

## Submission to the Commission on Parliamentary Reform

### Checks and Balances

*“the very end and fundamental aim: ... not that they by crossing and jarring should hinder the public good; but that ... the power is put into divers hands, that one should counterpoise and keep even the other” [Philip Hunton, A Treatise of Monarchy (1643)]*

The specific wording in the Commission’s remit refers to the parliament’s ability to be sure that it “has the right ‘checks and balances’ to enable effective conduct of parliamentary business.” This note suggests that such assurance will not exist without additional measures and probably institutions.

Written responses published by the Commission up to 26 March focus in most cases on MSPs and how they interact with the government, principally through the work of Committees. I draw attention to four issues which recur in the submissions:

- Need for more time (011, 028, 030, 037, 046, 047, 070)
- Need for more access to or use of expertise (004, 039, 040, 051)
- Need for integration particularly across “silos” but also viewing holistic effects (029, 058)
- Need to avoid excessive partisanship (057,058,066)

Most responses implicitly assume that “parliamentary business” consists only of what is done by MSPs during their personal research and their time in Committees and debates - and that the “checks and balances” called for need go no farther than modifying the process followed there<sup>1</sup>. However the ‘effective conduct of parliamentary business’ cannot be assessed without considering the purpose of a parliament and the institutional context in which the parliament operates - and what is in place to counter the likely sources of ineffectiveness, both in general and in the specific Scottish political environment.

### Effectiveness

Three functions are commonly expected of parliament in a democracy: the examination and approval of proposed legislation, the formation and approval of a government, and “holding the government to account.” In my view the effectiveness with which parliamentary business is conducted should be gauged by the extent to which its performance of these functions achieves desirable results. That is, the judgement should depend on whether the parliament does as well as it could in securing the quality of laws and services. Committees are one mechanism and they may often be effective in some respects but the Commission should be open to considering whether ensuring effectiveness may call for something more radical than merely modifying the Committee process in the light of the inward-looking problems identified in most of the responses.

### Legislation and Regulation

The parliament’s role in the legislative process not only includes refining the text proposed by the government but also often seeking compromises, clarifications or assurances to allow bills’ passage; attention also needs to be given to secondary legislation.

In addition to legislation much of the impact of government currently arises through regulation; the role of government is often to appoint and monitor regulators or to induce others to develop and abide by voluntary regulation. The system of checks and balances needs to extend to these initiatives of government as well as legislation.

Critical to consideration of both legislation and regulation is an understanding of what is intended to be the outcome, insight into the feasibility and likelihood of the proposed outcome, and the ability to assess whether changes are having the forecast effects. The current approach is to delegate this to a forum, the Committee, composed of MSPs who are not part of the government and who need to gather and assess evidence in a short

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<sup>1</sup> Bundling all these activities together as “scrutiny” seems to me unhelpful. Several of them, and different stages in the processes, call for different skills, inputs and types of engagement – if they are to be as effective as possible.

period of time but depend largely on the government for detailed information. The question arising is whether such a body has the information and the authority, as well as the time, to make an input that results in the optimum outcome.

## Examination of proposed Legislation

The four issues identified above highlight challenges for the examination of proposed legislation. Provision of additional time can be contemplated but the demands on MSPs' time create a constraint. This can to some extent be alleviated by better support at a technical level and by a more formal input from external sources, as advocated here, but the political dimension needs to be left in the hands of elected members.

The holistic, cross-silo viewpoint can to some extent be addressed by inter-Committee collaboration but where it is combined with a need for expert input the result is likely to be less insight rather than more. This needs to be addressed through the establishment of trusted external expert sources which can take a wider viewpoint (see below).

## Formation of a Government

It is not the intention of this note to address the issue of how the negotiations to form a government take place. It is however clear that in a system with more than three parties there are liable to be situations where forming a coalition is necessary but where agreement on policy is so difficult as to produce either stalemate or a 'horse trading' of favoured initiatives without a coherent shared vision.

