Scottish Environment LINK is very pleased that the Committee has decided to carry out this vital review into the efficacy of post-legislative scrutiny. We believe that it is one of the most crucial areas where reforms can improve the methods and processes of government in Scotland. We hope that a thorough review can produce clear recommendations for change.

In 2011, LINK published its report on the methods and processes of government in Scotland since the re-establishment of the Scottish Parliament in 1999 – “Governance Matters”. In it we discussed post-legislative scrutiny extensively, within the context of the way the new Parliament had operated. The paper is the basis for this evidence and the full paper can be found at: http://www.scotlink.org/files/publication/LINKReports/LINKGovernanceMatters.pdf

What is the most appropriate format for post-legislative scrutiny in the Scottish Parliament and, in particular, its committees? What are some of the barriers to undertaking post-legislative scrutiny and how can they be overcome?

It has always been the stated aim of the Parliament and its Committees to consider legislation and to scrutinise the implementation of the law by government. As all acts and expenditure of the executive branch must be justified in law (and principally on the basis of legislation) it follows that the traditional, broader role of a Parliament – to hold the executive branch to account – must be considered as post-legislative scrutiny. In other words, it is difficult, if not impossible, to separate post legislative scrutiny from straightforwardly holding the Government to account.

The experience of the eNGOs has been that post-legislative scrutiny by Parliamentary Committees has been seriously limited. As a consequence of the crowded legislative programme, very little time has been allowed by Committees for serious consideration of the implementation of the large numbers of environmental Acts passed or inherited (or to perform other scrutiny functions). Full and proper consideration and inquiry into the delivery of government has been lacking in our view – with even the National Performance Framework not used in its first four years as the basis for comprehensive scrutiny purposes which it should be. We believe that this observation is far from exclusive to the field of the environment.

It is well understood that with 129 members in a unicameral chamber, (with an average of 15 MSPs appointed to office as Ministers) the ability of the Parliament to establish large numbers of committees is limited – and these few Committees must do, therefore, the work of both Select and Standing Committees at Westminster (in both Lords and Commons). No serious consideration has been given to distinguishing formally the legislative and scrutiny functions within Holyrood’s all-
purpose Committees, and as a result of the enormous pressures of the legislative programme, scrutiny has seriously fallen by the wayside.

This is particularly seen in relation to agencies of government. In the environmental field, no comprehensive scrutiny of the work of either of the major agencies (SNH and SEPA, both with statutory foundations) has been undertaken. While the agencies have been called to give evidence to Committees on legislative (and other) matters, neither has ever seen their corporate priorities, individual programmes of work or annual report and accounts scrutinised fully by a Committee at Holyrood. Neither has any Committee of Parliament reviewed the selection and/or appointments of Chairs or Board Members – either the generic process or the actual decisions. LINK believes this may be a serious failing. At the same time, no Committee has ever inquired into the operation of Historic Scotland or Marine Scotland as Executive Agencies operating entirely within the structures of the civil service. No serious questions have been asked about whether they have or require independence in the policy or scientific fields. This too may be a serious failing.

In the field of Committee Inquiries into policy matters and the effectiveness of existing legislation, we have witnessed few into environmental areas. Positive examples include, however, the ERD Committee’s (2003-07) inquiry into the need for marine legislation – which set the scene (and developed cross-party support/understanding) for the subsequent Marine Act - but most such inquiries have resulted in little action because rarely have they been followed through. For example, the ERD Committee (2003-07) conducted an inquiry into sustainable development and both the 2003-07 and 2007-11 Committees completed inquiries into CAP reform. None of these have been reviewed or followed up, and none of them have had any discernible impact on the Government’s position on these matters.

The question of scrutiny comes into even sharper focus as a result of the election of a clear majority party in the Scottish Parliament in 2011. A whole series of questions arise about the willingness as well as the effectiveness of Parliament in challenging the executive branch.

**Recommendations:**
- We must consider how to radically improve the ability of Parliament’s Committees to schedule serious scrutiny work, including the possibility of setting aside specific time or meetings for the function.
- We should seriously consider the issue of whether Parliament has been presented with legislative programmes too heavy to allow proper performance of its scrutiny function.
- The issue of the division of constituency, plenary and Committee work recommended by the CSG should be re-examined, whether the division of time between them is right, and consideration given to whether more time is required for Committees to work - both during each term and during recesses.
- Government Agencies should be regularly scrutinised as to their core work.
- Room must be made in the Committee schedules for full Inquiries and legislative follow up as appropriate.
Are there examples of good practice in carrying out post-legislative scrutiny inside and outside the Parliament which could be shared?

LINK suggests that the Committee should commission a major piece of research (on the models used in the Constitutional Convention and the Consultative Steering Group) as to post-legislative scrutiny in unicameral Scandinavian parliaments, legislative assemblies in Canada and the USA, and other legislatures comparable in size and function to the Scottish Parliament. This should cover, in particular, (a) formal divisions of legislative and scrutiny functions and (b) the independent advisory and research resources available to Members and Committees.

