SPICe Briefing

Pàipear-ullachaidh SPICe

Post-Legislative Scrutiny in the Scottish Parliament: A Reflection of Session 5

Dr Tom Caygill

This briefing provides a reflection on the post-legislative scrutiny undertaken by committees during Session 5 of the parliament . It highlights the 11 inquiries undertaken as well as the outcomes of that scrutiny. It concludes that the Public Audit and Post-Legislative Scrutiny Committee was successful in adding capacity for detailed scrutiny and that overall post-legislative scrutiny undertaken by the parliament has been impactful. However, challenges still remain particularly in relation to subject committees.

3 October 2024
SB 24-45

Contents

Summary

This briefing presents the results of a research project into post-legislative scrutiny in the Scottish Parliament carried out by Dr Tom Caygill (Senior Lecturer in Politics, Nottingham Trent University) as part of the Scottish Parliament's Academic Fellowship programme. It is based on an analysis of 253 committee recommendations and subsequent government responses as well as interviews with MSPs and officials on certain committees which undertook post-legislative scrutiny during Session 5. The views expressed in this briefing are the views of the author, not those of SPICe or the Scottish Parliament.

Post-legislative scrutiny is an important tool for the Scottish Parliament to monitor the implementation and effectiveness of the legislation that it passes. The research aims to provide a reflection of the post-legislative scrutiny undertaken during Session 5, identifying both successes and challenges. Session 5 provides an interesting case study as the Public Audit Committee was given the specific remit of undertaking post-legislative scrutiny, alongside the continued right of subject committees to do the same. This has allowed a unique opportunity to compare and contrast two different approaches.

Eleven inquiries were undertaken during the course of Session 5. Six were undertaken by the Public Audit and Post-Legislative Scrutiny Committee and another five by subject committees. While the Public Audit and Post-Legislative Scrutiny Committee found the transition tough, particularly in terms of developing confidence in selecting Acts for review, it went on to undertake a substantive amount of post-legislative work alongside its audit role.

Although the post-legislative scrutiny remit was removed from the the Public Audit and Post-Legislative Scrutiny Committee in Session 6, the research shows the impact that the committee had in terms of developing additional capacity in this area.

The experience of the subject committees which undertook post-legislative scrutiny during the same period showed the importance of this additional capacity, given the workload challenges which they face, particularly in relation to the legislative process. Both sets of committees were able to identify suitable and meaningful candidates for review, whether it was the inquiry into the Control of Dogs Act 2010 by the Public Audit and Post-Legislative Scrutiny Committee, the inquiry into the High Hedges Act 2013 by the Local Government and Communities Committee or the inquiry into the Police and Fire Service Reform Act 2012 by the Justice Committee. Each impacted on people's lives and the committees were able to successfully review the Acts and submit recommendations to the Scottish Government to enhance them further.

Overall the research found that the Scottish Government accepted 60% of the recommendations made as a result of post-legislative scrutiny inquiries. Committees tended to focus their recommendations on changes to policy and practice rather than legislation. This was a reflection that the legislative frameworks themselves were not necessarily problematic but that the main issue was rather how they were being implemented.

Interviews with MSPs and officials conducted as part of this research identified two key challenges facing committees undertaking post-legislative scrutiny:

1. A lack of time and capacity to undertake scrutiny.

2. A lack of co-ordination across the committee system.

With the findings and challenges above in mind, the following recommendations are made to enhance the scope of post-legislative scrutiny:

1. Develop a repository system in order to collate ideas for suitable pieces of legislation to review in the future.

2. Encourage committees at Stage 1 of the legislative process to clearly establish the objectives of the bill in question in order to create a metric on which it can be judged later.

3. Encourage the standardisation of government responses to committee reports in order to improve accountability and the monitoring of recommendations.

4. Work with the Scottish Government to establish a process of post-legislative review in which Acts are reviewed (by the government) after five years in force with the findings of those reviews being presented to subject committees for additional scrutiny.

5. Encourage conveners in the first half of each new session to identify suitable candidates for post-legislative scrutiny that their committee will pledge to review in that five year term.

6. Trial the use of ad hoc post-legislative scrutiny committees in order to temporarily expand capacity for the undertaking of post-legislative scrutiny.

