led manner and present the options to Tynwald for consideration.

The Commission believes that the proposed amendment skips straight to the answer of 'no political Chair' without anybody coming out with an alternative, but does not give any consideration of what the most appropriate governance structure should be, beyond stating that a new Chair will be appointed by the Appointments Commission.

235 While there is clearly some agreement amongst some regulated entities and associated lobby groups on the removal of the political Chair of the Commission, there is no evidence to suggest that there would be a consensus on the future structure of the Commission. To make any changes without exploring all available models for the future governance of the Commission creates a risk that the most vocal groups could influence their industry's regulator in a way that is not in the best interests of consumers or the wider industry.

240 In Council, the Attorney General outlined that there is no structure universally acknowledged as best practice for National Regulatory Authorities, each jurisdiction adopts an approach that best suits its circumstances. There are three broad categories of governance structures: firstly, political, with a politician or senior civil servant as the chair of the board; second, organisations with an independent chair; and finally, organisations solely under executive management that do not have a board in a traditional sense.

245 We cannot overlook the fact that telecommunications is a key economic input that underpins strategically important sectors of the Island's economy. Without a properly functioning telecommunications market the Isle of Man would not be as attractive a prospect to sectors such as e-gaming and finance. The Commission is seeking to work with Government to pursue the ambitious aims in the Government's National Telecommunications Strategy, one of which is a recommendation that the Commission review its process and structures.

255 While there is an opportunity for change in the forthcoming consultation I would ask that Hon. Members take a long-term view and let the outcome of the consultation and the impact assessment guide them as to what is the most appropriate structure for the Commission.

It is acknowledged that one of the arguments for change put forward is that there is a risk of political influence on decisions made by the Commission. However, it should be pointed out in response to this that there is no evidence there has ever been any improper influence on the Commission's decisions.

260 Furthermore, there are sufficient safeguards in place that should provide sufficient protection until the consultation process on the structure of the Commission that was agreed in the National Telecommunications Strategy has been completed. The Commission operates on a one-member, one-vote basis and the Chair does not have a veto on any decisions made.

265 It is incumbent on the Commission to make its decisions in a transparent and objective manner. To that end the Commission publicly consults on key regulatory issues and as part of this process must show due regard to the impacts of the decision it intends to take. As such, there is no reason to prejudge the outcome of the consultation and we can allow time to consider all of the options in this very important decision.

270 I ask Members to allow the Commission to complete the process it has promised to undertake, in line with the National Telecoms Strategy, and give all stakeholders the opportunity to comment on all the options given in a formal evidence based way.

275 So I would ask, Members, that you agree with the Commission by pressing the green button this morning, which will agree that you allow the Commission to go and have the consultation, come back with some solutions and then have it debated in Tynwald when there are some other options on the table, and not just to suddenly come up today with a sunset clause and removing the political chair.

280 This is not the right direction to be going in. This is not the way we should be doing politics. We should allow the Commission to do its job which is what we have them there to do, and we should listen to their recommendations once they have gathered all the evidence, and we could actually have an open discussion on evidence-based procedure.

I beg to move that you accept the new changes to clauses 2 and 4. (*Interjections*) It is part 1 and part 4 –

285 **The Speaker:** I was hoping what you would do is move the motion in its totality at this point having introduced everything?

Mr Malarkey: Well, I have not introduced the other clauses, Mr Speaker, but I was going to do the other clauses separately. Yes? So we are moving –

290 **The Speaker:** Okay, so you are going to do it separately. That is not a problem. We will deal firstly, then, with 1 and 4.

Mr Malarkey: With 1 and 4 together, because 1 cannot move without 4, sir.

295 **The Speaker:** I had anticipated that we would do the debate as a whole but that is fine, we can do the debate just on this, that is not a problem.

Mr Malarkey: Well, if you want to do the debate as a whole –

300 **The Speaker:** No, no, I am happy either way. Let's continue on that basis, that is not a problem, Minister. (*Interjection by Mr Malarkey*) So the motion you have moved is that the House disagrees with amendments 1 and 4? (**Mr Malarkey:** Yes.)

