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Pàrlamaid na h-Alba

Official Report

STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE

Thursday 20 June 2013

Session 4

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STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE
10th Meeting 2013, Session 4

CONVENER

*Dave Thompson (Skye, Lochaber and Badenoch) (SNP)

DEPUTY CONVENER

*Helen Eadie (Cowdenbeath) (Lab)

COMMITTEE MEMBERS

George Adam (Paisley) (SNP)
*John Lamont (Ettrick, Roxburgh and Berwickshire) (Con)
*Richard Lyle (Central Scotland) (SNP)
*Margaret McCulloch (Central Scotland) (Lab)
*Fiona McLeod (Strathkelvin and Bearsden) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Paul Cairney (University of Stirling)
Michael Clancy (Law Society of Scotland)
Professor Russel Griggs (Regulatory Review Group)
Jackie McCreery (Scottish Land & Estates)
Professor Colin T Reid (University of Dundee)

CLERK TO THE COMMITTEE

Gillian Baxendine
Alison Walker

LOCATION

Committee Room 6

Scottish Parliament

Standards, Procedures and Public Appointments Committee

Thursday 20 June 2013

[The Convener *opened the meeting at 09:15*]

Decision on Taking Business in Private

The Convener (Dave Thompson): Good morning, everyone. Welcome to the 10th meeting in 2013 of the Standards, Procedures and Public Appointments Committee. I remind members and others to turn off mobile phones and BlackBerrys, please.

Agenda item 1 is to decide whether to take in private items 4, 5, 6 and 7. Item 4 is consideration of evidence for the inquiry into post-legislative scrutiny, item 5 is to discuss the committee's approach to its inquiry on Presiding Officer and Deputy Presiding Officer elections, item 6 is to consider a draft report on the review of the "Code of Practice for Ministerial Appointments to Public Bodies in Scotland", and item 7 is consideration of the process for Scottish Public Services Ombudsman special reports. Do members agree to take those items in private?

Members *indicated agreement.*

Post-legislative Scrutiny Inquiry

09:16

The Convener: Agenda item 2 is our inquiry into post-legislative scrutiny. This is a round-table meeting, so I hope that everyone will participate as freely as possible.

I welcome the witnesses and thank them for their written submissions. We have Michael Clancy, who is the director of law reform at the Law Society of Scotland; Professor Russel Griggs, who is chair of the regulatory review group; Jackie McCreery, who is a legal consultant at Scottish Land and Estates; Professor Colin T Reid, who is a professor of environmental law at the University of Dundee; and Professor Paul Cairney, who is a professor of politics and public policy at the University of Stirling.

We move straight on to questions. I will throw out a general question to all the panellists. Everyone thinks that post-legislative scrutiny is desirable. A number, if not all, the panellists have mentioned the resource that will be needed to deal effectively with it. What resource does Parliament need to carry out effective post-legislative scrutiny? Who will volunteer to start us off?

Jackie McCreery (Scottish Land & Estates): It is hard to answer that question when we have not decided on or thought about the format that we might use. We have suggested in our submission that a dedicated committee could look at post-legislative scrutiny, which would need to be resourced with manpower, expertise and skills. How much resource will be required will depend on how we want to proceed.

Professor Russel Griggs (Regulatory Review Group): The resource that will be required will also depend on what you want to scrutinise. The regulatory review group has had long discussions about how and what regulation to scrutinise. There is no doubt that a scrutiny industry could be created, but that would be worthless because there is no contention over much of the legislation.

The legislation that should be looked at has what I call the policy imperative that is to be introduced, delivery of which is by statutory instrument, and on which there has been debate, when the legislation was introduced, about whether the instrument will be effective. After that, at a future point, how that legislation is being applied should be examined. It is possible to be precise about the type of legislation to scrutinise if that is what is wanted. To scrutinise it all would be unproductive and not a good use of parliamentary time or resources.

Professor Colin T Reid (University of Dundee): In addition to that, there is the question of what you are scrutinising. Is it the overall effectiveness, which goes into issues of compliance as well as the structure of the legislation? Where does subordinate legislation fit in? If the parent act is just a skeleton, its effectiveness cannot be assessed without considering the subordinate legislation.

Jackie McCreery: In addition to that, most of the acts of the Scottish Parliament include codes of practice, so such legislation cannot be scrutinised without scrutinising those codes. It might just be the code of practice that needs to be looked at and changed, without changing the legislation itself. There is sort of a snowball effect.

Professor Paul Cairney (University of Stirling): The resources that you are talking about are the ability to do research and gather information, and the time that is available to devote to it, which is fairly limited. Since 1999, Parliament has been able to do post-legislative scrutiny. To some extent, that is the point of inquiries. The committee can decide to take on a piece of work; a big part of that is examination of how legislation is working. It is just a case of deciding the extent to which you want to make that process systematic. Part of the problem that has been identified is that there is some good practice in some committees, but that is not the case throughout the committees.