7. Consider reforming the committee system to make it more independent of party and government, including the direct election of conveners. This would aid post-legislative scrutiny by developing a more cross party approach to committee activity.

8. Consider other models of providing post-legislative scrutiny support, such as those established in the Swedish and Latvian Parliaments, whereby a specialist unit within the research and information service has expertise in undertaking reviews, supporting post-legislative scrutiny inquiries, policy auditing and legislative interpretation and is made available to support committees with post-legislative scrutiny inquiries.

What is post-legislative scrutiny?

One of the most important roles of the Scottish Parliament is to scrutinise and pass laws which are fit for purpose [1] . However, while many believe that a parliament's role ends after the monarch has given their Royal Assent to bills, as this is when a bill becomes an Act of Parliament, there is an increasing role for parliaments in reviewing the impact and effectiveness of the laws they pass. This is called post-legislative scrutiny.

The Law Commission of England and Wales defines post-legislative scrutiny as:

> " A broad form of review, the purpose of which is to address the effects of legislation in terms of whether intended policy objectives have been met by the legislation and, if so, how effectively."
>
> Law Commission of England and Wales, 2003[2]

The need for post-legislative scrutiny arises out of concerns expressed that parliaments (not just the Scottish Parliament) are not doing enough to assess the effectiveness of legislation once it has become law, given the volume of legislation they now have to deal with and the limited amount of time they have to reflect on legislation already passed [1] .

Post-legislative scrutiny has two distinct functions. There is firstly a function relating to the monitoring of the implementation of legislation. Secondly, there is an evaluation function relating to whether or not the aims of an Act are reflected in the results and effects of legislation once implemented [3] . The main aims of post-legislative scrutiny that follow from these functions [4] are:

- to assess whether legislation is functioning as intended and to offer solutions if not;

- to increase focus on the implementation of legislation within government; and

- overall, to produce better legislation.

Professor the Lord Norton of Louth (Professor of Government, University of Hull & Member of the House of Lords) states that:

> " Post-Legislative Scrutiny may be seen as a public good. It is designed to ensure that measures of public policy deliver on what the representatives of the people voted for. It means assessing the consequences against the purposes identified when the measures were introduced."
>
> Norton, 2019[5]

Post-legislative scrutiny is therefore not just a technical activity which parliaments can undertake, rather it is a valuable tool which they have in order to ensure that public policy actually delivers for the electorate.

Post-legislative scrutiny is not a formal part of the legislative process meaning that not every Act of the Scottish Parliament will receive it. It is up to the parliament to decide which Acts of the Scottish Parliament are in need of review. Government, in particular the civil service, may conduct its own reviews following the implementation of Acts. However, this process requires more outside scrutiny to avoid governments marking their own homework. Although post-legislative scrutiny is optional and dependent upon committees

for triggering it, it is important for the Scottish Parliament to draw upon a variety of stakeholders, ensure representativeness and draw conclusions on a cross-party basis. This adds legitimacy to the process of post-implementation review and awards the Scottish Parliament additional policy-making influence.

The Law Commission of England and Wales noted in its 2006 report on post-legislative scrutiny that there were some issues to be cautious about when it comes to post-legislative scrutiny which could impact upon its effectiveness [6] . The first is the risk that post-legislative scrutiny becomes a replay of the arguments that were put forward (or the debates that were conducted) during the original passage of the bill. If it becomes overly partisan, it is likely to divide scrutiny along party lines and limit the success of reaching consensus on next steps. Secondly, it is dependent upon political will and judgement, as without such will, the Scottish Parliament is not going to want to undertake such scrutiny. Finally, there is an issue with resources. The resources available to parliament are finite. This includes both time and money; and consideration needs to be taken as to how much of a demand post-legislative scrutiny will place on resources.

The Scottish Parliament has been able to conduct post-legislative scrutiny since its inception in 1999, however it is only in more recent sessions that the parliament has started to turn its attention to reflect upon how post-legislative scrutiny is undertaken as well as how its operation can be expanded. Part of this is linked the age of the parliament itself as there are debates about when is the optimal time for post-legislative scrutiny to take place after a bill has become law. The UK Parliament uses a time-frame of approximately 3-5 years [4] . Other academics have argued that 5-10 years is more appropriate in order allow the Act time to embed itself before a review is conducted [7] . However, ultimately this is a judgement for committees.

