STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE
INQUIRY INTO POST-LEGISLATIVE SCRUTINY
WRITTEN SUBMISSION RECEIVED FROM PROFESSOR ANDREA ROSS

Introduction to the Submitter
Andrea Ross is Professor of Environmental Law at the University of Dundee. She is the author of Sustainable Development Law in the UK – from Rhetoric to Reality and has written widely on the role of Parliaments (the UK, Scottish, Welsh and Canadian) in implementing sustainable development and monitoring the environmental performance of government.

Response to questions
These responses largely relate to the role of post-legislative parliamentary scrutiny in the promotion of sustainable development including the promotion of a sustainable economy and monitoring the environmental performance of government.

Q1 What is the most appropriate format for post-legislative scrutiny in the Scottish Parliament and, in particular, its committees?

Cross-cutting policies, like sustainable economy and sustainable development demand new forms of accountability and scrutiny that do not inhibit inter-organizational working, reinforce boundaries or prevent sensible risk-taking. The Scottish Parliament’s integrated committee system has the benefit of allowing the committee that reviews government activity to use that information to initiate or review legislation. However, for some overarching matters, like sustainable development, which affect the whole of the Scottish Government, the process remains too sector-based and too often time constraints mean that post legislative scrutiny loses out to pre-legislative scrutiny. For example, the committee currently charged with many matters linked to sustainable development is the Rural Affairs, Climate Change and the Environment (RACCE) Committee, (formerly the RAE) does not have sustainable development explicitly listed in its remit at all. Moreover the remit covers only certain aspects of sustainable development (matters relating to agriculture, fisheries, rural development, climate change, the environment and other matters falling within the responsibility of the Cabinet Secretary for Rural Affairs & the Environment.

Its predecessor, the Environment and Rural Development Committee (ERD) published a report on sustainable development in September 2004 based on independent research it commissioned into sustainable development within Scotland (CAG Consultants, 2004). Since then, the RAE/RACCE Committee, has conducted very few inquiries, but has, instead, focused almost entirely on legislative scrutiny. The programme of work agreed by the RACCE Committee on January 13, 2013 is biased agriculture and fisheries issues and legislative scrutiny. Given its remit this is justifiable but it does not promote a sustainable economy nor scrutinize the sustainability performance across government. From 2007 to quite recently, there was also a separate committee devoted to Transport, Infrastructure and Climate Change (TICC). The TICC was more active on general sustainable development
matters and meetings in both 2010 and 2011 have included items on finance and sustainable growth, and the future of the sustainable development committee (TICC, 2010; 2011). However, these were not full inquiries.

The Scottish Parliament needs an overarching committee with reduced standing committee duties to be charged with post-legislative scrutiny on sustainable development (sustainable economy). The model of the public accounts committee or the Environmental Audit Committee in the House of Commons works well. For example a Sustainable Economy Committee could conduct regular inquiries on the budget, spending plans, relevant strategies, the Scottish stance at international conferences such as the WSSD, UNFCCC; sustainable development / environmental performance of the executive and provide proper scrutiny for those reports required by various statutes including the Climate Change (S) Act. It could also properly assess (or provide guidance on how to assess) the sustainable development statements contained in the policy memoranda of Bills.

Q2 - What are some of the barriers to undertaking post-legislative scrutiny and how can they be overcome?

The current committee structure falls short in terms of properly scrutinising the Scottish Government’s clear commitments to sustainable development (which includes a sustainable economy with reduced GHG emission), and improving the environmental performance of the government estate for the following reasons:

- There is no committee who has an explicit remit to scrutinise government policy and operations in relation to sustainable development. For example, there is no scrutiny of the sustainability of the Scottish Government’s finances. At present, both the RAE and TICC Committees’ roles in scrutinizing the budget is limited to considering the proposals of the relevant Cabinet Secretaries and Ministers (thus limited to rural affairs and the environment or transport, infrastructure and climate change) and reporting to the Finance Committee in late spring. A cross-cutting committee like the Sustainable Economy Committee described above could provide the much-needed external scrutiny of the spending review process.

- Some reports submitted to Parliament do not receive detailed scrutiny in Committee. Pursuant to the Nature Conservation (Scotland) Act 2004, every three years, a report regarding the implementation of the Scottish Biodiversity Strategy is to be laid by the Scottish Ministers before the Scottish Parliament. One would have thought that the RAE Committee or some cross-departmental committee would take responsibility for the proper scrutiny of this innovative legally required report. This did not happen and instead, for instance, the 2007 Progress Report was reviewed in plenary and approved with little discussion (Scottish Parliament, 2008).

