Part 1 - Legislative Questions

The experience of LINK and its members in the field of legislation is very considerable and a reflection of this experience can be found in our recent publication *Scotland's environmental laws since devolution – from rhetoric to reality*. This paper notes that large number of laws relating to the environment have been passed, many of which were, in our opinion, major steps forward – but suggests that the implementation of those laws by the executive has been less than satisfactory in several instances. The paper gives insight into the wider issue of our experience of the Parliament as a whole in respect of legislation and governance. There are, however, some further, crucial questions which require to be asked and the answers added to a generally positive and satisfactory experience.

1(a) Is the legislative performance of the Parliament satisfactory?

Are there ways in which it might be improved? Has Holyrood attempted to pass too much or too little legislation? Are there arguments for a more participative model with regard to setting the legislative agenda?

The experience of LINK and its members has been that the Scottish Parliament has performed commendably as a legislature, with a series of highly significant environmental bills being passed in the 12 years since its establishment. With an excellent basis in the recommendations of the Consultative Steering Group (CSG) the new Parliament built an admirable legislative ethos and practice, consulting widely, building expertise and avoiding its committees being turned into servants of the executive.

With the Coalition government of the first eight years of the Parliament, however, the legislative timetable was kept incredibly full. Parliament operated as a legislative machine on a familiar Westminster model, with exceptionally full legislative programmes from year to year. The Parliament was attempting to forge its own approach to legislation, and new developments such as the carry-over of Bills from year-to-year throughout the four year session were immensely valuable. Many of the Bills introduced by the Executive appeared, however, to have the purpose of “making a point” rather than fundamentally improving the law. This accusation has been made, also, of some of the Members Bills proposed. There was sometimes a sense of Bills for the sake of activity. Furthermore, the Parliamentary Committees existed under huge pressure, and on many occasions gave the impression of rushing their work. We note that “laws to make a point” can have an impact, but if their purpose is administrative change inside government our preference is that the problems be tackled directly. We discuss this further in Part 2.
A major difference with Westminster is, however, the size of the Scottish Parliament. With only 129 MSPs, Committees have been handed the work of both the “Standing” and “Select” committees in the UK Parliament and of both the Houses of Commons and Lords. Westminster’s Select Committees scrutinise the Government, while Bills are being dealt with concurrently by Standing Committees. At Holyrood, the Committees have benefited from their all-encompassing remit - in that the experience from working on both legislation and administration has proved of value – but the balance between the two has strongly favoured legislative work, at least in the environmental field.

In the third session of the Parliament, with a minority government and therefore against expectations perhaps, this pressure was kept up and it became apparent that Parliament has, in vital respects, conceded that the legislative timetable has become largely the property of the executive branch. Despite the number of Bills laid, there was little if any increase in the number of Members’ Bills dealt with; no Bills arising from the Committees; and no Bills introduced by opposition parties. The Consultative Steering Group’s (CSG) hopes that legislation might come from several sources appeared to evaporate. This is, once again, familiar within a UK context.

**Recommendations:**

- **We (Scotland) should carefully consider the amount of time devoted by each Committee to legislative work and seek to redress the balance of this work with the job of scrutinising the Government.**
- **We should seriously consider the issue of whether Parliament has been presented with legislative programmes too heavy for its numbers.**
- **We should re-visit the opportunities (and process) by which legislation can be proposed by individual MSPs, Committees, opposition parties and even civic society.**

**1(b) Can Parliamentarians be persuaded that ‘balancing’ the interests of ‘stakeholders’ is not always the wisest course of legislative action?**

In considering legislation, we have heard from several MSPs of all parties (and in other areas of their work) of “balancing the interests of all the stakeholders” in debates. During the passage of the Marine (Scotland) Act 2010, for example, Parliamentarians listened carefully to the views of fishermen, environmental campaigners and the renewable energy industry (amongst many others) and, laudably, recognised that these groups all had a vital interest in shaping the legislation. The understanding that the marine environment was fundamental to the well being of many long-term economic and social interests was highly apparent in the work of MSPs on the Bill, but there were occasions when this understanding of the fundamentals came perilously close to being seriously undermined by the need to “look after” the shorter-term interests of stakeholder groups. In the final analysis, the legislation passed has the potential to deliver ecologically sound management of our marine environment but its passage demonstrated the tensions between sticking to essential scientific principles and seeking to satisfactorily placate all those involved. As the legislation is implemented, Marine Scotland will face similar challenges.
It is especially important to work from principles on legislation which creates duties for sustainable development that a baseline understanding is established. The UK has a clear, shared and accepted statement of principles for sustainable development, regularly acknowledged by the UK, Scottish and Welsh Governments and the Northern Ireland Executive. The Shared UK Principles were originally given in the UK Framework for Sustainable Development and are given above.

