

Enhancing Scrutiny in the Scottish Parliament Submission to the Commission on Parliamentary Reform¹

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1. Summary

In this submission we consider:

- The roots of the Scottish Parliament's establishment, and especially the development of four key principles that informed its creation: sharing power, accountability, access and participation and equal opportunities.
- The role of committees in the Scottish Parliament, taking account for how they were originally conceived but also how they came to fruition. We note that committees have generally fallen short of expectations.
- We consider two forms of enhancing scrutiny in the Scottish Parliament:
 - o The introduction of elected conveners, which would:
 - Ensure stability and prevent distractions from high committee turnover;
 - Lessen the influence of party whips;
 - Encourage a cultural shift for the executive to take committees more seriously; and,
 - Encourage the emergence of an alternative career path for MSPs.
 - o The introduction of a parallel chamber, similar to Westminster Hall in the UK House of Commons or the main committee in the Australian House of Commons, which would:
 - Provide additional time for private business, such as debates;
 - Enhance opportunities for committees to discuss their inquiries and reports;
 - Serve as an opportunity to raise business that would otherwise fail to find time in plenary session, and in a less rigid environment.
- We believe that these two proposals would ensure further scrutiny and accountability in the Scottish Parliament and enhance the distinct identity of the Parliament over the Scottish government.

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2. Introduction

The Commission on Parliamentary Reform was established in October 2016 by the Presiding Officer, Ken Macintosh MSP, to consider possible ways in which the Scottish Parliament can be improved. In particular, the remit of the commission is to consider ways in which the Scottish Parliament can (Scottish Parliament, 2016):

- Be assured it has the right checks and balances for the effective conduct of parliamentary business;
- Increase its engagement with wider society and the public; and,
- Clarify its identity as distinct from the Scottish government.

This paper addresses how the Parliament might strengthen scrutiny and accountability.

The four key principles that informed the establishment of the Scottish Parliament and continue to inform its operation were first outlined by the Consultative Steering Group:

- *sharing power* between the people, the legislators and the executive;
- *accountability* of the executive to the Parliament and both accountable to the people;
- *access and participation* of the people and legislators in decision-making;
- promotion of *equal opportunities* for all.

These were, in effect, reactions to the perceived malfunctioning of the system of parliamentary democracy at Westminster (Mitchell, 2009). There was a clear view running through the work of the Constitutional Convention and in critiques of the pre-devolution constitutional order that power was overly concentrated in the hands of the executive. The Convention considered at length means of shifting the balance of power in favour of a new legislature and to the public at large at the expense of the executive branch of government. The focus on greater accountability reflected the view that Scottish affairs had not been adequately called to account in parliamentary debates and questions in Westminster. There was a sense that access and participation, especially amongst women and ethnic minority communities were severely limited. In essence, the founders hoped to shift the balance of power along the continuum offered by Nelson Polsby (1975) in his classic account of the relations between executives and legislatures from an ‘arena’-based legislature to a ‘transformative’ one. The extent to which this was achieved is open to debate but, while the founders intended the new Scottish Parliament to a break with the past, the functioning of the Parliament has been remarkably similar to that at Westminster. Indeed, the aforementioned perceptions may be seen to have been a mixture of serious critiques and caricatures of Westminster practices (Mitchell 2010) and are dated given the reforms that have occurred in parliamentary procedures and practices in the House of commons since 1997.

3. Scrutiny in the Scottish Parliament: the role of committees

In his study of Congressional Government, Woodrow Wilson remarked that, ‘Congress in session is Congress on public exhibition whilst *Congress in its committee-rooms is Congress at work*’ (Wilson, 1981 [1885]: 69, emphasis added). Wilson’s observation is just

as true of Westminster and Holyrood as it is of Congress. Any would-be transformative legislature requires an effectively functioning committee system. Committees can have a range of functions, take many forms and vary according to context (see Strøm, 1998: 29). The effectiveness of parliamentary committees is widely acknowledged to depend on a number of factors. The World Bank Institute (2014: 19-20) suggested the following:

- A clear *mandate*: clear roles and responsibilities of the committee.
- The *size* of the committee: if a committee is too large or too small it renders it ineffective; large committees become unwieldy and small numbers limit the quality of ideas needed for effective work.
- The skills of the committee *chair* in managing activities and meetings of the committee.
- The quality of *support staff and resources* available to the committee.
- Consensus-building capacity.

