The Scottish Parliament faces three main constraints:

1. Post-legislative scrutiny is a rather broad term which could now describe virtually all Scottish Government activity, since there are now very few devolved policy areas left untouched following devolution.

2. The Scottish Parliament and its committees have very limited resources – time, attention, research and staff capabilities – to devote to any form of scrutiny. In particular, the resources of committees do not allow them to perform a comprehensive scrutiny role in relation to their relevant Scottish Government departments and associated legislation. They also struggle to secure information from relevant organisations such as non-departmental public bodies and local authorities.

3. Limited resources oblige committees to choose a small number of issues on which to focus. However, it may be as difficult as usual to find cross-party agreement, within committees, on which issues to pay most attention, since the choice of issue is a political choice. For example, Labour and Liberal Democrat MSPs may be relatively reluctant to revisit legislation produced up to 2007, while the SNP may object to a sole focus on legislation produced in the last 5 years.

Consequently, we should not describe the prospect of post-legislative scrutiny as a lost cause, but we should recognise that: (a) it will be much simpler to devise a way to ensure a post-legislative scrutiny system for the future rather than to deal with the past; and, (b) it may be simpler to build the post-legislative process into the design of legislation than to rely on committees finding ad hoc agreement. The process may relate to the specific aims expressed, and promises made, by the ministers responsible for taking the legislation through its stages 2 and 3 (rather than the broader policy area perhaps more likely to be covered by a wider inquiry).

In short, the main problem with the system of the past is that ministers often make commitments during the passage of legislation, but neither the Scottish Government nor Scottish Parliament have devised a system to make sure that they deliver on those promises. We should not be too critical of this situation because, in one sense, the outcome reflects an understandable and often-positive way to deal with the limitations of the legislative process. For example, ministers often promise an amicable exchange to MSPs: if you withdraw your stage 3 amendment now, I will make sure that we address your concerns in subsequent regulations and/or statutory instruments (if the amendment is raised at stage 2, a minister will often offer to bring forward an alternative at stage 3). In turn, MSPs may reasonably take it on trust that ministers act accordingly.
The alternative is to invite the Scottish Government to produce a document (produced immediately after the conclusion of stage 3) including a short list of aims and promises to be studied by the relevant subject committee at a date to be agreed between the relevant ministers and committee. Such an agreement would provide a means to introduce systematic post-legislative scrutiny without the need to make political choices requiring constant cross-party agreement. This recommendation also raises the prospect of scrutiny taking place after an election, with new ministers and committee members – putting the emphasis on cementing the long term relationship between the Scottish Government and Scottish Parliament rather than the short term relationship between specific individuals and parties.

Since the Scottish system places the bulk of resources in the hands of the Scottish Government, the system of post-legislative scrutiny would not only require the full support of the Scottish Government, but also the enhanced ability of the Scottish Parliament to call on its own research capability, to succeed. Post-legislative scrutiny is not simply about getting the right answers, but having enough resources and information to know the right questions.

The reform, if accepted, would require a small change to Standing Orders.

I am not currently aware of ‘examples of good practice in carrying out post-legislative scrutiny’ in other parliaments, but the Welsh Assembly is also currently considering the issue and there is potential for an exchange of ideas.

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