INTRODUCTION

In the book of essays published in 1970 entitled “The Scottish Debate – essays on Scottish Nationalism”, Donald Dewar gave an insight into his view of devolution. He wrote “released from the tight schedule of an overworked Westminster, some of the virtues of the Parliamentary system might become more apparent. Adequate time could be found for legislation in important but less politically controversial fields such as law reform. The development of a Scottish Cabinet would allow for the more thorough supervision of the administrative machine... even the backbencher might that bit the more effectively carry out his traditional role as a watchdog on the Executive”.

In the White Paper, “Scotland’s Parliament” (command 3658), which was published in July 1997, Donald Dewar stated that the process of devolution “will not in itself solve the problem of resources or banish the dilemmas of Government. What it can do, is connect and involve people with the decisions that matter to them. It can bring a sense of ownership to political debate and a new confidence to our affairs”.

That sense of ownership has, of course, borne great fruit, Acts of the Parliament of Scotland, thousands of Scottish Statutory Instruments, substantial law reform in Adults with Incapacity, Reform of Feudal Tenure, Land Reform, Criminal Justice and Courts issues, Care for the Elderly, Improvements in Public Health and perhaps most of all, compliance with ECHR.

In the report of the Consultative Steering Group on the Scottish Parliament entitled “Shaping Scotland’s Parliament” (December 1998) the key principles of the Scottish Parliament were stated to be:-

“The Scottish Parliament should embody and reflect the sharing of power between the people of Scotland, the legislators and the Scottish Executive;

The Scottish Executive should be accountable to the Scottish Parliament and the Parliament and Executive should be accountable to the people of Scotland.

The Scottish Parliament should be accessible, open, responsive and develop procedures which make possible a participative approach to the development, consideration and scrutiny of policy and legislation;
The Scottish Parliament in its operation and its appointments should recognise the need to promote equal opportunities for all.”

The actual sitting pattern of the Parliament is, in the Society’s view, a matter for the Parliament to determine. MSPs and officials know best how to structure the Parliamentary week between constituency work and Parliamentary work. The important focus should, however, be on maintaining the key principles of the Parliament, affording adequate time for legislation, ensuring proper scrutiny of Government and accountability to Parliament and the people and maintaining openness and accessibility.

In essence, there are two types of issue which fall within phase 2 of the committee inquiry. These are:-

1. Structural issues; and
2. Legislative issues

1. Structural issues

The Scottish Parliament has broadly adhered to the founding principles of power sharing, accountability, accessibility and openness, and promotion of equal opportunities. It is important that the work of examining practice in the context of these founding principles continues and occurs on a regular basis. This will enable the Parliament to ensure that these principles are given the respect they deserve.

It is important to ensure that the best endeavours are made to build on the structure of Ministerial accountability in the Scottish Parliament. Many commentators have questioned if First Minister’s Questions is the best way of achieving accountability. In this connection, recent changes made to First Minister’s questions by the Presiding Officer allows backbench MSPs more opportunity to participate and to hold Government to account. Although Ministers, including the First Minister have appeared before committees recently, perhaps a more structured calendar of appearances before committees by the First Minister and other Ministers would be a better way to achieve improved accountability.

2. Legislative issues

Scrutiny

Pre-Legislative Scrutiny

In a unicameral Parliament, pre-legislative scrutiny of proposals assumes particular importance. It is extremely important that Government plays its part in this aspect of process. Accordingly, pre-introduction consultation needs to be thorough and timely to enable adequate participation by civic society and the public. The consultation should also take account of the background EU and UK law and existing Scots law.
Legislative Scrutiny

When a Bill is introduced in Parliament, the process is generally a good one with adequate opportunity for those interested in or affected by legislation to put their point of view. However, the Society has one suggestion which might assist in this area; this may be an issue for standing orders rather than primary legislation.

In practice the Scottish Parliament’s capability as a legislature could be improved in terms of scrutiny of bills possibly by having a further revising stage which would not be prohibited by Section 36 of the Act.

The UK Parliament assigns five stages to a bill; 1st reading (formal), second reading is the debate on principle (analogous to stage 1 in the Scottish Parliament), Committee (amending) stage analogous to stage 2, report and third reading.

Stage 3 in the Scottish Parliament is a conflation of both report and third reading. It would be useful for the Commission to consider whether stage 3 could be redesigned to enable the Scottish Parliament’s scrutiny of a bill to match that of the UK Parliament.

On too many occasions, as seen for example with the Abolition of Poindings and Warrant Sales Bill or the Licensing Bill, many changes have been made to a Bill at Stage 3. A recent example is the Alcohol Bill. At the Stage 3 debate held on 10 November 2010, the Deputy First Minister proposed an amendment which, in effect, sought to reintroduce a minimum price for alcohol, this provision having been removed from the Bill in Committee by amendment at Stage 2. A consequential amendment which was in effect a “sunset clause” of six years on the minimum price of alcohol unless an order was made by Scottish Ministers after a period of five years but before the end of the six year period.