A further consideration should be aired in this matter of balancing of interests – that of the equivalence of the data presented to MSPs. To many environmentalists and scientists the environment is a long term and fundamental issue and it could be seriously disturbing to have it “balanced” against what were perceived to be relatively short-term economic interests. Furthermore, to many scientists, their research represented not an “interest” to be “balanced” with anything, but the best available (and sometimes conflicting) factual evidence.

This experience reflects on the excellent access of the various stakeholders within the legislative process – but as a doctrine, it can, on occasion, sidestep the need to bite the bullet and take a baseline, radical view of legislation in some fields. Legislation founded on the basis of simply balancing all the interests involved might be open to criticism as avoiding critical issues and might be a reflection of weakness and indecision on the part of the Parliamentarians.

**Recommendations:**

- **We should carefully consider the effects of “balancing the interests” of the stakeholders in the approach to legislation and explore ways in which we can better evaluate the equivalence of the evidence and arguments presented to Parliament.**
- **We should debate the opportunities and means by which Parliamentarians (and others) can acquire a greater awareness and understanding of the challenges of sustainable development (where sustainable development delivers a healthy, just society, living within environment limits, while “living within environmental limits” means genuinely respecting those limits, as opposed to simply splitting the difference between them and other interests).**
- **Room must be made in the Committee schedules for full Inquiries and follow up as appropriate.**

**1(g) Is the Committee structure working?**

Are there ways in which it could be improved? Can we interact with committees and clerks better, especially outside of formal evidence giving or scrutiny of Bills? Do the Committees help to solve the problem of “departmentalisation” in both their own work and the work of the Government? Does the current Committee system cope with the task of pursuing truly sustainable development – and joined-up governance?

There have been considerable advantages in the Parliament adapting its range of mandatory and subject Committees to its numbers at the beginning of each session – and sticking to the model. This practice has provided stability for the system and made the fact that the subject Committee remits cross Government departmental boundaries, an understood and acceptable one. Parliament has demonstrated that it
can stick to its roles within the limitations it faces (particularly in terms of numbers of MSPs) and has avoided, within each session, copy-cat following of the varying structures of Ministerial responsibility in the executive branch. It has refined the process over the three sessions so far. The stability has allowed members of the Committees dealing with environmental issues to build up considerably greater experience over their time in post, something that is of great value.

Where stability of remit has worked, however, stability of membership has been less certain. Particularly during the first and second Parliaments, the regularity of ministerial re-shuffles lead to large amounts of knock-on changes of membership of Committees. In addition to this relative instability, few individual MSPs have developed a long-term political specialism due to a combination of personal interest and legislative, as opposed to ministerial, ambition. Due to the relatively small numbers of MSPs, we have not seen the development of many career-long, specialist backbenchers. Given the size of the Parliament, even with time, only a few issues are ever likely to be covered by such specialists. This relative lack of specialist back-benchers could only be covered by the appointment of greater numbers of permanent specialist advisers to the Committees.

As has been mentioned earlier the Committees (and in particular those with environmental responsibilities) have faced what has sometimes amounted to a legislative log-jam. This has seen their scrutiny, and other, functions suffer, but has also given the impression that their work programmes are impossibly full. This should not be confused with or blamed on the structure for the Committees.

The fact that the responsibilities of the Parliamentary Committees remits have not been coterminous with those of the (far too often re-organised and shifting) departments of Government should have had an effect in “depolarising” governance. It was always hoped that the Committees might look across all other departmental responsibilities and offer insight in this process of scrutiny that assisted the creation of “joined-up-government”. In the crucial, environmental area this has happened only in a very marginal way. The environmental Committees have had very little chance to operate outside their primary field. Rarely have they been able to ask questions of the economic and social parts of government. Even worse, they have, on occasion been treated as distinctly secondary in importance to the economic and social committees. For example, the Rural Affairs & Environment and the Transport & Climate Change Committees were asked their views on the 2011 Budget Bill. They called for and took evidence, but when their views were submitted to the lead Committee (the Finance Committee), they were almost without exception, ignored. This is, sadly, far from an isolated example.

Despite the rhetorical commitment of all the parties to the principles of sustainable development, time after time, economic interests are put first and economic development has been given primacy. This has been the case particularly in the last four years when the mantra of “sustainable economic growth” has been intoned at every opportunity as a version of sustainable development despite its basic failure to tackle the core questions – based on the definition of sustainable development accepted across the UK.
- Are the required environmental questions asked when primarily economic or social matters are decided upon?
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As was suggested earlier, we should debate the opportunities and means by which Parliamentarians (and others) can acquire a greater awareness and understanding of the challenges of sustainable development (where “living within environmental limits” means genuinely respecting those limits, as opposed to simply splitting the difference between them and economic or social interests).