These factors were, directly or indirectly, considered in debates about Scottish devolution. Ultimately, this led the Consultative Steering Group (1998: para 10) to recommend that committees should have the capacity:

- To consider and report on the policy and administration of the Scottish administration;
- To conduct inquiries into such matters or issues as the Parliament may require;
- To scrutinise primary and secondary legislation and proposed European Union legislation;
- To initiate legislation;
- To scrutinise financial proposals and administration of the Scottish Executive (including variation of taxes, estimates, appropriation and audit); and,
- To scrutinise procedures relating to the Parliament and its Members (including adherence to those procedures).

The extent to which committees have had the capacity to perform these varied and demanding functions effectively has been limited by a number of factors that have been noted over many years by various studies (Cairney and Widfeldt, 2015; Johnston, 2009; Mitchell, 2010). This is particularly important in a unicameral legislature without a second chamber to perform similar functions as those that might be performed by committees. The pattern had been established early on as outlined in what remains the most forensic analysis of the workings of the Parliament, produced one year after its establishment (Winetrobe, 2001):

- The chamber became more central than initially envisaged and overshadowed the work of the committees especially in media and public attention;
- The Parliamentary Bureau had become less open, transparent and inclusive than envisaged as well as more formalised than Westminster's 'usual channels';
- Membership of committees remains under the control of private party caucuses, in the old Westminster tradition;
- Considerable heavier workload than anticipated especially in the early years in terms of legislative output of the Parliament thus limiting committee scope for other activities;

- Absence of scrutiny of ‘core executive’ functions such as a strategic oversight of freedom of information, public appointments ministerial ethics, quangos agencies and public service reform;
- Turnover of members and convenors in part as a consequence of the small size of the Parliament has limited continuity of service and thereby accumulation of expertise and authority;
- Committees suffer from addressing extremely important but often matters which attract little public or media attention thus limiting public authority and often only attract attention when the committee or member adopts an adversarial or partisan approach;
- The most visible aspect of the committees’ work identified after one year has remained how busy they are.

In essence, the committees have not been the powerhouses of the Parliament as envisaged by many at the outset. They have operated well within the limits set by capacity, structure and resourcing.

4. Enhancing scrutiny

There are a number of ways that scrutiny in the Scottish Parliament can be enhanced. Here, we cover two innovations: the election of conveners and the introduction of Westminster Hall-style debates.

4.1. Election of conveners

One simple but arguably also the most effective way to enhance the power and status of Scottish Parliament committees is to loosen the control of political parties over committee membership, especially convenerships. Conveners of committees are crucial to the functioning and effectiveness of committees (Kelso, 2016; Ogle, 2004). Conveners are assumed to take on a leadership role in inquiries, especially with respect to deciding the focus of inquiries, chairing meetings, and fostering consensus on issues. Due to their centrality, conveners of parliamentary committees are also often central to developing norms and values of a committee and, importantly, representing the committee in wider relationships both within their legislature and beyond it through media and public engagement (Geddes, 2016: 111-36). These factors are applicable to the Scottish Parliament, especially in creating a more distinct identity of the Scottish Parliament and enhancing public engagement.

International comparisons find that, generally, chairs of committees are ‘in practice decided in the parties, and indeed by the party whips’ and that, ‘nowhere are committee chairs elected even in their party groups, let alone in the chamber as a whole’ (Russell and Paun, 2007). Since the publication of this study, significant reforms have taken place in the UK Parliament, especially with regards to its House of Commons select committees. The lessons from the House of Commons are useful comparators because both Holyrood and Westminster have similar systemic features (e.g. no separation of powers, tight control by political parties, etc. (Mitchell, 2010)).