Session 5 in context

Following the report of the Standards, Procedures and Public Appointments Committee in Session 4, which noted that despite some successes, there was scope for further improvement with regards to post-legislative scrutiny, [8] the parliament decided that in Session 5 the Public Audit Committee should have post-legislative scrutiny added to its remit [9].

This meant that the committee was given the specific task of considering previous Acts of the Scottish Parliament to determine whether they had achieved their intended purpose. However, the adding of post-legislative scrutiny to the remit of the Public Audit Committee did not mean that other subject committees were prevented from launching their own inquiries.

One interviewee indicated that this decision was:

> " mostly a recognition that post-legislative scrutiny hadn't really taken on much of a form in previous sessions (Interview O1)."

Despite other committees always having the ability to undertake post-legislative scrutiny, its extent had remained limited. As such, the decision to give a committee a specific remit was aimed at trying to drive post-legislative scrutiny forward. The limited uptake of post-legislative scrutiny in previous sessions was partly a result of timing (the parliament was only 17 years old at the start of Session 5) but also due to other competing priorities. As a result of this decision, the Public Audit Committee became the Public Audit and Post-Legislative Scrutiny Committee.

Based on interviews, there was a general feeling that public audit was an area in which post-legislative scrutiny would naturally fit given the committee's audit role meant that it was already interested in looking back and was focused on the proper use of resources (Interview O1).

The decision to drive post-legislative scrutiny forward by giving a specific committee the remit to conduct it was also due to interest in post-legislative scrutiny starting to pick up from Session 3 (2007-2011) combined with the fact that subject committees were struggling to conduct such scrutiny because they receive a lot of referred work (e.g. bills and petitions). "There were a lot of complaints … that they didn't have enough time to do any of their own initiated work" (Interview O1) including post-legislative scrutiny. The Parliamentary Bureau would refer legislation and other relevant business to them and that would dominate committee work programmes for the majority of the session (Interview O1).

This problem was exacerbated during Session 4 due to the Scottish Government having a single party majority which led to a lot of legislation being introduced during that session. There was an argument therefore that by giving a specific committee the remit to conduct post-legislative scrutiny, some would always be getting done, because it was expected, regardless of political circumstances. The issue of committees getting blown off course when it comes to undertaking post-legislative scrutiny was raised as an issue in the UK Parliament, even with those committees not having responsibility for legislative scrutiny [7]. As Interviewee O1 noted, "Session 5 was an attempt to try and address that" (Interview O1).

This decision was also the parliament recognising that there was a problem that needed to be addressed. The "lack of post-legislative scrutiny taking place had been … a feature for a long time" (Interview O1) and it was "a recognition that this was something that needed to be addressed" (Interview O1). While post-legislative scrutiny was happening prior to this intervention, it was considered that perhaps it was not occurring as much as it should be.

As noted, this means that during Session 5, the Public Audit and Post-Legislative Scrutiny Committee had a specific remit for undertaking post-legislative scrutiny. However, this did not preclude other subject committees in undertaking their own post-legislative scrutiny inquiries.

During the course of Session 5,11 'full' post-legislative scrutiny inquiries were undertaken. The term 'full' denotes inquiries which were dedicated solely to post-legislative scrutiny, which were reviewing either part of an Act, a full Act or a number of complimentary Acts. This does not include modes of scrutiny where post-legislative scrutiny was present but not classified as such. This is to acknowledge that there are alternative ways of undertaking post-legislative scrutiny, although there is debate about the quality of those varieties.

Table 1: Post-legislative scrutiny inquiries, Session 5

Committee	Acts of the Scottish Parliament Reviewed
Public Audit and Post-Legislative Scrutiny Committee	Section 97 of the Criminal Justice and Licensing (Scotland) Act 2010
Public Audit and Post-Legislative Scrutiny Committee	Nature Conservation (Scotland) Act 2004 and the Wildlife and Natural Environment (Scotland) Act 2011
Public Audit and Post-Legislative Scrutiny Committee	Lobbying (Scotland) Act 2016
Public Audit and Post-Legislative Scrutiny Committee	Freedom of Information (Scotland) Act 2002
Public Audit and Post-Legislative Scrutiny Committee	Social Care (Self-directed support) (Scotland) Act 2013
Public Audit and Post-Legislative Scrutiny Committee	Control of Dogs (Scotland) Act 2010
Justice Committee	Police and Fire Reform (Scotland) Act 2012
Local Government and Communities Committee	Disabled Persons' Parking Places (Scotland) Act 2009
Local Government and Communities Committee	High Hedges (Scotland) Act 2013
Local Government and Communities Committee	Community Empowerment (Scotland) Act 2015
Environment, Climate Change and Land Reform Committee	Marine (Scotland) Act 2010