Only when these fundamental questions are being asked – in Government and in Parliament - and the issue of sustainable development being truly and fully addressed in a structured fashion will we make serious progress towards achieving sustainability. The Committees of Parliament can play a vital role in this task. From an environmental point of view, there is no Committee in the Scottish Parliament playing the crucial role of the Environmental Audit Committee at Westminster, where all manner of economic and social policy issues are effectively audited for their environmental consequences. Equally, there are no Committees at Holyrood performing the equivalent policy audit function in the economic and social fields. Governance remains, therefore, in “silos”. “Joined up government” is still rhetorical.

**Recommendations:**

- **We should commission academic research to establish the efficacy of the uncoupled Committee/Department structure in achieving depolarised scrutiny of government.**
- **Consideration should be given to the appointment of permanent specialist advisers to the Committees**
- **We should consider how the barrier to sustainability represented by Parliament’s apparent inability to ensure the cross-auditing of social, economic and environmental policies can be overcome.**

**1(h) How successful is the three stage legislative process?**

How has Parliament coped without a revising chamber? Can we engage better and more successfully at certain stages? Do we exploit the potential for Private Members Bills or the possibility of Committee Bills fully?

The unicameral nature of the Parliament has, over its life, offered us the opportunity to analyse the effect of the lack of a “correcting chamber”, such as the House of Lords at Westminster. No major complaint about the lack has become an issue – but it is the view of LINK that the consequences having a single chamber for the revision of legislation during its passage remains an issue of real importance. Some in legal circles have criticised the quality of the legislation produced, and one or two clear problems have arisen with the sometimes almost arbitrary effect of Stage 3 votes on amendments, particularly in the years 2007-2011.
In LINK’s experience, the effectiveness of the three stages is greatly enhanced if there has been good debate on the issue of policy intentions and the engagement of a wide range of stakeholders before the introduction of a Bill. Such pre-legislative processes might include one or more consultation papers, a well-constituted stakeholder forum, or a draft bill. For example, the Marine Act was preceded by extensive discussions and a consensual approach within AGMACS and the ERD inquiry. Similarly, the Nature Conservation Act was beneficially shaped within the discussions and debates of the Expert Group on SSSI reform and the legislative sub-group of the Partnership Against Wildlife Crime.

The three stage legislative procedure has been largely successful in creating the proper distinction between first debating the principles and broad policy involved, then attending to the detailed amendment of the Bill followed by a final debate and ‘polishing’ of the legislation. At Stage 1, the Committees have, in most cases, been able to assert their prerogative of indicating the need for major changes in policy direction (and the Government has mostly responded helpfully). Stage 2 has seen the Committees cope reasonably well with the large number of amendments promoted by the parties and by interested stakeholders. Stage 3 debates have rarely failed to focus attention satisfactorily on the major remaining issues to be resolved.

Problems with the system have been apparent in the last four years, particularly in relation to:

- the shortness of time for reflection between Stages;
- the speed with which Stage 2 is often pushed forward (causing problems particularly in the time between lodging amendments and debating them - and the possibility of amending amendments following discussion and agreement between the parties); and
- the possibility of contradictory amendments being passed at Stage 3 (as happened during the Stage 3 Debate of the Flood Risk Management (Scotland) Bill (2009), without recourse to a corrective amendment procedure to tidy-up the final Act.

These problems were, however, extensively addressed by the 2003-2007 session’s Procedures Committee, who considered these problems and made a number of recommendations. While many of the recommendations have been implemented, the problems are still evident. LINK believes that there remains potential for significant improvements, but there is a suspicion that parties in Government may dislike such changes because they would slow the legislative process and “clog-up” the legislative production line. They might also increase the possibility of the passing of non-government amendments.

LINK and its members have exerted every effort to be of assistance by providing our own policy agenda and the requisite briefing and amendments to back up our ideas. We have never felt excluded from the process. Only rarely have we felt that we were taking the legislative initiative by promoting Members’ or Committee Bills, however, and although this is principally an argument concerning the setting of the legislative agenda, it is also a reflection of the huge pressures put on the system by the sheer amount of legislation introduced by Governments.
Recommendations:

- We should commission research into the legislative workload of similarly sized, unicameral Parliaments – and how they organize their Committee work.
- We should revive the report of the Procedures Committee from the 2003-07 session and pursue its recommendations and consider whether other measures are required.

1(i) How successful are “general duties” within legislation?