After debate, the first amendment proposing minimum pricing was disagreed to, yet the sunset clause was agreed to. The result of this is that the Alcohol (Scotland) Act 2010 now has a meaningless sunset clause at Section 1. Legislation like this which is incomplete, difficult and impossible to implement should not occur. Having an appropriate amending stage after stage 3 would avoid this for the future.

There is a significant issue in the fashion for framework legislation which currently prevails. More effort should be made to ensure that as much detail as possible goes into legislation before it is introduced. This would improve the law and ensure that legislators were able to scrutinise bills properly.

Post-Legislative Scrutiny

The Society also supports adequate post-legislative scrutiny such as sunset clauses to ensure that legislation meets the needs for which it was enacted and continues to provide efficient and effective achievement of its objectives.
European Union

There are also specific issues linked to the scrutiny of EU legislation which falls within the Parliament’s competence. Although it is difficult to estimate how much of the Scottish Parliament’s legislative output originally emanated from Europe, it is clearly a significant source of legislation and policy in areas such as environmental law, agriculture and fisheries and, prospectively, in the area of justice and home affairs. Such legislation is typically, although not invariably, implemented by way of subordinate legislation. Given the procedural and time limits applying in this area, and the restricted opportunity for scrutiny and potential for amendment of legislative texts, issues of transparency and parliamentary scrutiny arise and could be improved upon. These concerns can be mitigated by the effectiveness of pre-adoption consideration of proposals, but there is a potential lack of consistency resulting from the different working methods of Parliamentary committees.

Law Reform

A particular issue arises out of the implementation of Scottish Law Commission reports.

This problem has been encountered, most recently, by the Scottish Law Commission. In the Annual Report for 2010, the Chairman of the Scottish Law Commission, Lord Drummond Young, stated “since 2007 no civil law statutes based on Scottish Law Commission recommendations have been passed by the Scottish Parliament, although we have produced seven reports on devolved civil law subjects since September 2006. In addition, several earlier reports remain unimplemented.

A major problem appears to be a lack of capacity in the Scottish Parliament to deal with law reform measures. These are not political, and consequently they do not seem to be prioritised by contrast with more obviously political Bills. Nevertheless, it is of vital importance to Scots law and the Scottish economy that the legal system should be kept up to date. If Scottish private law ceases to be generally regarded as an effective modern system, that is likely to drive legal business away from Scotland. We are aware that lawyers in jurisdictions where the legal system is kept up to date, for example the Channel Islands, are using the modern nature of their law as a strong selling point in attracting foreign legal business. This may be accompanied by an unfavourable comparison with the United Kingdom, describing the law here as “outdated”. If Scotland is to realise its full potential in the legal, financial and other commercial fields, it is plainly essential that our legal system should be modernised and should be perceived as such. At present that is not happening.”

No one wants the intellectual capital of the Scottish Law Commission to be squandered or for valuable public resources to be wasted on unimplemented work.
Perhaps therefore the Scottish Parliament should consider new ways of dealing with Law Commission reports.

The UK Parliament provides a recent example which might be helpful.


The Society suggests, however, that a new Committee of the Parliament should be created to deal exclusively with Scottish Law Commission Bills or that the remit of an existing committee should be extended to include Law Commission Bills. On introduction, the Presiding Officer could certify a Law Commission Bill as such by means of an italic note similar to that used to certify competence. The Bill would then be remitted to the Law Commission Bill Committee which would be the lead Committee for all Law Commission Bills. That Committee would conduct Stage 1 inquiry. Accordingly, the full consultation process will apply to any Scottish Law Commission Bill and that, in the event of controversy being identified during the passage of the Bill, any new procedure would stop and the Bill would revert to ordinary scrutiny and evidence. However, instead of sending the Bill for a Stage 1 debate in the chamber, the Stage 1 debate could be held by the Law Commission Bill Committee. The motion for Stage 1 would be taken formally in plenary of the Scottish Parliament at a later date. It would be possible to challenge such a Bill were there serious opposition at that point by way of a motion.

Stage 2 would follow in the ordinary course of events in the Law Commission Bill Committee and Stage 3, split into an amending and final stage would take place in Plenary Session of the Parliament in the usual way.

The Parliament should also be encouraged to hold the Scottish Government to account, on a regular basis, as regards what decisions the Scottish Government has taken in respect of the implementation of Scottish Law Commission Reports and their Bills, to the extent that they do not relate to reserved matters.

For example legislation on the model of section 3A of the Law Commissions Act 1965, as inserted by section 1 of the Law Commission Act 2009 (that new provision applies only in respect of the work of the Law Commission (for England and Wales) and as regards reports to the UK Parliament). The provision can be found at: http://www.legislation.gov.uk/ukpga/2009/14/section/1

Such a provision would require Scottish Ministers to report at least annually to the Parliament its decisions on the implementation of recently issued SLC Reports - stating their reasons for any decision not to implement.

Although this could also be achieved by agreement with the Scottish Ministers, legislation would seem preferable (it would avoid such matters having to be agreed with each new Administration).
In this way, the Scottish Parliament would be able to free up time for consideration of Scottish Law Commission Bills, allow the Justice Committee to be relieved of any anxieties in that respect and develop expertise in dealing with Scottish Law Commission non-controversial measures.

Law Society of Scotland
27 October 2011