Table 1 shows that the Public Audit and Post-Legislative Scrutiny Committee undertook six inquiries during the five year period, while three subject committees undertook the other five inquiries. The Local Government and Communities Committee is notable for undertaking three of its own inquiries during this period and also the Justice Committee for conducting post-legislative scrutiny of a large piece of legislation.

While it is not possible to say how many subject committees did not carry out post-legislative scrutiny as a result of the Public Audit and Post-Legislative Scrutiny Committee's new role, the fact that none were prevented from doing so suggests that six extra inquiries were potentially undertaken during the course of Session 5 which might not otherwise have been undertaken given subject committees' busy schedules.

To some degree then, the decision of the parliament to add post-legislative scrutiny to the remit of a specific committee appears on the face of it to be a correct one, if the goal was to drive post-legislative scrutiny forwards. However, the number of inquiries alone does not reflect the nature of post-legislative scrutiny during the session. This briefing also addresses the outcomes of those inquiries, in terms of what they recommended and what the Scottish Government was willing to accept. It also reflects on the views of those who undertook the scrutiny in both the Public Audit and Post-Legislative Scrutiny Committee and the subject committees.

Post-legislative scrutiny: Session 5 overview

The process of undertaking post-legislative scrutiny is more or less similar to the development of other inquiries undertaken by committees.

The start of the inquiry involves the committee deciding on a subject area it wants to focus on. In the case of post-legislative scrutiny, it is a case of deciding which piece of legislation it wishes to review. Committees are independent in this regard and can decide to undertake scrutiny into any Act they wish which falls within their policy remit.

The second stage of the process is the committee agreeing the terms of reference for the inquiry. In the case of post-legislative scrutiny this often becomes a question of which areas of the Act the committee wishes to focus on. Sometimes this will involve the review of the full Act or only part of it. This decision will be guided by a number of factors such as time and the size of the Act in question, but also whether or not the committee has already received evidence of issues with the Act. For instance, the Justice Committee's inquiry into the Police and Fire Service Reform (Scotland) Act 2012 was a review of the full Act despite it being a large piece of legislation. On the other hand, the Local Government and Communities Committee's review of the Community Empowerment (Scotland) Act 2015 only looked at two sections of the Act. This was on the basis that they had received evidence highlighting particular challenges with those parts of the Act.

Once the terms of reference are agreed, committees will then issue a general invitation to members of the public and other interested stakeholders to submit evidence. Committees and their staff will then also begin the process of drawing up a list of likely witnesses they want to hear from. This list is then expanded on following the submission of written evidence to encompass those who the committee may not have identified previously and to ensure a variety of points of view can be expressed.

Once the committee has had the chance to consider written and oral evidence, committee staff will support the convener in identifying the key themes and any tentative recommendations from the evidence that they have heard. Staff will then go ahead and prepare a draft report to present to the committee as a whole. This allows the committee to discuss the key themes again and negotiate and debate recommendations they might want to make. The aim is to try and achieve consensus in reports, so there will inevitably be back and forth discussions in private in order for the committee to reach a consensus on its approach.

It is important for committees to achieve consensus in this area as it makes any reports more hard-hitting for the government in particular, as their own backbench MSPs will also be supportive. Reports which are unanimous cannot be swept under the carpet as being overly partisan.

Once agreement has been reached, the report is published on the Scottish Parliament website, press releases go out to the media and a copy of the report is sent to the relevant Cabinet Secretary. Following the report's publication and submission to the Scottish Government, committees will receive a response whereby the government states its position on the recommendations presented to it. The government is not required to accept the recommendations which committees make but is expected to explain why any

recommendations are not being accepted. If committees are not content with the response they receive from the government, they are able to continue to engage with the relevant Cabinet Secretary until they receive a satisfactory response to their report.