The way to deal with the resource issue in a system in which the Government produces and amends most policy is to put that burden on the Scottish Government. The systematic element is to ensure that whenever the Scottish Government presents policy to Parliament, its aims are clear and the method of assessing the success of the policy is clear from the outset, so that the post-legislative part is relatively straightforward for Parliament and you do not have to think about first principles and what they mean when a committee does an inquiry.

Fiona McLeod (Strathkelvin and Bearsden) (SNP): Can I question Paul a wee bit further on that? I am sorry—Professor Cairney.

Paul Cairney: No—Paul is good.

Fiona McLeod: I should be much more careful for the *Official Report*. You talked about a systematic process. One of the questions that has come up in discussions and written evidence is what would be the triggers of systematic specific post-legislative scrutiny. You talked about putting the burden on the Scottish Government, and I know that that suggestion was also in your written submission. We talked about it with the previous witnesses. I am slightly worried that we would, if we were to go down that route, be leaving it to the Government to decide what legislation to scrutinise and when, which could take power away from Parliament. We have considered what would trigger committee scrutiny of legislation, which might mean giving Parliament the power, rather than the Government. Do witnesses have thoughts about possible triggers?

Professor Griggs: I will build on the point that Jackie McCreery made. You can produce wonderful legislation, but all the guidance and everything else that goes along with it must be in place, or it will not work. It is about scrutinising not just legislation but everything that goes around it. For example, in the Licensing (Scotland) Act 2005, it was quite clear that the guidance did not match the act, so people were having to make decisions. It was the guidance that was wrong, not the legislation. Just looking at legislation without considering how it is implemented by whoever must implement it—in that case it was local authorities—is somewhat meaningless. Parliament could go round and round in circles; it could produce perfect legislation, but if the guidance is rotten, it will not work.

Richard Lyle (Central Scotland) (SNP): I will come back to Professor Cairney's point. You said that committees make up their own work programmes, so a committee could decide to revisit legislation because members suggest it, or because someone from outside Parliament has seen, or believes that they have seen, that something is not working and has gone to the Public Petitions Committee to try to trigger post-legislative scrutiny.

Paul Cairney: That is possible in the system just now. The committees are flexible and can decide to do that, but it is not a systematic process. It depends on how we want to describe the process: we can say that it is ad hoc or that it is flexible. We do not want it to be too hard and fast.

As far as the question about the power of the Scottish Parliament is concerned, for me, the Parliament's power lies not in the detail, which it simply does not have the resources to deal with, but in the principles. If we put the burden on the Government to say, "Here are our aims and here's how the policy can be assessed," that would be an additional thing that could be discussed at stage 1 alongside the bill's principles. The point about stage 1 is that, essentially, the Parliament says whether it agrees with the entirety of the bill. If we were to incorporate at that stage what the bill's aims were and how its success would be measured, in my view that is where the Parliament would be powerful, rather than in the detailed process of how the legislation would work and be implemented.

Michael Clancy (Law Society of Scotland): We are talking about a bundle of things that are all interconnected. We started off with resources and went on to triggers, and now we are discussing what the Parliament should consider at stage 1. If one tries to separate some of those strands from the bundle, it is clear that the issue of resources is one that the Parliament and the Government must consider and decide on.

We all operate within the constraints of things such as the Government's legislative process and its legislative statement, and based on issues that are brought in from outside through petitions. We operate in an environment in which the outside intrudes all the time when it comes to our law. A court somewhere might make a decision that throws up an issue relating to legislation. I can think of no better form of post-legislative scrutiny than a court saying, "This law happens to be off-beam." There are lots of forces that can cause Parliament and the Government to think again about their law. It is for Parliament and the Government to act in partnership to get this right.

If one looks at certain principles of law making, one might think that if one puts in good stuff at the start, one should get out good stuff at the end. If there is robust legislation at the end, the process of post-legislative scrutiny should be an easier task and should not present surprises, and I think that we are all in the business of not being surprised—at least, I try not to be surprised at things.

That means that the Government has a responsibility. If one thinks about the First Minister's legislative statement, one can see clearly that if the First Minister announces 15 bills, the time for Parliament—time is a big resource issue—to do post-legislative scrutiny will be limited, because the available time is whittled down with each bill that the Government decides to introduce.

Therefore, it might help if Parliament and the Government were to adopt a collaborative approach in order to identify a protected zone of time in which Parliament could embark on post-legislative scrutiny, with a Government commitment to afford Parliament sufficient monetary resources for it to be able to do that. Time and money are part of the problem.

The Convener: How would we go about designating

"a protected zone of time"?

Jackie McCreery mentioned a dedicated committee. That in itself would provide protected time. If we were not to have a designated committee, how could we provide such time?