I need a seconder to that motion. Dr Allinson.

305 **Dr Allinson:** Thank you, Mr Speaker. Happy to second.

The Speaker: Mr Shimmins.

Mr Shimmins: Thank you, Mr Speaker.

310 I will be voting against the Minister on these two amendments and I would just like to explain why, because I welcome the fact that the Legislative Council have scrutinised this legislation. And I also believe firmly in independent media and a free press.

I absolutely accept the assurances that the Minister has provided in terms of there is no evidence that there has been political interference. But for me, these amendments actually
315 remove any scintilla of doubt that would be remaining that there would be political interference.

I am also aware there has been a consultation on this already and the Minister has asked us to take a long-term view. It does feel like we have been discussing this for quite some time already, so I think we are probably taking a long-term view. And I note that the amendment actually talks about: 'Not later than the third anniversary of the coming into operation of this
320 section ...'. So that feels to me like quite a long term for the change to come into effect.

So I do not think that this is a knee jerk or an improper way. I think we have had a Bill that has been brought forward; there has been a debate; there have been further proposals put forward. It does not feel to me there is anything improper about this.

I accept that there is perhaps a difference of opinion on this, so I just wanted to explain why I
325 would vote against the Minister on this occasion.

Thank you.

The Speaker: Hon. Member for Ramsey, Mr Hooper.

330 **Mr Hooper:** Thank you very much, Mr Speaker.

I am not going to rehash all the arguments that were made the last time this was debated here in this House. I do not think it is going to add anything if I do that.

I do challenge the Chairman's assertion that there is no internationally accepted standard for regulatory bodies being independent from political interference. I think it is quite clear that
335 there is. The last consultation that was done asked this question and there were a number of responses in that consultation that stated as much, that it was unusual we had a political chairman of a regulator on the Isle of Man.

I think those consultation responses are still available on the Comms Commission website. It is quite clear that even the big players in industry who deal across international markets found that our unique setup was pretty much that – unique. It is very unusual in the
340 telecommunications space – in fact in any regulatory space – to have political interference in a regulator.

Equally, it is inappropriate and I think very unusual to have a regulator having the ability to undertake its own forms of political interference. We saw that in the Manx Radio debate with
345 the Chairman of the Communications Commission tabling amendments to a motion regarding public service broadcasting, and that itself felt a little bit inappropriate.

I do not see this amendment that has been tabled by Council as actually providing any issues that does not stop the Communications Commission from consulting. It does not stop them from deciding what the best new, appropriate structure would be. The only thing it actually says is
350 that the new Chairman shall not be a Member of Tynwald; that is it. And because it is three years, I think there is plenty of time. If it turns out throughout the consultation process that might not be the right solution – I cannot envisage any circumstance in which that would not be the right solution – but if that does come out of the consultation process they have got three years to table a very short amending Bill to change the law. It does not seem like a big problem
355 to me.

One question I would like an answer to, actually, is the wording of the disagreement. So, under Standing Orders if this House disagrees with a Council amendment we can either just flat out disagree, which is what is being proposed, or we can disagree and ask for a conference and say, 'Let's try and find a resolution to this'.

360 Now, I am concerned that if this House does disagree with this amendment we are introducing hugely avoidable delays and we end up playing parliamentary ping-pong between us and Legislative Council. (*Interjection*) If they decide to stand their ground, my understanding is that it will be 15 months before this Bill can come back to this House for the Minister to attempt to take it through as a Keys-only Bill, which would require 17 votes. I am not convinced the
365 Minister has 17 votes in this House to override this particular issue.

So my question really would be: is the Minister willing to risk causing this Bill becoming completely dead in the water over a point of principle that inevitably ... He has already said they are open to changing the structure, they are willing to consult, they are willing to do what actually both Branches of Tynwald, I think, broadly think is probably the right thing to do at
370 some point in the near future.