- Some committees do not have the time to conduct either specific or regular inquiries due to their commitments in relation to proposed legislation (see note earlier about RAE /RACCE work post 2004)

- The committees do not have the resources necessary to conduct such inquiries and there is a lack of data and evidence particularly independent evidence. (See discussion below)
Q3 - Are there examples of good practice in carrying out post-legislative scrutiny inside and outside the Parliament which could be shared?

The Environmental Audit Committee in the House of Commons is regularly held up in international studies on implementing sustainable development as exemplary good practice. The Environmental Audit Committee’s remit is to consider the extent to which the policies and programmes of government departments and non-departmental public bodies contribute to environmental protection and sustainable development, and it audits their performance against any sustainable development and environmental protection targets. Unlike most select committees, the Committee’s remit cuts across government rather than focuses on the work of a particular department. Since its inception, the EAC has sought out policies and programmes which are not primarily environmental, but which do have a significant environmental dimension for its inquiries. Every inquiry the EAC has conducted involved major policy issues such as the budget, greening government and climate change, and this has become the main focus of its work.

The Welsh Assembly, like the UK Parliament, has a cross-cutting scrutiny committee dealing with sustainable development matters. The Welsh Sustainability Committee’s remit covers climate change, energy, rural affairs and agriculture, environment and planning. Arguably, this is a bit narrow and, to date, its inquiries and reports have been limited to the energy and environmental side of sustainable development. That said, its remit crosses departmental and division boundaries so it can call any part of the WAG to account.

Q4 What information and support is required by MSPs in order to carry out effective post-legislative scrutiny?

Most committees do not have substantial resources so need to rely on others to provide them with the evidence for their inquiries. First, the Government itself is the main source of information and inquiries require regular internal reporting by the either the whole of the Scottish Government or by individual public bodies. Second, effective scrutiny also demands effective, reliable and independent review and reporting. Third, it requires access to experts and advisors who are familiar with the relevant data and able to comment on its reliability, what it means, how it fits into a wider context and offer possible ways forward.

Getting the balance right between the review and scrutiny functions is crucial. A narrow reading of its remit would require the EAC to review specific departmental policies, programmes and decisions in terms of their impacts on sustainable development or environmental protection, as well as to audit departmental performance against operational targets set by Ministers. The EAC does not have the resources to do this work itself. However, at various times either the National Audit Office or the Sustainable Development Commission has conducted such reviews and the EAC has followed through with inquiries. The EAC has been instrumental in pressuring the Government to set targets and to ensure that these are audited. As targets are set, the EAC’s audit function has become more significant. However, it still cannot cope with a very detailed departmental review, but again, benefits from data produced by other sources such as NAO briefings, value for money reports and the Sustainable Development Commission’s annual reports.
Since the demise of the SDC in March 2011, the EAC has stated that it will continue to monitor the sustainability of the government estate (SOGE) data and reporting process, and changes anticipated for the indicators system, as well as assess the Government’s performance against its ambition of becoming the ‘Greenest Government Ever’. Moreover, also reviews the appraisal of government policies across Government and the impact of these policies on sustainable development (by, for example, examining impact assessments of key policy programmes), as well as examine changes to the Green Book and impact assessment methodology due later in 2011. To date, both the reporting and scrutiny on policy appraisal have been sadly lacking, and this is a very welcome addition to the remit and would be well worth doing in any Scottish Committee.

Q5 What type of legislation should be the subject of post-legislative scrutiny?

Q6 When should post-legislative scrutiny be carried out following the passage of legislation?

All legislation and government activity should be subject to Parliamentary scrutiny. A committee dedicated to the promotion of sustainable development (sustainable economy) which has a remit that covers all government activity including the programme for government, the economic strategy, the budget and spending plans and relevant duties imposed on public bodies (Climate Change (S) Act) could conduct regular inquiries on the budget, spending plans, progress on sustainable development indicators etc. It could call individuals to account for a lack of progress particularly in relation to specific duties. It should also conduct more one off inquiries to explore the sustainability of a specific technology, incident or upcoming event (the Commonwealth games). As an aside, this committee could also have responsibility for assessing the statements on sustainable development set out in the policy memoranda of bills as at present these statements are meaningless. This responsibility could be supervisory or in terms of providing guidance to other committees or it could do the assessments itself.

All reports required by statute to be laid before parliament such as those required under the Climate Change (S) Act and the Nature Conservation Act should be done by an expert committee (which may or may not be the Committee above) not in plenary.

Further reading


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23 JANUARY 2013