Michael Clancy: I think that the committee has recently been involved in discussions about Scottish Law Commission bills. In assigning treatment of Scottish Law Commission bills, the Scottish Law Commission is a substantial actor on the stage of post-legislative scrutiny. I think that the SLC's submission to the committee indicated that that is something that it considers to be very much within its province.

This committee assigned to the Subordinate Legislation Committee the task of dealing with SLC bills, so there is a model for assignation of time and resource to deal with a particular type of legislation. One could imagine that there could—without burdening Nigel Don and his committee too much—be tweaks made to that remit. Alternatively, there could be a stand-alone committee. I would not be too fussed about which way it was done. However, it might be problematic to create single-purpose committees for the kind of work that we have discussed. However, if a committee were to develop expertise in dealing with one form of post-legislative scrutiny—to wit, Scottish Law Commission bills—it might also be able to do that with other legislation.

09:30

I will stop after this to let the debate continue, because I am having a deadening effect on it. We assume that expertise in a subject area should determine who does post-legislative scrutiny: for example, the Justice Committee should review legislation that it has dealt with, as has been in the pattern in the past, and the other committees should scrutinise legislation that applies to their remits. However, I am not sure that legislative scrutiny needs to be related to expertise in the subject matter.

Russel Griggs: If I were to recommend only one piece of resource to put into this area, it would be for someone to read a bill on the morning after it comes out of stage 3. On the afternoon of the last day of stage 3, when all bills go before Parliament to be passed after being scrutinised well by committee members, you all become politicians again and you throw in amendments and changes to this and that. It would be beneficial to have somebody at the end of that, when it has all been passed, to scrutinise what is there and ensure that it makes sense and will work.

We spoke before about the fact that we have all experienced bills in which sentences or paragraphs have been left out, or in which one section contradicted another section. A resource at the end of stage 3 for scrutinising the bill could ensure, after all the political machinations that go on in the last afternoon of stage 3, that what is produced is still legislation that will work. That

would overcome some of the challenges that can arise later on.

I am not suggesting that there should be a stage 4 such as at Westminster; I am suggesting just a sort of official scrutiny, perhaps by the bill team and the responsible minister. That would be useful, because there are lots of examples of legislation that came out the morning after stage 3 not quite as it was when it went in to stage 3.

The Convener: Okay.

Michael Clancy: I think that Russell Griggs is on to something here, but I have difficulty accepting his suggestion in its entirety. We might know that there is a shocking gap in a bill after it has been passed at stage 3, but the bill is then on its way to the law officers for checking and on to the palace for royal assent, so it is just too late to do anything about it.

In earlier investigations into procedure, I suggested that we consider splitting stage 3 into an amending stage and—without going to a full-blown report stage—having within a week afterwards a stage 3 part 2. That would create the opportunity for a post-stage 3 amending process and would allow people to reflect in the intervening week on whether there were difficulties with the bill as passed, which could then be dealt with at stage 3 part 2.

The Convener: We are planning some work on legislation and how we process it, which is pencilled in for early next year, I think, so we could certainly pick up on that.

Jackie McCreery: I will pick up on some points that have been made. The technical issues that the two previous witnesses raised would certainly be one of the triggers, to return to Fiona McLeod's point. Some problems can be picked up early, but some will be missed and will become evident only as the legislation beds down and is implemented. The Law Commission in England and Wales has done some work on that. In our written evidence, we have summarised some of the triggers that the Law Commission came up with, and have added some of our own. There are many different triggers that might lead to a need for review.

On Richard Lyle's point, we need to be careful regarding the point at which public interest and the public pressure for scrutiny tips over into reform. The legislation may be working and may be achieving the objective that it set out to achieve; it may just be that sections of the public do not like what it is achieving. We need to be careful, where there is public pressure, to think about what the legislation is for. Do we want to reform the law, or to go back and scrutinise how effectively it is implementing its objective?

There are not just one or two triggers, but a number of different ones. Some will be technical, and others will be much wider.

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): On the point that Professor Griggs raised about mistakes that are made during a bill's passage, I would like that to be quantified. I can understand how it would happen, but can you give us an indication of how many bills have errors? I have been here for six years and I am not aware that many substantial mistakes have been made.

Professor Griggs: No I cannot, is the answer to your question.

Jackie McCreery: I can give an example. The Scottish Land Court literally had to add in its own words to the Agricultural Holdings (Scotland) Act 2003 because the legislation did not make sense as it was written. Professor Reid probably has other examples.

Professor Reid: There is one piece of legislation—I cannot remember which it is—that has a dangling half-sentence that just does not make sense. I got in touch with Her Majesty's Stationery Office, thinking that the version that I had seen was a mistake, and got a letter back that said, "No. That is what we got from Parliament, so we have just had to repeat it."

The Convener: So, there are a few obvious examples.

Jackie McCreery: Yes.