In 2009, the House of Commons appointed the Select Committee on the Reform of the House of Commons (or Wright Committee for short). It considered two main areas of possible reform: select committees and scheduling business in the House, and concluded that, while there were strengths to the system that existed at the time, there were ‘strong feelings that the system should be reformed’ (Wright Committee, 2009: para 71). It argued that the House of Commons should choose which of its members should scrutinise the executive, not the executive itself. As a result of these sentiments, it recommended committee chairs should be elected by secret ballot by the whole House (*ibid.*: para 80). These reforms were instituted in the 2010 parliament, where chairs were allocated to parties on 23 May 2010 and elected on 10 June 2010. During this process, 56 candidates put themselves forward for 23 chairships (or 49 MPs for 16 contested posts), while 57 stood in 2015 for an equivalent number of chairships (or 47 MPs for 13 contested posts). The competition for these posts demonstrates that these are sought-after positions that increasingly carry respect and influence amongst MPs and wider policy circles.

Directly electing chairs has resulted in an important shift in the balance of power between executive and legislature, even if this is predominantly a cultural one. Russell, for example, noted that it has created a ‘kind of vibrancy and sense of an outbreak of democracy’, while Tony Wright maintained that ‘huge gains’ had emerged from the reforms (Political and Constitutional Reform Committee, 2013: para 9 and para 12). This is supported by interviews that were undertaken during the 2010 parliament about committee scrutiny. For example, one chair, who had been in place both before and after the Wright reforms, noted that it had ‘raised the status of committees very significantly and given them more autonomy and independence’ (interview with committee chair 01). In particular, the election of chairs has increased the respect and prestige not only amongst fellow backbench MPs, but also among government ministers and, perhaps most importantly, outside Parliament through increased coverage of committees in the media (Dunleavy and Muir, 2013). One chair noted: ‘in the eyes of the media, you’re ... a media expert and go-to person of everything that happens in this [policy] area’ (interview with committee chair 09).

The conception of greater independence, mixed with an electoral process that allows participation from across the House, means that, chairs conceive of themselves as playing a wider House role:

I just get the sense all of the elected committee chairs have been empowered by that [being elected]. That they feel they’ve got a House role. That they’ve been endorsed by the people across the House, not just their own side. And I think that’s given us greater licence to speak up and out (interview with committee chair 05).

This quote, echoed by other interviewees, is very important in indicating the changed perspective of chairs, especially their confidence and authority in setting the agenda on their committees. Indeed, another chair said of her chairship: ‘it’s my role in Parliament. It’s completely my role in Parliament’ (interview with committee chair 08). While she lamented that it has affected her other commitments, it also demonstrates that becoming chair of a committee has grown in prestige and brought strong commitment from its office

holders. A more subtle effect is that chairs, in taking this leadership role, are key for the stability of a committee over the course of a parliament (or two parliaments if re-elected), which is different to both members and staff, whose membership or support for committees is far more fluid (as, indeed, in the Scottish Parliament).

In the House of Commons, chairs are the single-most important actors in developing the norms and values of a committee by being in place for up to 10 years and committed to their role (thereby providing sought-after stability). They are also unafraid to speak out (thereby asserting their independence from government) and, in doing so, willing to set their own agenda, to which the media pays attention (thereby asserting a strategic, leadership role). The evidence from the House of Commons is valuable. It suggests that the Scottish Parliament could similarly improve its committee system through the introduction of directly-elected conveners. It would:

- Ensure stability and prevent distractions from high committee turnover;
- It would lessen the influence of party whips;
- It would encourage a cultural shift for the executive to take committees more seriously; and,
- It would also encourage the emergence of an alternative career path for MSPs.

4.2. A parallel chamber?

In 1999, the Modernisation Committee of the House of Commons proposed the introduction of a parallel chamber in order to alleviate time pressures found in the main chamber regarding constituency representation, debating time on issues of the day, and debates on select committee reports (Modernisation Committee, 1998: paras 84-89). This borrowed initial ideas from the Australian House of Representatives, which also has a parallel chamber, known as 'the main committee'. The main committee was originally established in 1994:

As a means of enabling the House to deal more effectively with legislation, but enabling non-controversial legislation to be discussed at greater length while freeing the Chamber for longer debates on more controversial issues. Its remit was subsequently expanded to include debates on committee reports and Government papers. At the end of last year a further provision was made to permit short adjournment debates and statements by Members (Modernisation Committee, 1998, para 91).