While there is evidence that countries can continue to function while awaiting the formation of a government, through the efforts of the civil service and the supervision of "demissionaire" governments, the effective functioning of the parliament is judged by whether there is more than simply the tolerance of a purely responsive administration. A basis for initiatives, and for the assessment of options, is required even in the interregnum between approved governments.

With this in mind it is important that MSPs have the freedom and facilities to form working alliances through which possible initiatives can be defined and canvassed. Such fora need not correspond to the pre-existing Committees but must none the less have similar access to information and the ability to call upon the support of the civil service in elaborating proposals (which in turn will be subject to review by Committees). No conventions or infrastructure for this appears to exist or be contemplated at present.

## Holding the Government to Account

The government requires to be held to account for a variety of functions

- Content and quality of legislation
- Implementation of initiatives and policy on which its mandate rests
- Ongoing effective conduct of its executive responsibilities

In all these areas the effectiveness of parliament's involvement depends on the ability to obtain and analyse information on what has happened and to judge what is likely to happen. Lack of time, as noted by many, has an impact both on the gathering of information and on the consideration or analysis needed to use it. Lack of time may also reduce the scope for obtaining and assessing input of expertise; thus enhancing the relative impact of selective inputs from lobbyists and interested parties.

## The Model Parliamentary System

Scotland is like other countries in that the pressure of public opinion and the exigencies of party politics are liable to lead governments to precipitate actions, to overpromising and to trying to hide evidence of failure. Members of Holyrood Committees have the political sensitivity to detect that such pressures are at work; and the subject orientation as opposed to a purely bill orientation of Committees gives some hope of accumulating experience<sup>2</sup> and uncovering snags. There is asymmetry, however, between the ability of the government to

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<sup>2</sup> Hopefully reducing the risk of policy reinvention – a characteristic of the Westminster system as highlighted in the Institute for Government's recent publication "All Change"

model outcomes and the ability of the Committee(s) to undertake similar modelling and identify alternatives and/or vulnerabilities.

Recent IT failures (NHS24 and i6) have illustrated that, as in England with NHSIT and Universal Credit, external commentators have been able to identify unrealistic expectations well before government Gateway reviews. While questions could have been raised through the Committee system, the parliament has no systematic access to independent and expert investigation and assurance.

While major change programmes beyond the IT field are also subject to “misplaced optimism” the challenge for the Committee system is that their impact cuts across a variety of policy areas. The issue is in part that despite the merits of the current system it feeds perspectives which reflect the silos within which government policy making occurs. And more seriously that the assessment of government interventions requires an holistic viewpoint and consideration of how interactions will evolve over a time-frame that extends beyond the horizon for the current administration. This calls for forecasting based on a level of social and economic modelling that is not available. The question posed here is how such forecasting can be put at the disposal of the parliament.

### Forward-looking inputs

While post-legislative scrutiny has been introduced, this does not answer the need for greater depth in pre-legislative forecasting. As the process has not yet settled down it is unclear whether it will look into ongoing implementation actions and form judgements about their prospects for success. However the backup currently available would not support any in-depth forward looking.

Within the Scottish institutional framework only the Scottish Fiscal Commission is charged with a forecasting role. This however revolves around budget questions and government initiated enquiries. This contrasts with the Dutch *Centraal Planbureau* (Bureau for Economic Policy Analysis) which assesses not only the developing economic situation but also the likely financial consequences of the policy programmes of several political parties (at their request, since such an assessment is a valuable asset in electoral terms). MSPs would be well served by being able to have such support in looking at alternatives to government proposals. Better still would be to extend the reach of such forecasting to include social effects.

Audit Scotland makes comments on ongoing activities. Some of these can be read as implying how things may develop in the future, however, like NAO, its statutory remit is retrospective which limits its scope. Its work programme, though well-structured and diverse, does not support the development of any comprehensive socio-economic assessment tools. Extending its remit into explicit forecasting would conflict with the professional focus of audit work and divert it from its current valuable function.