The Convener: I suppose it makes us look a bit silly when we end up with mistakes like that. Next week we will consider at stage 3 the Crofting (Amendment) (Scotland) Bill, which is intended to correct a problem that was created by the previous crofting legislation that was passed just a few years ago—

Helen Eadie (Cowdenbeath) (Lab): I am sorry to speak over you, convener, but the flooding legislation is another example; it was pointing in two directions at once.

The Convener: It is obvious that there is an issue for us to look at. We can pick up on it not so much with regard to post-legislative scrutiny, but in terms of how we deal with legislation and with our legislators.

Jackie McCreery: That brings us back to the gist of what we are talking about. Some of the need for post-legislative scrutiny could perhaps be avoided if there was a little extra time to scrutinise legislation as it goes through Parliament.

I am a big fan of consultation on draft bills before they are introduced to Parliament, because at that stage the legal profession has time to examine it. They are the people who will

implement the legislation, so consultation on draft bills before they reach Parliament—where that is at all possible—would be a good thing, because a lot of technical issues can be ironed out at that point.

Once a bill is introduced, there is a very tight timescale for scrutiny. It is almost impossible for a committee that may be dealing with two or more bills at a time to give the technical elements of a bill the necessary level of scrutiny.

Fiona McLeod: I was going to ask exactly the same question as John Lamont, so I will ask it again. Is there any way that we can get some figures on the amount of bills that have similar problems?

We are coming up with examples off the top of our heads, which makes it sound as if there are a lot, but we have passed hundreds of bills since 1999, and we have mentioned only three or four. It would be interesting if anybody could tell us—

Professor Griggs: It is not just mistakes. When we finished our post-legislative scrutiny of the Alcohol etc (Scotland) Act 2010, I had a discussion with an MSP, who said to me, "I've read your report, Russel—you were absolutely correct, and it was my fault." I said, "How was it your fault?", and he said, "I lodged an amendment without realising what the impact would be."

It is not just about making mistakes; it is about MSPs inserting sections quite legitimately but without understanding what the impacts will be.

John Lamont: So, we need to get better MSPs. [*Laughter*.]

The Convener: Can you name names?

Jackie McCreery: Sometimes, the impact is not known until a number of years down the line. The mistakes may seem to be small typographical errors, but there are resource implications. We have had Land Court cases that have lasted years over a section from which there has been something missing or in which there is ambiguity.

Paul Cairney: Just to complicate things further, if I were putting resources into something I would say, "Do it a bit later." Often, a key part of the stage 3 process is ministers saying to MSPs, "That amendment won't work, but if you trust us we'll go off and make regulations to address your points." I do not get a sense that many members actually check what the minister has done to address those points and the extent to which the aims of the bill have been changed. If there is a stage 1 process that sets out the clear aims, how those aims might be achieved and how that will be assessed, it makes sense to check, after the legislative process, whether any significant change has been made to the bill and whether its aims and how they will be assessed in the future have changed.

Margaret McCulloch (Central Scotland) (Lab): We have problems just now with the proposed new European Union procurement directive in that local authorities are interpreting it differently from each other, which is impacting on smaller businesses being able to tender for work. That, I keep hearing, is down to each local authority's interpretation of the procurement directive. Our procurement bill will go through Parliament soon, with the Infrastructure and Capital Investment Committee as the lead committee. Is there any way of testing the procurement bill, in its early stages, to get the local authorities' interpretation and understanding of it before it goes to the next stage, in order to ensure that there is clarity and understanding?

Russel Griggs: We have made two recommendations—one on alcohol licensing and one on knife crime. If you are producing a bill that will, in the end, have to be delivered by somebody, please go and speak to the person who will have to deliver it at the consultation stage, in the pre-legislative period, so that the legislation will be deliverable and the words of the guidance absolutely clear. We do not do that currently. In a lot of cases, the licensing clerks, the planning officers or the procurement officials do not get involved in the consultation process as officials in the Scottish Government do. In my view, if you are producing something that you want somebody else to deliver, you should get them involved at the beginning. We could do a lot more to get people involved at the beginning, which would prevent the confusion. You may not have to change the legislation; it could be a matter of making the guidance more precise. In a lot of cases, for all sorts of good political and commonsense reasons, fairly loose pieces of legislation are passed that require strong guidance for their interpretation. To resolve that, you could utilise more practitioner expertise at the beginning, during the consultation phase.

Jackie McCreery: At the end of the day, the courts can—

The Convener: Hang on a minute, Jackie. I will take your comments after we have heard from John Lamont and Michael Clancy.

John Lamont: My comment is now a bit out of context. It is a response to what Professor Griggs said about the problem that politicians sometimes create by amending bills without understanding the consequences or how the courts will interpret the amendments at a later date. It strikes me that that is not new. As long as we have had parliaments, we have had politicians and there is always going to be a danger of our creating problems or making mistakes. Until we remove

politicians from the equation, we will have that situation. It is very hard to see how we can have a foolproof system.