Calls were made for something similar to be introduced in the UK House of Commons, and the Modernisation Committee (1999: para 23) recommended the introduction of a parallel chamber in the form of Westminster Hall in order to:

Offer fresh opportunities to back-bench Members and enable the House to hold the Government to account on a wider range of issues. We see Westminster Hall as a venue for business for which there is a substantial demand but an insufficient supply of time on the floor, and for business which cannot be taken at all at present, rather than as a place to which portions of the House's existing business would simply be transferred.

The rationale for Westminster Hall debates was to make more time available for scrutiny in the House of Commons. It would be institutionally distinct from the main chamber in that it would not be allowed to hold divisions (which means that the style of debates would also be different). Alexandra Kelso (2009: 60-1) identifies three purposes to Westminster Hall debates:

1. It would provide additional time for private Members' business, such as adjournment debates.
2. It would enhance the available opportunities for select committees by finding more time to discuss their work and reports.
3. It would serve as an opportunity for business that failed to find House time, such as green paper debates and English regional concerns.

This rationale was promoted in subsequent debates that established the parallel chamber on an experimental basis. However, while this reform was introduced to enhance scrutiny, Kelso also notes that it was: 'constructed with an eye towards moving non-contentious legislation away from the main chamber, and of creating time elsewhere for backbenchers', which subsequently means that 'Westminster Hall has not really contributed to enhanced parliamentary effectiveness, but has instead enhanced efficiency by moving yet more business out of the main chamber' (Kelso, 2009: 61-2). Philip Norton (2013: 32) makes a more positive assessment of these in arguing that MPs have come 'to see it as a means of supplementing and not supplanting proceedings in the chamber, providing a valuable opportunity to raise issues'.

Today, Westminster Hall is home to a number of scrutiny issues, including:

- Adjournment debates (two debates of one-and-a-half hours each on broad subject matters, and three half-hour debates), chosen in combination by the Backbench Business Committee or by ballot.
- The Liaison Committee can choose to hold a debate on a select committee report on Thursday afternoons for up to three hours.
- Since the introduction of the Petitions Committee, it can determine whether a sitting should take place on a Monday to consider one or more petitions or e-petitions, which may last for up to three hours. One high-profile example is the debate to 'ban' Donald Trump from the UK in January 2016.
- Cross-cutting oral questions took place for a brief time in the 2003-04 Session. These did offer an opportunity to ask questions about a subject that involved a number of departments rather than about a single one, but were abandoned since 2004.

Proceedings are televised and published as part of the Official Report (*Hansard*). They are chaired by a member of the Panel of Chairs under arrangements supervised by the Chairman of Ways and Means (who has overall responsibility for proceedings) (for a summary, see Rogers and Walters, 2015: 259-61 and 289-90). All MPs that wish to attend may do so and, unlike the main chamber, decisions in Westminster Hall may be taken only unanimity – votes are not permitted, but may be referred to the main chamber. This means that these debates occur in a less partisan manner.

There is a case for considering whether something similar could be adopted at Holyrood. There would be difficulties and drawbacks but whether on balance the case for such an

innovation outweighs is a matter for consideration. The case against relates to points made above: members are already over-stretched; such a forum might draw attention away from the work of committees; and there would be issues of capacity to consider. On the other hand, such an innovation might offer an alternative forum with an alternative remit, debating matters that rarely make it onto the agenda in the chamber, are focused on reports of committees and/or explicitly adopt a long-term focus, allow for creative ways in which the public might be able to have input into MSP debates, etc. At this stage, our recommendation is only that further consideration be given to what has proved to be a successful institution within the Westminster system.

6. Conclusions

In this submission we have considered:

- The roots of the Scottish Parliament's establishment, and especially the development of four key principles that informed its creation: sharing power, accountability, access and participation and equal opportunities.
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