

## **STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE INQUIRY INTO THE PROCEDURES FOR CONSIDERING LEGISLATION**

### **WRITTEN SUBMISSION RECEIVED FROM PROFESSOR PAUL CAIRNEY**

My submission is primarily a commentary on the 26 submissions (many of which came from committees). Many submissions argue that: (a) the Scottish Government should provide much more (and more timely) explanatory information to accompany their amendments and memoranda; (b) there should be few ‘bounced’ amendments (the Scottish Government amends a bill at the last moment which minimises the time for scrutiny); and/ or (c) all Scottish Government bills should be published in draft, before submission to Parliament, to allow the public and interest groups to examine it while there is a reasonable chance to influence it. There is more frustration with tight timetables, and insufficient information and scrutiny, at the end of the process than at the beginning. Many recommendations could be addressed, to some extent, with a change to the Standing Orders regarding deadlines, the provision of information and the gaps between stages.

The short history of the Scottish Parliament suggests that the committee is looking at perennial problems linked to Scotland’s Westminster-style political system.<sup>1</sup> The Scottish Government has the vast majority of resources to research and produce policy, and the Scottish Parliament has minimal resources (such as time and staff) in which to provide meaningful scrutiny. It also does not get involved until a complete draft bill has been produced. In this system, the Scottish Parliament will always feel that it does not receive sufficient information or time to allow it to provide effective scrutiny.

This is a political as well as a technical consideration. We would expect the Scottish Government to respect the Scottish Parliament process, but also to use its advantages (e.g. most Scottish Governments have enjoyed a parliamentary majority) to deliver its legislative programme, as close as possible to its original intentions. A more assertive Scottish Parliament may influence Scottish Government procedures, but: making a case for the delay of a bill (or removal of major sections) takes a large amount of time and attention (and, if an MSP is criticising her/ his party in government, courage) to get right; not all MSPs are driven by a desire to provide in-depth improvements to Government legislation; and, they have limited time to do so - given, for example, their constituency and party commitments.

#### Specific recommendations in the submissions:

**MSPs should be given time, after stage 3, to reflect on amendments before the bill goes for Royal Assent.** My view is that the system is not set up to produce this result; that we should not rely on parliamentary scrutiny to make bills technically competent. Rather, the vast majority of resources, to draft and amend the bill, are held by the Scottish Government. Many MSPs do not have the training or skills in legal drafting to know if a bill is sophisticated or full of holes, or how it relates to a raft of connected bills. It is also difficult to imagine how to shift completely from a partisan stage 3 process to an apolitical/ technical stage 4 process in which MSPs are simply pointing out mistakes in a draft.

The more practical alternative is to ensure more time for the Scottish Government to get the post-stage 3 process right, combined with a way for it to consult the Scottish Parliament (and perhaps seek its approval) on any corrections to the bill. This move could be usefully combined with the recommendation, by the Delegated Powers and Law Reform Committee, that the Scottish Government provides a more meaningful memorandum on all bills/ amendments conferring delegated powers on Ministers.

**Interest groups should have more time to consider stage 2 and 3 amendments.** This is an area in which there are major trade-offs between aims in the Scottish system. One aim is a Scottish Government responsive to Scottish Parliament scrutiny, producing amendments that reflect their concerns expressed at stages 1 and 2. Another aim is a coherent bill based on widespread consultation and considerable research before the bill is presented to the Scottish Parliament. In a unicameral system, the legislative process is ‘front loaded’ – almost all of the substantive work should be done early, partly because there is no second chamber there to produce a pause in which to consider further amendments.

So, the request by many groups for more time to consider amendments, and to receive more Scottish Government information on the meaning of the amendments, is a good one – it would make the process more efficient (explaining an amendment once makes more sense than multiple groups trying to make sense of it) and more equitable (some groups have more resources to scrutinise policy than others). However, so too is the argument that the bill should not be amended too much at such a late stage.

One response to the problems of tight stage 2 and 3 amendment processes is to introduce more meaningful pre-legislative scrutiny, with: (a) MSPs and committees consulted at the same time as groups, so that Scottish Parliament concerns can be incorporated before the bill reaches a full draft; and/ or (b) Scottish Parliament committees more assertive at stage 1, when deciding if the draft bill is based on sufficient consultation (see the Health Committee’s unusually assertive stage 1 report on the Adult Support and Protection (Scotland) Act 2007). In other words, the stage 2 and 3 processes may seem ‘last minute’ partly because the Scottish Parliament does not get involved until the ‘final hour’.

**The amendments process is almost impossible for the public to follow.** I only felt that I understood its vagaries after studying the outputs of a full session. I know of only a handful of people in this universe willing to do the same. It is unlikely that many people will understand the effect of an amendment on a draft bill. The Scottish Parliament could supplement the provision of information by the Scottish Government, to further publicise the bill and its understanding of the stakes at each stage (to a very small interested public). However, this should not come at the expense of resources that could be used to make sure that all MSPs understand the effects of amendments.

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<sup>i</sup> See Cairney, P. and Johnston, J. (2014) ‘What is the Role of the Scottish Parliament?’ *Scottish Parliamentary Review*, 1, 2, 91-130 <http://paulcairney.files.wordpress.com/2013/09/scottish-parliamentary-review-cairney-johnston-2.pdf>