09:45

Michael Clancy: I am showing my age, but that comment puts me in mind of the fact that in 1426 the previous Scots Parliament decided that it would set up a commission to examine the law and to

"mend the laws that needed mendment".

This is not a new problem.

To a certain extent, the issue that Margaret McCulloch raises relates to something that Jackie McCreery mentioned, which is draft legislation being exposed in good time so that people can be encouraged to look at it, think about it and consider how they would deal with it.

That takes me back to the collaborative approach that I mentioned. We should consider who will deal with the legislation, which will depend on the kind of legislation that it is. If, for example, legislation is on procurement issues, there is a pretty easily identifiable group of people who will be involved: local authorities, Government agencies and big business. If, however, legislation is on protection from abuse, a more disparate group of people might be involved. If you can identify who will use the legislation and—to pick up Russel Griggs's point—engage with them at an early enough stage, you might get into a position whereby you can predict what people will think about a piece of legislation.

To establish how people will interpret legislation after it is made is a much more difficult proposition. Whatever one local authority, under a particular administration, may think about a piece of legislation, that is not binding on a local authority in future with a different administration, in much the same way as a Government does not bind future Governments. People's interpretation of legislation could change over time, and it could change in response to external stimuli, such as a decision of a court. That makes the business of fixing an interpretation and making sure that everybody sticks to it a very difficult proposition.

Jackie McCreery: An important point, which I think Michael Clancy has made, is to get the people who will be affected by the legislation involved in drafting the guidance. There should be consultation on the guidance so that, as far as possible, there is a consistent approach—if that is what is required—because guidance in itself can be ambiguous. The people who are affected should be involved.

We adopt such an approach in our organisation and it works well. We get involved with the Government to look at the legislation—whether we are writing it for our members or whether the Government is writing it and our members will have to comply with it—as it helps if we work together to produce something that everyone understands.

Paul Cairney: I would like to separate the technical aspect from the point of principle.

On the one hand, it is important for there to be as much consultation on bills before they come into Parliament for good technical purposes and to get the legislation right. On the other hand, a key criticism of Westminster when the Scottish Parliament was set up was that the Government used to argue that it could not change a bill to any extent because it had already gone through a meticulous process of consultation and drafting, and that, if the Parliament did anything to the bill, it would undermine it.

Part of the consultative steering group process was to encourage the publication of more draft bills, which means that they are more susceptible to amendment through the parliamentary process. Such amendment is the only way that we can demonstrate that the parliamentary legislative scrutiny process is important. If all that happens is that an almost finished bill comes into Parliament, goes on a conveyor belt and comes out almost the same, the committee process has very little point. There is therefore a trade-off between technical and practical issues and the principle of parliamentary scrutiny.

The Convener: That is interesting.

Helen Eadie: Having heard what we have heard, do you favour any particular new approaches to the scrutiny process, which could be piloted?

Michael Clancy: Last week, I was at a conference at which the Leader of the House of Commons, Andrew Lansley, was speaking about a project that the Office of the Parliamentary Counsel in Whitehall was proposing—the good law project. Everyone signs up to good law, and that department's report discusses what happens when laws become too complex—part of the issue that we are dealing with—as well as changes to parliamentary procedure in Westminster.

A procedure known as a public bill reading was piloted for a couple of bills. The bills were put into the parliamentary process by being put on the Parliament's website, and comments were invited from the public. The one with which we got involved was the Small Charitable Donations Bill. The public bill reading was not a particularly effective mechanism for us at the time, because, for a start, it was hard for people to find the bill on the website even if they had been told that it was there. There has to be a way of getting a bill into

the public eye, and of making it easy and accessible for people to look at and to give their views on it.

As Paul Cairney said, the CSG looked at the way in which the Scottish Parliament's procedures should operate to maximise accountability and transparency and to uphold the founding principles of the Parliament. It is important that we remember the balance between Government action and parliamentary scrutiny when we have a unicameral Parliament. In those circumstances, the committees of the Parliament must be strong enough to be able to hold Government to account, and part of the process of post-legislative scrutiny is holding Government to account for its ideas.

It will be difficult to get the balance right. To a great extent, the Parliament has succeeded in getting that balance pretty nearly right, but there are occasions when that might become more problematic than in other instances.

Jackie McCreery: Scottish Land & Estates has suggested—whether as a pilot or not—that one or two areas of law could be chosen per session, or per year, for a complete review. For example, nature conservation law is now massively complicated. There are pre-devolution acts that have been amended in different ways north and south of the border, with subsequent legislation, secondary legislation, guidance and codes of practice. That area of law is ripe for a total overview and possibly some consolidation.