There is therefore an outcome from this scrutiny in terms of recommendations produced by committees and also the response those recommendations receive from the Scottish Government. It is these outputs which this briefing now focusses on. In this section the briefing focusses on the outcomes of the six inquiries undertaken by the Public Audit and Post-Legislative Scrutiny Committee as well as the three subject committees which also engaged with post-legislative scrutiny during Session 5:

- Local Government and Communities Committee (three inquiries)

- Justice Committee (one inquiry)

- Environment, Climate Change and Land Reform Committee (one inquiry).

In total 253 recommendations were analysed. Each recommendation was categorised for the type of action which the committee called for; as well as the strength of action required from the government (whether that be amending legislation, tweaking policy or a brand new piece of legislation). The corresponding government responses to each of those recommendations were analysed for the level of acceptance by the Scottish Government (e.g. from full rejection through to full acceptance).

Type and strength of recommendations

Table 2 shows that most recommendations that committees made in relation to post-legislative scrutiny called for a change in policy and practice, or for further research or a review to be undertaken.

Table 2: Type of Recommendations

Type of Recommendation	Number	Percentage of total recommendations (%)
Policy/practice	109	43
Research or review	64	25
Disclosure	43	17
Promotional or public information campaigns	10	4
Legislation	18	7
Co-operation	3	1
Guidance	2	1
Attitude change	2	1
Resources/funding	2	1
Total	253	100

The focus on policy and practice is not unusual for post-legislative scrutiny. Indeed, research on the UK Parliament shows that policy and practice recommendations are most frequently used there as well [4].

Policy and practice can be a useful landing zone for committees when recommending action for a number of reasons. Firstly, there is the possibility that the legislation which has been selected for review has been determined to be operating effectively and what is required is not legislative action but rather changes to the policy which the legislation underpins or to the implementation of that legislation.

An alternative factor at play could be that because governments are not required to accept or implement committee recommendations, there may be a tendency for committees to think realistically and focus on what they can achieve. A change of policy and practice is less intensive from a political capital perspective. It is also less embarrassing for a government to accept changes in policy. In Westminster past research has shown that committees have tended to take that approach [10] . One benefit of the committee structure in the Scottish Parliament is that even if committees do not recommend legislative action from post-legislative scrutiny, they are in a position to be able to substantively shape new legislation in their respective policy area even if it is a number of years later. This does raise the question of committees perhaps deciding to focus on action in their reports which is required in the short to medium term on the basis that they themselves have the power to resolve longer term issues through future legislative scrutiny.

The strength of recommendation refers to the political capital that would be required from the government to act upon a committee's recommendations. 'Upper-medium' and 'large action' focus on different levels of legislative action from amendments to new legislation. 'Lower medium' and 'mid-range action' call for resources, changes in practice as well as changes in policy and/or new regulations respectively.

Table 3: Strength of recommendations

Strength of recommendation	Number	Percentage of total recommendations (%)
No action	1	0.5
Small action	122	48
Lower medium action	48	19
Mid-range action	71	28
Upper medium action	7	3
Large action	4	1.5
Total	253	100

The table shows that 48% of recommendations call for 'small action', these are recommendations which have called for reviews to be undertaken, information to be released and guidance to be issued. While small action is the largest single category, 50% of recommendations are accommodated under the combined medium categories. As noted in the previous sub-section, there are two factors which require consideration. Firstly, the recommendations being made are on pieces of legislation which do not require, in the opinion of the committees undertaking reviews, substantive amendment. Indeed, the review of the Police and Fire Service (Scotland) Act 2012 identified that while there were problems with the operation of the police service, it wasn't necessarily the legislation that was the issue (although it was a contentious Act), rather it was policy and practice tweaks that were needed to make the Act operate as intend. It is also possible that committees may shy away from legislative action.

Acceptance of recommendations

As well as analysing the outputs from committees, this briefing must also addresses the views of government when it comes to these recommendations. This gives an indication of the government's willingness to accept committee recommendation and also the influence that committees can wield in this area.