The work of the Scottish Law Commission can be seen as providing an independent input to the work of the parliament in which it takes a long-term forward looking perspective in that it considers the probable effects of proposed changes inspired by inputs to its consultation process. It is, however, not clear to me that such forward thinking is integrated or reconciled with other perspectives on the future.

As noted, the governance of modern society involves multiple regulatory regimes, for many of which the government is accountable or highly influential. Implicit in these regimes are forecasts of how their effects will play out; and it is appropriate for the parliament to consider whether regulation is working and whether it being conducted on a coherent and society-wide basis. No officially recognized source of society-wide expertise exists for this function, though of course bodies such as the Regulatory Review Group and a variety of civil society bodies are keen to offer comment from their own particular perspectives. In dealing with such input the parliament would be well served with some basis for discerning whether they were based on sectional rather than national interest. And this is unlikely to be clear in the current *laissez-faire* approach.

### Comments on Existing Proposals

Many proposals to improve “scrutiny” are circulating. Most focus on the lack of time and assume that increasing this will improve quality. Some comments:

A Second Chamber. The most radical approach is represented by the Foulkes/Suttie proposal to amend the Scotland Act by creating a Scottish Senate. While this would provide an additional cadre and increase the number of politician-hours that could be devoted to 'scrutiny', the issues of expertise, comprehensiveness and coherence are not solved by increasing the number of politicians involved (albeit that a list system does allow parties to bring expertise in by including experts in their lists). The need for support exists here as well.

Past Presiding Officers are unanimously of the opinion that there is a need for more scrutiny in the legislative process. Lord Steel, in rejecting the idea of a separate second chamber, has argued for an extension and specialisation within the existing parliament. Others have focussed on time and the number of MSPs. These approaches again all rely on the work of MSPs whose selection is based on party and policy issues rather than on their ability (or willingness) to assess legislation or practice.

Citizen involvement has been advocated in various submissions and can take different forms ranging from online to Citizen Councils. This undoubtedly has value in providing an articulation of – or implicit demand for – the holistic approach that current approaches struggle with. The response from the parliament could be to respond politically to the input, but this does not imply any increased ability to achieve the results which the citizenry is seeking – unless there is new insight into details, likely impacts, etc. Sorting out which inputs from citizens hold important lessons is a difficult, valuable but specialised task.

## Conclusion and Suggestion

As the parliament comes to grips with the greater range of powers Scotland has now acquired, it is more possible than before for governments to shape the social and economic structure of the country along its chosen lines. Previously the limited powers available were easily dealt with in "silos" and the use of standing Committees gave some assurance of continuity and cumulative learning. Much of what had to be considered was either sharply contested policy issues or detail of implementation within a defined area; and with limited time available and limited exploration of alternatives, the Committee structure functioned adequately. In the new situation it is unlikely that the parliament will maximise its effectiveness unless MSPs are provided with backup to expand their access to reliable forecasting of likely effects and means to explore alternative to what is put in front of them by government. Few legislative bodies have a high level of support of this sort, but that should not constrain the aspiration of the Scottish parliament to be a model for others.

To put the conclusion in the form of a concrete proposal – which would be only one of many possible approaches – I suggest creating a body as follows

- On the analogy of the Scottish Fiscal Commission, independent of government
- Forward looking, creating forecasts of the social as well as socio-economic effects of legislation and programmes of governmental action
- Holistic in its approach, particularly looking at interactions amongst policies
- Available to parties and MSPs committees to assess alternatives to government policy
- With access to (commissioning) integrated technical assurance studies of projects and programmes, both at its own initiative and on request from the parliament.<sup>3</sup>

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This note reflects my personal view not that of the institution

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<sup>3</sup> While this appears to duplicate Gateway reviews etc, these are reports to the government of the day about matters for which it is responsible; they are as such not independent, and have on numerous occasions been found to be optimistic.