There would be resource issues, but it may be a better idea to pick one or two areas of law and do a complete review—not just of the primary acts but of everything that goes with them—and to get that right, rather than to pick seven or eight pieces of legislation and do a summary review. An in-depth review of one or two areas would be preferable.

Professor Reid: I pick up on Jackie McCreery's example to show where there is a lack of political will. I have given evidence on the various nature conservation bills that have gone through Parliament. Committees and witnesses have consistently said that the law is a mess and needs consolidation. The Government has said, "Yes, we'll think about it—we appreciate the issue and we'll do something about it," but 10 years on there has been no progress.

Richard Lyle: On the point that Jackie McCreery and Colin Reid have made, is it up to the Law Society of Scotland, to Scottish Natural Heritage or to other organisations to suggest to Parliament that it scrutinise or review an act? As Fiona McLeod said, the Parliament has passed hundreds of bills, but many acts date way back—maybe not as far back as 1426, but to the 1900s. When people say things such as, "It's under the 1937 act," I think that we should be looking at those acts to upgrade or amend them. We would have to agree how many we could do. As Jackie McCreery has said, we could not do hundreds, but we could do three or four a year.

Professor Reid: Part of the remit of the Scottish Law Commission is to keep consolidation up to date and to tidy up the statute book, but it struggles to find the resources to do that, partly because even the commission needs support from within the departments and directorates of the Government.

If you look at court decisions, parliamentary committee reports, inquiry reports and publications from pressure groups, you will see that people have identified endless examples of areas of legislation that need to be improved and tidied up. However, if the topic is not a politically exciting one that spurs the Government on, things can sit around for ages.

I have been doing some teaching on the subject of English criminal law. There are two or three criminal law acts in England every year, and yet there are some well-known technical problems that the House of Lords and the Supreme Court have identified as needing to be tidied up but which are not being tackled. Some of those problems have been around for 20 years or so, but they have not been dealt with because they are not exciting.

The Convener: We have ranged over a number of topics. I would like to focus for a while on the issue of having a dedicated committee—perhaps the Delegated Powers and Law Reform Committee, which is the new title for the Subordinate Legislation Committee—as a means of ensuring that some post-legislative scrutiny is carried out.

As Paul Cairney said earlier, committees have the power to conduct post-legislative scrutiny. Some quite good work has gone on in that regard, but not an awful lot. As was said earlier, part of the problem is the fact that the Government always has a pretty full legislative programme, and there is a need to think about how we can build in time to do some post-legislative scrutiny, given that we have a limited number of members of Parliament and committees.

It would be useful to discuss the idea of having a dedicated committee to see whether we can get any common view on the issue.

Russel Griggs: First, I agree with John Lamont's view that we do not want politicians to stop being politicians, as that is what they are elected to be. However, we must accept that we will always find mistakes when we conduct post-legislative scrutiny.

The challenge for politicians, therefore, is not to politicise those mistakes, if I can put it that way. If we want to use post-legislative scrutiny to make legislation better—as Colin Reid said, to look for genuine mistakes—we probably need to set some rules around it. That is why we might need a committee to do the work, as it will have a precise role and might not end up arguing about policy.

When the regulatory review group reviews a piece of legislation, we do not argue with the policy. All we are there to do is to test whether the bill is delivering the policy—whether we agree or disagree with the policy is immaterial. If you want a committee to do that kind of scrutiny, there need to be some clear rules to ensure that people do not disappear back into the political debate about what the policy was in the first place.

Paul Cairney: I will give you a balanced, academic view, which means that I will contradict myself.

The CSG designed committees that would combine standing and select committee functions, so that specific expertise could be developed in a business-like way that would ensure that committees could really do something. The practical side, however, is that there is such a turnover of members that it is not always clear whether that has actually worked.

There is also a practical issue in the idea of having a dedicated committee to review legislation. It could well end up being a graveyard committee—people do not like that phrase, but I am talking about the kind of committee that you are sent to if you are unpopular or being punished.

The Convener: That is this committee.

Helen Eadie: Or the Delegated Powers and Law Reform Committee. [*Laughter*.]

Paul Cairney: A dedicated committee would need a status and prestige that ensured that people actually listened to it. If it were a graveyard committee, that could be a problem. I guess that I am suggesting that you should not change the committees too much but, to contradict myself, I can give the opposite argument.

If you have a dedicated committee for a certain issue—sustainable environmental policy, health inequalities or whatever—the problem is that you will find that virtually every issue cuts across committee areas. You will face that problem by either sticking with the subject committees to deal with that or completely rearranging them to deal with the fact that the Scottish Government has rearranged its functions to be cross-cutting rather than departmental. That is not something that we could recommend; it is up to you.

10:00

On the question about how to find the time, the only way in which the approach would work would be to get a commitment, when the legislation is going through, to finding the time in future. That goes back to my original point. If the Government's process involves saying, "In one year, three years or five years, we will produce a report for discussion on how well this has gone," that will provide the opportunity for some scrutiny.