Table 4: Acceptance of recommendations

Level of acceptance	Number	Percentage of total recommendations
No response	42	17
Rejected outright	8	3
Partially rejected	18	7
Neither accepted nor rejected	34	13
Partially accepted	57	23
Fully accepted	94	37
Total	253	100

Table 4 shows that the majority of recommendations (60%) are accepted either in full or in part. Actually very few recommendations (10%) are rejected either in part or outright. This shows a substantial level of success for committees in the Scottish Parliament and the success rate is around 20% higher than in the UK Parliament [10] .

Although the majority of recommendations call for small or medium action, and they require less political capital to accept and implement, this still represents a success for the committees involved and does show that they have a level of influence. However, there is a significant minority of recommendations which do not appear to have received a formal response from the Scottish Government (17%).

When coding recommendations and government responses it should be noted that the quality of responses did vary depending upon the policy area and Cabinet Secretary they were coming from. Some provide a full breakdown of each recommendation and a response in table form, others are simply letters and do not necessarily cover all recommendations flagged in the committee's report. There is arguably a need for more consistency here, particularly for the sake of accountability.

It is also worth noting though that just because an incumbent government doesn't accept recommendations in its response, this doesn't mean that: a) the same government won't implement them later down the line, or b) that a new government won't pick them up upon entering office. This is important to flag in relation to post-legislative scrutiny on the basis that impact isn't just about the first couple of months after a committee has reported.

Comparison of the Public Audit and Post-Legislative Scrutiny Committee and subject committees

Given that this briefing is addressing two different types of committees undertaking post-legislative scrutiny, it is also worth acknowledging that there may be differences in the outputs of those different committees. For the purposes of this analysis I have grouped together the six inquiries from the Public Audit and Post-Legislative Scrutiny Committee (PAPLS) and the five subject committee inquiries in order to compare them.

Table 5: Comparison of recommendation types: PAPLS vs Subject Committees

Type of recommendation	PAPLS	Subject committee
Legislation	12%	3%
Guidance	0%	2%
Research or review	33%	18%
Promotional or public information campaigns	4%	4%
Disclosure	13%	20%
Resources/funding	0%	2%
Attitude change	0%	2%
Policy/practice	37%	48%
Recommendations for other bodies	0%	0%
Co-operation	1%	2%
Total	100	100

Table 5 highlights a number of areas of note, firstly that the Public Audit and Post-Legislative Scrutiny Committee clearly felt more willing to make legislative based recommendations. While this may be down to the selection of Acts of Parliament for scrutiny (i.e. ones which were perhaps in more need of being altered), it may also be because the committee does not have the same relationship with specific Cabinet Secretaries as subject committees do and is therefore potentially less hesitant in the development of its recommendations.

The Public Audit and Post-Legislative Scrutiny Committee was also more likely to develop recommendations which called for research and review. This may be because the committee does not have subject expertise and therefore was more hesitant in developing certain recommendations. This is a phenomenon which has also been explored in Westminster [4] .

The Public Audit and Post-Legislative Scrutiny Committee was also less likely to recommend changes to policy and practice. This likely reflects the committee's greater propensity to recommend legislative, and research and review changes instead.

Table 6: Comparison of recommendation strength: PAPLS vs subject committees

Strength of recommendation	PAPLS	Subject
No action	1%	0%
Small action	51%	45%
Lower medium action	14%	23%
Mid-range action	26%	30%
Upper medium action	5%	1%
Large action	2%	1%
Total	100	100

When it comes to the strength of recommendations, again there are some notable differences, reflecting the greater likelihood of the Public Audit and Post-Legislative Scrutiny Committee to recommend legislative changes. There is a slightly greater propensity for recommendations to be stronger but not by much. However, on the other metrics there are broad similarities between the two committee types, with most recommendations landing in the small, lower medium or mid-range action categories.

Table 7: Comparison of recommendation acceptance: PAPLS vs subject committees

Level of Acceptance	PAPLS	Subject
No response	21%	13%
Rejected outright	3%	3%
Partially rejected	7%	7%
Neither accepted nor rejected	12%	15%
Partially accepted	20%	25%
Fully accepted	37%	37%
Total	100	100

In terms of the level of acceptance, the rate of rejection (outright or partial) between both committees is the same. Subject committees were, however, slightly more likely to have their recommendations accepted (by 5%). Subject committees were also less likely to see recommendations fail to receive a response. This could potentially be as a result of the relationship they have developed with their respective Cabinet Secretary and civil servants.