So that is my question: why no conference? Why is he not trying to find a way of resolving this impasse rather than risking a minimum of a 15-month delay before this can become a Keys-only Bill? And perhaps an even longer delay if he cannot get the numbers in this House to force the Bill through.

375 It seems like a very risky strategy that does not seem to be based in any form of evidence. I would like a very good explanation from the Chairman of the Communications Commission as to why he thinks this issue is his die-in-the-ditch issue in respect of communications regulation?

Thank you, Mr Speaker.

380 **A Member:** Hear, hear.

The Speaker: Hon. Member for Douglas North, Mr Ashford.

Mr Ashford: Thank you, Mr Speaker.

385 Just pulling it back a bit, I think one of the important things to focus on is what the Commission themselves are saying. So not even the Chairman of the Commission here today, but the Commission themselves. What the Commission are saying is that their view has been the same the whole way along, that they need to look at the models, they need to decide what they want to do going forward and they are saying do not rush the fences on that.

390 Now, while I can understand what Mr Hooper is saying and he says you can bring forward an amending Bill if for whatever reason it changes, but what you are doing by passing this today, Mr Speaker, is you are giving an indication already to the Communications Commission of where this House believes they should be prior to them actually having completed their review. And I think that we should not be doing that at this point in time.

395 The Commission may well come back after all the reviews and decide that there should not be a political chair and that there need to be changes. I believe that can be done via the secondary legislation rather than amendment to primary anyway. But I think it is important that we let them get on with the business in hand and let them review the processes.

I also want to just briefly speak about something that the Hon. Member for Ramsey,
400 Mr Hooper has just mentioned about parliamentary ping-pong. I think it is important that we remember, Mr Speaker, this is not the first time that a form of this amendment has been discussed here by the elected House. This is now the *second* time.

I have got to say, Mr Speaker, if the House today rejected these two amendments from Council, but then Council – and this would be the *second* time of the elected House doing so, or
405 something similar to – if the then unelected Chamber decided to try and hold up an important piece of legislation ...

Well, the Hon. Member Ramsey has actually mentioned the phrase 'die in a ditch' which is very popular politically. I would use the words 'constitutional crisis' which are very popular as well because you would then have the unelected Chamber (**Mr Malarkey:** Yes.) trying to
410 overturn something that this elected House has not voted on once, but has voted on twice. And I think that would actually start setting a very dangerous parliamentary precedent, Mr Speaker.

So, yes, there is the ability for the unelected House to do that and it is enshrined there; but I think personally, if they are sensible, that is a battle they would not pick.

415 **The Speaker:** Mr Baker – just in time.

Mr Baker: Thank you, Mr Speaker.

I was perhaps expecting a few more people to speak.

I have reflected on this and in a couple of conversations this morning, and just listening to the
420 debate, which I think is where one should conclude. Mr Hooper said it is unusual and it may be unusual but that does not make it wrong. Lots of things in the Isle of Man are unusual.

This Hon. House – and the Hon. Court of Tynwald – has the power to do what it thinks is right and in the best interests of the Island. So the fact that something is unusual and that other
425 people do not do it does not make it wrong for me.

Reference to political inference, but there was an acknowledgment that actually there is no
425 evidence of any political interference; and an argument that says, 'We'll, pass the law, do the consultation, and if the consultation gives something else then unpass the law again', which is what Mr Hooper said – to me is not the right way around it. So I am struggling with that.

The other thing, just stepping right back from the discussion, what is being proposed in this
430 amendment is to say that Tynwald Members cannot do this role. Well, Tynwald Members are elected by the people. If we do not have a Tynwald Member doing it we have an unelected person doing that. Is this a retired civil servant? Is this an industry expert? Who knows? But it certainly is not anybody who has got a mandate from the people.

So, looking around at other situations we have got other bodies around Government where
435 there are challenges because there is not political accountability for their performance. I am not going to particularly mention any at this point, because this is a debate about the Communications Commission, but there are bodies where we have challenges and issues because there is not a level of political accountability. Whereas here, with the Chairman being a Tynwald Member there is political accountability – there is the ability to ask questions in this
440 Hon. House and elsewhere.