Examples would be good. For me, the simplest example is the ban on smoking in public places. It could have been said, "Our initial aim is 100 per cent—or as close as that—compliance with the policy, and our longer-term aim is to reduce smoking in the population." There could be a discussion about both things: one is the fairly technical issue of whether the short-term aim has been achieved, and the other gives a chance to ask whether the policy has worked in the way that was intended.

Professor Reid: The idea of reporting is coming into legislation nowadays. There are many examples in the Climate Change (Scotland) Act 2009 of things that the Government must report on at certain stages. The Wildlife and Natural Environment (Scotland) Act 2011 added the duty for the Government to report every three years on compliance with the biodiversity duty.

In time, the Parliament will develop experience of seeing whether things are working. There is a requirement in the Wildlife and Natural Environment (Scotland) Act 2011 to report if delegated legislation is not introduced on training for people who shoot deer. There is a power to introduce regulations on training and if no regulations have been introduced by a certain time—it may well be that voluntary and other mechanisms work well enough—there will have to be a report.

The Parliament is already adopting that sort of technique, but there has not been enough time for practice to build up and to see how effective that is.

Michael Clancy: It is clear that, if some mechanism for post-legislative scrutiny was built into the legislation when appropriate, time would have to be allocated, as the Parliament would then be bound by the law. We are talking about whatever the legislation says. The minister might have to provide a report within a certain period of time, or there might be a sunset clause that brings the legislation to a close, pending a report.

I have cited an example of that. Pre-devolution, I was involved with the Crime and Punishment (Scotland) Act 1997 at Westminster. There was a requirement in that act to undertake a research project within a year of the legislation coming into

effect and for the report to be given to Parliament within three years—otherwise, a particular provision would lapse. That is clearly a way by which the Parliament can signal that such activity needs to be done.

Given that a requirement would be included in the bill, members could choose when things would be appropriate. For some bills, there is not necessarily a problem; for other bills, post-legislative scrutiny is an extremely desirable process to go through.

The Convener: So the approach could be tailored, depending on the bill. Am I right in thinking that, normally, it would be the Government that is asked to do something?

Michael Clancy: Normally, yes.

The Convener: Would that approach be appropriate for all bills or at different levels for different bills? If the Government had to review every bill, I could see the legislative programme after a few years consisting of reviews of bills and nothing else.

Michael Clancy: As I was saying, the process would be tailored, and a review would not be required for every bill. One could be carried out because some issue of considerable controversy had come up during the passage of the bill—perhaps from what witnesses had said at stage 1. It might have been ascertained that Parliament wanted to find out how a provision was operating in practice after three years.

We are already at the stage of examining legislation that was brought in during the early years of the Parliament. Your anxiety about reviewing legislation is a reality. That is the nature of law, and until we achieve my desired solution, which is codification, we will not be able to resolve it.

The Convener: Does the panel think that a combination of things might be the best way forward? That could involve building a review period into bills when appropriate; designating a particular committee and giving it a remit to set aside some of its time to choose certain acts; and leaving all committees with the power that they have at the moment to carry out legislative reviews.

Any committee could choose to examine any legislation in which it had been involved; the specialist committee would have the remit to set aside some time each year to do one or two bits of post-legislative scrutiny work; and provisions could be built into legislation such that Government would have to come forward anyway. A combination of those three things might work to provide a far greater level of scrutiny than what we have been getting up until now.

Jackie McCreery: I totally agree with what you have just described. We need some flexibility, so it is definitely right to have more than one avenue for approaching the matter.

One thing that attracted us to having a dedicated committee perform some function was that it would raise the status and profile of post-legislative scrutiny in the Parliament. I can see the risk that Paul Cairney has highlighted that it could become the graveyard committee, but I think that it would be the opposite. It would raise the status of the issue so that, as bills went through the committee stages, MSPs and everyone else would know that those stages were not the end of the process and that someone else would be looking at the eventual act after they had finished.

There is a risk that, once they have done and dusted a bill, subject committees might not have the inclination to go back and consider the same issues again, even if they have the time. There is an attraction to having another dedicated committee for post-legislative scrutiny.

The reporting mechanism could feed into that committee, which could ask for reports and delegate some aspects to subject committees. It could ask for independent research, and it could ask for the opinions of experts. Having a dedicated overseeing committee, with other avenues available, is a good suggestion.

Russel Griggs: I would add a fourth option. All the bills that the Parliament passes must be implemented by somebody, whether that is a regulator, a local authority, the police or somebody else. Perhaps you could also ask the body in question to have it as part of their remit—as a non-departmental public body, for instance—to review legislation in specific cases, to ascertain how it is operating and to report back to Parliament. It would become a statutory duty for the body to report back to Parliament on how pieces of legislation are working. You would not be doing all the work yourselves.