LINK has been instrumental in pursuing amendments to legislation inserting clauses laying down general duties on government and “public bodies”. General duties on sustainable development have been successfully inserted into several bills, including the Climate Change (Scotland) Act 2010 and improved the general biodiversity duty in the Nature Conservation (Scotland) Act 2004. A general duty to protect and, where appropriate, enhance the marine environment was inserted into the Marine (Scotland) Act (2010). Government has almost always opposed the insertion of such duties, often using the argument that they are not required in legislation because they arise from international obligations and are, therefore, part of both the normal legal and administrative processes. LINK’s response has been to argue that setting the duties within Scots Law adds clarity and real political weight to them as opposed to the lack of clarity we have witnessed in relation to our pursuit of the substance of, for instance, the Aarhus Convention obligations of the Scottish Government or the European Landscape Convention.

The very small numbers of cases involving environmental law to come before the Scottish Courts means that we have little if any case law to test the meaning and efficacy of general duties. It may be that the terms of general duties are so vague and caveated as to be unenforceable. They are an undoubted advantage as we pursue policy objectives, providing the desired clarity and political weight that might persuade Government to avoid a legal conflict, but the question must be asked as to the real outcome of the pursuit of general duties in legislation. Have they been a successful means of pursuing policy change and progress? If so, how effective have they been and are other strategies required?

One alternative strategy we should consider is the use of preambles to each piece of legislation, adapting a European model. This goes against the Westminster model that laws are there primarily to give powers to the executive and that the insertion of statements of the principles upon which the legislation is based is something akin to anathema. Considering the ability of our Courts to provide decisions based on the EU’s Directives, which already contain fully justiciable preambles, the time may have come to ask what benefits are obtained by following the English parliamentary and legal tradition. As EU law is directly applicable by our own courts and a fundamental understanding of Scots Law is that it is based on legal principles, there may be advantages to changing course.

Recommendations:

- We should continue to monitor the effect of general duties in legislation.
- We should consider the use of preambles to Bills.
1(j) How successful are 'action plans' or other administrative strategies in comparison to legislation?

Does Parliament properly scrutinise these non-legislative strategies?

LINK has been instrumental in moving amendments to Government legislation, inserting clauses laying down duties to establish Government strategies – and was particularly successful (working with Stop Climate Chaos Scotland) in establishing strategies within the Climate Change (Scotland) Act (2010) such as the Land Use Strategy and the Public Engagement Strategy. Government has almost always opposed the insertion of such strategies, using the argument that they are not required in legislation and that they have always been available, and often delivered, as part of the normal administrative process. LINK’s response has been to argue that setting the strategies in law adds permanence and real political weight to them, as opposed to the temporary and non-binding nature of, for instance, the Labour/Liberal Democrat Coalition’s Strategy for Sustainable Development or the Organic Targets Action Plan - never again heard of under the SNP minority administration. At an even more central level, the SNP’s own National Performance Framework was announced with fanfare as the overall measurement of performance, but has had little Parliamentary scrutiny or debate. Despite this, it has significantly impacted on the operation of Government and its agencies.

It is known that the substance of a “legislative strategy” has little additional weight in a court of law over the administrative version - the only duty binding Government being the delivery of the strategy itself as laid down in legislation, with only the broadest possible limitations as to the substance of the document (and policy). We have no evidence as yet from case law as to the attitude of the courts in this matter – and little if any evidence that the political gain of achieving a successful amendment is great or small. The indications from the two strategies mentioned above suggest that the Civil Service is well aware of this legal background, and unperturbed in producing drafts and strategies that clearly do not meet the aspirations expressed in Parliament during the insertion of the strategy clauses. This was certainly the LINK experience of the draft Land Use Strategy of 2011, produced under the Climate Change (Scotland) Act (2010) – and our views were strongly backed by the Rural Affairs and Environment Committee when they called in the draft for scrutiny. It is questionable, even now that the completed Strategy has been laid before Parliament that it fulfils the terms set out in the Act, and in substantive terms is much stronger than the draft but much weaker than was the clear intention of Parliament. The Strategy did not, however, require any positive affirmation by Parliament.

The question that must be asked is, therefore, has the pursuit of policy strategies in legislation been meaningful – other than in terms of providing a focus for Parliamentary debates? A further question with some validity is whether a strategy such as the Land Use Strategy should be taken to the Court of Session for a judicial review to test its fulfilment of the legislative requirements. Only the Court has the power to determine whether the will of Parliament or Government is being observed – and whether a legislative strategy is of any more value than the non-legislative variety. This matter is related to the discussion below of the nature and effectiveness of statutory and non-statutory executive agencies.
Recommendations:

- We should continue to monitor any differences in the delivery of policy backed by a legislative strategy as opposed to an administration strategy.
- We should consider the value of a constitutionally contentious judicial review in order to obtain clarity as to the status and content of legislative strategies.

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