It is clear from the data that there are some differences between the two types of committees in terms of their outputs. However, the data also shows that whatever the committee, committees are able to have substantive impact through having certain recommendations accepted by the Scottish Government. While committees are more likely to recommend change which requires less political capital from the government, it does mean more recommendations are accepted and that the committees consequently achieve something.

However, there is only so much that the data on recommendations and their acceptance can reveal about post-legislative scrutiny. The subsequent sections of the briefing will discuss specific case studies based on data collected from a series of interviews undertaken with MSPs and committee officials.

Case Studies

The remainder of the briefing is dedicated to four case studies of the committees which undertook post-legislative scrutiny during Session 5. These case studies include work carried out by:

- the Public Audit and Post-Legislative Scrutiny Committee

- the Justice Committee

- the Local Government and Communities Committee

- the Rural Economy and Connectivity Committee.

These case studies were developed through a series of interviews with parliamentary officials as well as Members of the Scottish Parliament (MSPs). In total seven parliamentary officials and five MSPs were interviewed as part of the study. Interviewees were selected based on their proximity to the post-legislative scrutiny undertaken during the course of the session.

The goal with the case studies is to identify successes and challenges which these committees faced during their scrutiny, in order to identify best practice, and also areas where procedures and processes can be enhanced.

Public Audit and Post-Legislative Scrutiny Committee

This section encompasses a case study of the Public Audit and Post-Legislative Scrutiny Committee in Session 5. The analysis comprises the findings of five interviews, two with MSPs and three with parliamentary officials.

The adding of post-legislative scrutiny to the remit of the Public Audit Committee was a key trial in enhancing the process of post-legislative scrutiny in the Scottish Parliament. Although that remit has since been removed, it is important to explore the experience of the Public Audit Committee in carrying out post-legislative scrutiny as it is likely to be different from subject committees which are balancing legislative and oversight work, of which the former is often substantial.

As this case study is longer than the others, it is split into the following themes:

- remit of the Public Audit and Post-Legislative Scrutiny Committee

- subject knowledge

- identifying legislation for post-legislative scrutiny

- standout inquiries

- impact of post-legislative scrutiny

- challenges.

Remit of the Public Audit and Post-Legislative Scrutiny Committee

The case study begins with addressing the view of the committee in having post-legislative scrutiny added to its remit. Of course this is a partial dedicated committee and prior research in Westminster has noted the importance of Member interest and engagement. [7] The membership of the Public Audit and Post-Legislative Scrutiny Committee, as you might expect, had an overarching interest in public audit and there was some suggestion that there was initial reluctance to see post-legislative scrutiny added to the remit of the committee (Interview O3).

There are some areas of crossover between public audit and post-legislative scrutiny, indeed the first post-legislative scrutiny inquiry the committee undertook with its new remit was on the National Fraud Initiative (Interview O3). However, one Member noted that:

> " We're here to follow the pound, we're not here to look at whether policy around a particular piece of legislation has been followed and whether it is delivering … it just doesn't quite fit (Interview M2)."

A consequence of the additional post-legislative scrutiny remit was that less work was possible on public audit. Members noted recalling that a decent amount of discussion had taken place about whether post-legislative scrutiny was going to detract from the public audit remit of the committee (Interview M1). The clerks ensured that the committee was always doing a piece of post-legislative scrutiny work on a consecutive basis (Interview O4). Audit work was foregone in order to fit in post-legislative scrutiny (Interview O3). In particular, the committee would normally consider Auditor General reports, take evidence on them and do a short report. During Session 5, the taking of evidence on this matter was considered to have been carried out in a less detailed way than in previous sessions (Interview O3). The workload was balanced between the two tasks based on when the committee knew it would be busy with audit work, typically in the autumn.

It was also noted that it was a challenge from a resource perspective to manage and support both a busy public audit programme alongside the need to undertake post-legislative scrutiny (Interview O4). Despite the remit of the committee increasing, there was no subsequent increase in team resources to accommodate that change (Interview O4).

However, despite two substantive remits and the challenges that this brought, the committee was able to produce significant outputs in both parts of its remit (Interview O4). Members highlighted that the committee had "some very, very good MSPs on it" (Interview M1) and that the quality of membership was viewed as having made a difference, despite it being tough. Another Member also noted that despite not thinking that post-legislative scrutiny was a good fit with public audit, the committee should be praised for getting as much done as they did (Interview M2).