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

LINK applauds the excellent work done by the Scottish Parliament Information Centre (SPICe) and the independent experts appointed to advise the Parliament's Committees. The publicly available briefings produced by SPICe are of particular value to the wider Scottish policy community and to MSPs - although it has been suggested by some that, on occasion, too little attention has been paid to this invaluable source of information. We note, however, that by comparison with the executive branch and its agencies, Parliament has very limited access to authoritative independent advice, even after account is taken of the excellent input made by advisers appointed by Committees and the variable, but often highly valuable, evidence given by civic organisations, civil servants and others to Committee hearings. We are firmly of the view that Parliament needs greater resources for SPICe, and to source independent research and advice.

Our experience of providing independent opinions and advice to MSPs is that we are grateful for the opportunity, and they are very grateful for such assistance. In view of the work and information overload faced by the average MSP this assistance is an essential requirement. In particular, we note that if Committees succeed in expanding their scrutiny activities they will require far greater research capacity than is currently available. This would probably require increased funding.

Our experience suggests that the Scottish Parliament would benefit greatly from a wider and deeper range of policy advice and expertise than is currently available. Expert advisers to Committees have been appointed, but this has had little impact in the environmental field. Procedures for appointment of such experts should, of course, be carried out openly and in consultation, especially where an area is politically or administratively contentious, or where there are particularly distinct points from which advice can be offered. Committees should also consider appointing more than one adviser, covering different perspectives in any given debate. Advisers should be drawn, furthermore, from across the policy community, and not limited to academics or ex-civil servants. This use of expert advice should apply in particular to the scrutiny of Government and its agencies, where Parliament is heavily reliant on the expertise and advice of the Ministers and civil servants being scrutinized - a highly unsatisfactory situation which has on occasion left the impression of a lack of openness and a system dominated by insiders.
Recommendations:

- If Parliament is to improve performance of its scrutiny function it will need to allocate significantly more resources to research and independent advice.
- The research and advice must be, and be seen to be, open and independent, as should the appointment of advisers.
- There is a need to utilise a wider range of Scotland’s policy community to provide such advice.

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

LINK believes that it is the responsibility of any legislature to ensure that the whole corpus of the law is up-to-date and fit for purpose. This suggests strongly that all legislation should be the subject of post-legislative scrutiny in some form or other. We draw the attention of the Committee to revision of the Game Laws undertaken in the Wildlife and Natural Environment (Scotland) Bill 2011, where seriously outdated eighteenth and nineteenth century laws required replacement.

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

We believe that there should be three categories of post-legislative scrutiny – and that space for each of these groups should be allowed for in the programmes of all subject Committees over the course of each Session of Parliament.

1. **Recently Passed Acts**: Perhaps the most intense scrutiny should be given to each piece of legislation during its introductory period as timetabled in each Act. A self-respecting legislature should be keen to ensure that its will is properly observed by the executive branch. LINK was instrumental in assisting the Scottish Parliament to do just this with reference to the statutory Land Use Strategy, introduced under the Climate Change (Scotland) Act, 2011. It was our view that the draft Strategy proposed by the Scottish Government was inadequate to give effect to the unanimously passed wishes of Parliament. We successfully urged the Committees of the Parliament to call in the draft for scrutiny during the consultation period (against the conventions) – in order to prevent its being presented to Parliament under a permissive procedure for secondary legislation which would have made the draft into law without any scrutiny at all. In the process, Parliament set a precedent for exerting its rights to properly scrutinise secondary legislation.

2. **‘Sunset’ or Statutory Review Clauses**: Parliament can, if it so desires, set into law a ‘sunset’ clause whereby the legislation expires if it is not specifically renewed. Similarly, Parliament could insert a statutory ‘review’ clause, setting a date for the executive branch to institute a review of the legislation in order that the report of such a review can be reconsidered by a future Parliament.

3. **Comprehensive Reviews of Legislation**: In this category Committees, or the Parliament as a whole, can designate entire areas of legislation which require scrutiny on a comprehensive basis. For example, LiNK encouraged
the original Inquiry by the ERD Committee into marine environmental protection, which covered a policy area including 78 separate pieces of (often contradictory) legislation, and led to the Marine (Scotland) Act.

Are changes needed to Standing Orders or other parliamentary procedures to facilitate improved post-legislative scrutiny?

In this evidence we have suggested or recommended very major reforms of the balance between the legislative and scrutiny functions of the Parliament. Such reforms would require a thorough review of the Parliament’s Standing Orders and procedures to implement new or extended principle involved. Particular attention to Chapter 9 – Public Bills Procedure and Chapter 12 – Committee Procedures would be required but other Chapters might also be affected.

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