If the resource is in only one place, you will end up doing only what that resource can cope with. If there are various bodies whose job it is to do the same thing on a day-to-day basis, they can play a role in reporting back. You could specify what they would have to do.

Paul Cairney: On the question of having a separate committee, you could learn from your colleagues in equivalent committees. It is not the Subordinate Legislation Committee anymore—

The Convener: It is the Delegated Powers and Law Reform Committee.

Paul Cairney: There is a similar argument for delegated legislation: not only can subject committees consider it; there is also a dedicated

committee. It would be worth finding out from people on that committee whether that is what happens.

My gut instinct is that, because people know that there is a dedicated committee for something, they leave that work to them, and they deal only with those issues that are referred to them. If there were issues in which a subject committee said that it was worried about a piece of delegated legislation before the Delegated Powers and Law Reform Committee brought it to its attention, that might provide more of a sense of how things could work.

The Convener: Having conferred with the clerk, I can confirm that all delegated legislation goes to both the Delegated Powers and Law Reform Committee and the relevant subject committee.

Michael Clancy: I have a slight worry about the idea of subject committees undertaking post-legislative scrutiny while there is also a dedicated committee or an enhanced remit for the Delegated Powers and Law Reform Committee. That would take away time for subject committees to conduct inquiries. It could mean that while a subject committee carries out post-legislative scrutiny on an act—it may even look only at a specific part of an act—the dedicated committee is looking at the same act.

Such an approach would require a good level of co-ordination. Depending on politics—all this takes place within a political framework—there might not be as much co-operation between committees as would be ideally hoped for. I am therefore a little cautious about subject committees undertaking such post-legislative scrutiny if there is also a dedicated committee.

Professor Reid: The problem is that one cannot really draw a division between post-legislative scrutiny and an inquiry into a subject in which one or two acts are particularly important. The same work will be done; it just depends on how it is labelled. I have problems with the idea that post-legislative scrutiny is completely free standing and separate from the rest of a committee's work.

Michael Clancy: I can imagine a circumstance in which the inquiry comes up against an issue that relates to post-legislative scrutiny. It is at that time that the dedicated committee should be brought in and told, "Here you are. Our inquiry has thrown up an issue about this statutory provision. Remit to you."

Jackie McCreery: My final point is that, if we had a dedicated committee, we should not forget that it should also look at good practice. Its work should not be all about looking at what has gone wrong; it is important that it looks at what has worked well, including particular techniques of implementing law, and can share good practice.

The Convener: Does anyone else have any points to make before we wind up?

Paul Cairney: To oblige Governments to state clearly what their aims are and how they can be assessed is easier said than done. A good way to demonstrate the benefit would be for this committee to set out its aim in making recommendations on post-legislative scrutiny and how the success or failure can be measured. That would show how complicated such a thought process is and would put in mind the extent to which Governments can set out their aims and how they can be assessed in each circumstance.

The Convener: Thank you all very much. That was useful. Your contributions, along with those made at our previous evidence session, have given us plenty of food for thought. You will all get a copy of the committee's report; it will keep you riveted for days on end.

I suspend the meeting so that the panel can leave and the table can be rearranged.

10:13

Meeting suspended.

10:17

On resuming—

Cross-party Groups

The Convener: Item 3 is consideration of responses received from cross-party group conveners. At the meeting on 23 May, members will recall that we agreed to write to the cross-party groups on beer and the brewing industry, co-operatives, park homes and sexual health because it had been identified that they had not met for more than a year.

The conveners' responses are annexed in paper SPPA/S4/13/10/3, which members should have before them. Do members have any general comments, or would you prefer to deal with the cases individually?

Helen Eadie: The update on cross-party groups has proven to be a worthwhile exercise. The paper is helpful. I am particularly pleased to note that one of the groups has offered to lapse its membership. That demonstrates how things sometimes move on and issues change.

The co-operatives group met recently. The park homes group also met recently; it has established a programme of activities. That is good to see. I note that there is a question mark over the beer and the brewing industry group.

The Convener: I agree that that is encouraging. We should perhaps simply note the fact the co-operatives and park homes groups have held their annual general meetings and that they are back on track, and that the sexual health group is to lapse.

The convener of the beer and the brewing industry group has asked for guidance on whether the group should lapse or sit in abeyance. I do not think that there is a process to allow groups to sit in abeyance. I therefore recommend that we suggest to the group that it should lapse. If there were a future need for it to be reformed, it could come back and make a case for its re-establishment.

Richard Lyle: I agree. I do not think that there is a case for groups to sit in abeyance, so the group should lapse. Under the new procedures, it will have to come back and present a case if it wants to be re-established.

The Convener: Do members agree with that?

Members *indicated agreement.*

10:19

Meeting continued in private until 11:15.

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