So, actually, I do not quite get the extent of the concern. It is almost as though having a
Tynwald Member is a problem. Well, yes, but these are people that have been elected by the people so our duty is to the people of the Island.

I think this is a complex mix, but actually I think are a lot of reasons why the *status quo* could
445 be okay. But there is a process that the Hon. Minister has outlined, where the Communications Commissioner is going to review it. So, for me, I am going to give the benefit of doubt to the Communications Commission and let them take their time to actually review the situation and then let's see where we end up.

Thank you, Mr Speaker.

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The Speaker: Hon. Member for Douglas Central, Mr Thomas.

Mr Thomas: Thank you, Mr Speaker.

Just a very brief point and the Clerk I am sure will jump up if I am incorrect. But the
455 15 months that has been mentioned by the Hon. Member for Ramsey begins when the Keys refer the Bill to the Legislative Council; so it is not 15 months from now, it is 15 months from March 2019. So, basically, Keys is looking at the opportunity if we go that way to come back between June and December 2020.

460 **The Speaker:** Mover to reply.

Mr Malarkey: Thank you, Mr Speaker.

This debate is always a bit of a hot potato. We have had it several times.

465 I would like to thank those who have made their comments – Mr Shimmins, I know your views have been quite firm on this, but the point is once you allow this to happen, there is not much point in carrying on and looking into it. The Commission's hands will be tied and the decision will be made for them.

470 Why do we have a Commission in that state then, if we are going to start taking the responsibilities? They are asking for time to look at the alternatives and to see if there are better alternatives to having a political chair. Clearly, as I said at the beginning, these are their words and this is what they want to do. I think we should actually respect that, Mr Speaker.

475 Mr Hooper, on a couple of points. Can I firstly say that the debate on Manx Radio was a parliamentary debate and I made it quite clear at the time I was not speaking on behalf of the Commission. Just because I was the Chair of the Commission I was quite entitled in my opinion, that the procedure that was being handled that day was totally wrong. So to start throwing the fact that I am Chair of the Commission and then I am not allowed to have a parliamentary debate in another place, I think is totally wrong, Mr Speaker. So I will carry on defending myself on that one. It had absolutely nothing to do with the fact that I was the Chair, it was me using nearly 12 years' experience in this place and another place that I thought the way things were being handled was incorrect.

480 So let's move on from that.

485 Mr Hooper also says it is quite unique us having the political head. Well, I have seen some of the figures that are already coming in from some of the consultations. There were some shown to me this week. Believe me, we are not unique being the only place with a political chair, there are other jurisdictions that do have political chairs.

490 And if you allow the Commission to do their job that evidence will come out in due course because this is what the Commission wants to do. They want to go out and find what is fact and what is fiction, and come back with some facts, so that you can make your own decision at a later date with help and guidance after they have done their research. And, if this gets held up, you are not allowing them to do their research.

Mr Hooper: If the Hon. Minister would give way just for one moment, if that is all right?

Mr Malarkey: Not particularly, no; you have had your say, Mr Hooper.

495 This debate has gone on long enough. I think Mr Ashford has summed it up absolutely perfectly. If today I am successful and we go along and we press the green button, we reject the Legislative Council's proposals, that will be twice this elected House have rejected it.

500 Now, who are the elected people around here? *We* are. Who are the ones who go knocking on doors day in, day out before an election to get elected to get into this Hon. House? *We* are. The people in here.

505 So I am hoping that if we are successful today there will be a clear message sent up to the Legislative Council that this is the will of the House of Keys and you should respect it. And if they do not respect it I would find it very, very hard to have respect for them; (*Interjections*) because this Bill cannot afford to be held up.

You heard at the presentation about the telecommunications the other day that the Bill actually ties in with the work, the national telecoms strategy, that is going on at the moment.

510 So I beg you folks, please press your green button and please accept the recommendations of the Commission and let's please send a clear message to Legislative Council that this is the will of this House.

