This is the Scottish Law Commission's response to the Committee's request for views about post-legislative scrutiny in the Scottish Parliament. The Commission welcomes the Committee’s review.

We are persuaded of the general desirability of post-legislative scrutiny. Indeed, it is one of our basic functions. But we are not qualified to comment on how the Parliament and its Committees should carry out their functions, and therefore confine our response to two general matters.

Strategic reviews of operation of legislation

We would like to remind the Committee that this Commission is another, well-tried, avenue for reviewing the operation of legislation. We give four examples.

The Prescription and Limitation of Actions (Scotland) Act 1973 resulted from a Commission Report, and we have addressed further issues in that area in a number of subsequent reports

We are currently updating our 2005 Report on unfair contract terms.

More immediately, in our Report on Registration of Rights in Security by Companies (Scot Law Com No 197, 2004) we recommended the reform of the Scottish law on floating charges. The recommendations were implemented by part 2 of the Bankruptcy and Diligence etc (Scotland) Act 2007. Part 2, however, has not been brought into force because of concerns raised subsequent to its enactment by the banking sector in relation to the effect on floating charges granted by English companies over Scottish assets. In 2009 the Scottish Government set up a technical working group led by Registers of Scotland to consider the issues and one of the then Commissioners, Professor Gretton, was a member of the group. It reported in 2011 and the Government engaged in a consultation upon its report in 2012 to which the Commission contributed a detailed response.

Finally, our current project on Adults with Incapacity is an example of shared working. We are undertaking part of a wider Scottish Government scrutiny of various aspects of that legislation.

It is of course the case that reviews such as those mentioned above are conducted by the Commission either because they are included in one of our five year programmes, or because they are referred to us by the Government. Resource implications would make it difficult for us from responding, on a regular basis, to requests for reviews from other sources.
Separately from the above, we wonder whether the Committee might wish to investigate, with the Government, the possibility of a regular – perhaps biennial – miscellaneous provisions bill.

In principle, such a bill – whatever it might be called – would enable a number of useful alterations to be made to the law across a range of subjects, without requiring individual subject committees to consider separate legislation. In practice, Governments (and in particular their business managers) are cautious about the use of such bills because of their wide scope. They are necessarily and almost inevitably open to amendments of all branches of the law, and could be seen as a convenient means of enabling MSPs with particular issues to pursue to avoid the normal requirements for Members’ bills.. Quite apart from the political difficulties which this might cause, it is easy to see that such a Bill might well become of inordinate length.

But it would be unfortunate if a potentially useful method of giving effect to proposals for amendments to legislation were to be ruled out because of what is only a possible disadvantage. You may wish to consider, with the Government, whether the Parliament could take measures to reduce the potential for difficult or time-wasting additions to the bill.

Such a procedure, properly controlled, would enable faster action to be taken to deal with minor alterations to legislation, without the implications for separate subject measures.

SCOTTISH LAW COMMISSION
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