Thank you. I beg to move, Mr Speaker.

The Speaker: The question is that amendments 1 and 4 in the marshalled list be disagreed with. Those in favour, please say aye; against, no.

A division was called for and electronic voting resulted as follows:

FOR

Mr Ashford
Dr Allinson
Mr Baker
Mr Boot
Mr Cannan
Mrs Corlett
Mr Cregeen
Ms Edge
Mr Harmer
Mr Malarkey
Mr Quayle
Mr Skelly
Mr Thomas

AGAINST

Mr Moorhouse
Mrs Barber
Mrs Caine
Mr Callister
Mr Hooper
Mr Peake
Mr Perkins
Mr Robertshaw
Mr Shimmins
Mr Speaker

515 **The Speaker:** There are 13 for, 10 against. The ayes have it. The ayes have it.
Minister, amendment 2.

Mr Malarkey: Thank you, Mr Speaker.

Amendment 2 to clause 3, 'Interpretation'.

520 This amendment from the Council, for Mrs Sharpe, amends the definition of 'public service
broadcaster' in order to allow for a change in the future for two or more licence holders to be
specified as public service broadcasters. This introduces some necessary flexibility into the Bill.
The Commission raises no objections to this amendment
I beg to move.

525 **Mr Cannan:** I beg to second and reserve my remarks.

The Speaker: Thank you, Mr Cannan.

I put the question that amendment number 2 be *agreed* to. Those in favour, please say aye;
against, no. The ayes have it. The ayes have it.

530 Minister, are you taking 3, 5 and 8 together?

Mr Malarkey: I am indeed, Mr Speaker – 3, 5 and 8.

535 These amendments remove the specific requirement for Council of Ministers to consult in
these cases, due to the fact that the amendment in Legislative Council to clause 152 introduced
a general duty for Council of Ministers to consult licence holders and/or any other such person it
considers appropriate when making regulations or orders under the Bill.

It introduces a consistent approach and the Commission has no objection to these
amendments. (*Interjections*) I beg to move 3, 5 and 8.

540 **Dr Allinson:** I am trying to beat the Treasury Minister, and I beg to second.

The Speaker: I put the motion that amendments 3, 5 and 8 stand part of the Bill. Those in
favour, please say aye; against, no. The ayes have it. The ayes have it.

Amendment 6, Minister.

545 **The Speaker:** Amendment 6, clause 74, 'Universal Service Order'. This amendment has the same effect as the previous amendments in removing specific duty for the Council of Ministers to consult in this case as a general duty is introduced by the amendment at clause 152.

The Commission has no objection to this amendment.

I beg to move.

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The Speaker: Dr Allinson.

Dr Allinson: I beg to second and reserve my remarks.

555 **The Speaker:** I put the question that amendment 6 stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Amendment 7, Mr Malarkey.

Mr Malarkey: Amendment 7 to clause 81, 'Procedure for issuing determinations'.

560 This amendment introduced by Legislative Council merely adds 'confirming' to ensure that the sentence is clear so that it can be read as 'the Commission must publish a further notice ... *confirming* the identification of a market'. The Commission has no objection to this amendment.

The Speaker: Dr Allinson.

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Dr Allinson: I beg to second and reserve my remarks.

The Speaker: I put the question that amendment 7 stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

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And, finally, amendment 9, Mr Malarkey.

Mr Malarkey: Yes, Mr Speaker, finally, amendment 9 to clause 152, Statutory Documents. This amendment ensures that the Council of Ministers is required to consult before passing any order or regulations which puts Council of Ministers in the same position as the Communications Commission in requiring a consultation process and ensuring consistency of the approach.

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The Commission has no objection to this amendment made by the Legislative Council.

I beg to move.

The Speaker: Dr Allinson.

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Dr Allinson: Thank you very much.

I beg to second.

585 **The Speaker:** I put the question that amendment 9 stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

That concludes Consideration of Council Amendments; and amendments 1 and 4 – the Bill returns to Legislative Council.