One Member also highlighted their belief that post-legislative scrutiny is a key function of the Scottish Parliament and therefore there was a duty to do it to the best of their ability (Interview M1). Despite initial hesitance, Members came to the view that post-legislative scrutiny was an important activity and that the six inquiries they undertook during the session is testament to that.

Subject knowledge

One of the challenges which dedicated and ad hoc committees face when they are undertaking post-legislative scrutiny is that they are not necessarily subject specialists in the legislation which has been selected for review. Indeed, one Member noted that they were not familiar with the work of the subject committees, apart from where committee members were sitting on other subject committees too (Interview M2).

There was a concern that this lack of subject knowledge meant that they were picking subjects for scrutiny almost at random, as opposed to having a good knowledge of the subject (Interview M2). The same Member felt that this blunted the good work that the committee was doing because they did not know whether they were doing something that was useful or a priority (Interview M2).

That being said, the Members did not think the actual scrutiny was impacted by this lack of subject knowledge (Interview M2), rather it was about whether they were selecting the most deserving of Acts. Coming back to the calibre of people on the committee at the time, Members felt this was very high and, as a result, they were able to interrogate what needed to be interrogated regardless of political affiliation (Interview M1).

There was an acknowledgement from the officials too that the lack of subject knowledge did mean that, for some of the post-legislative scrutiny undertaken, it had been a learning curve for the committee (Interview O3). Both officials noted that the bio-diversity inquiry was the more challenging of the inquiries from the perspective of a lack of expert knowledge (Interview O3; Interview O4).

However, where the committee did have expertise from other committee assignments and/ or had an interest in the subject area, that is when post-legislative scrutiny worked best (Interview O4). Both officials highlighted the inquiries on the Control of Dogs (Scotland) Act 2010 and the Freedom of Information (Scotland) Act 2002 as stand out inquiries as these involved issues that Members were aware of and which had featured in their political lives (Interview O3; Interview O4).

There is something to be said here in terms of the difference between subject knowledge and subject interest. From prior research undertaken by the author in the UK Parliament [4] , it has seemed as if the latter was more important than the former. Indeed, the role of evidence sessions is to find out more information about the subject and to fill in gaps in knowledge. As noted by one of the interviewees, their concern was not the quality of the scrutiny (officials noted this was not necessarily an issue either) rather the concern was about whether they were selecting the most pressing pieces of legislation for review.

Identifying legislation for post-legislative scrutiny

In principle, the officials supported the idea of asking stakeholders which areas would benefit from post-legislative scrutiny, however the difficulty that the committee found was that a variety of areas were identified and it was hard to gauge how much wider support there was for each option (Interview O4). Indeed, Interviewee M2 noted that not knowing what should be a priority because of a lack of subject specialism was the committee's

weakest area.

To identify legislation for post-legislative scrutiny, the committee used a range of criteria set out below and asked stakeholders and the public for their views:

- Do you consider that the Act has had sufficient time to have made a difference?

- Does the Act have a measurable outcome or policy objective, and has it fulfilled its intended purpose?

- Has another committee of the parliament already carried out post-legislative scrutiny of the Act?

- Does the Act contain an in-built mechanism for post-legislative scrutiny?

- Has the Act been subject to, or could it be subject to, significant revision?

- Would there really be merit in undertaking post-legislative scrutiny of the Act?

- Is the Act subject to legal challenge? [11]

Interviewee O4 noted that following this process nineteen Acts met the above criteria (Interview O4). Interviewee M1 noted that the process of selection felt quite iterative with Members and officials working together to find their way through (Interview M1).

The committee then prioritised five of those nineteen options and took evidence to try and gather more information. However, the challenge of a lack of initial subject knowledge did have an impact as the committee couldn't identify, without doing further work, whether there really was an issue worthy of further scrutiny (Interview O4).

Interviewee O4 also reflected on the fact that, if they were to run the process differently, they would think again about how they got views from members of the public and stakeholders, perhaps adding in a further process to ascertain how widespread the support was for reviews of specific Acts (Interview O4).

> Over time, it is clear that it did become clearer which Acts should be prioritised and there is evidence of the committee building confidence in this area. For example, the Freedom of Information (Scotland) Act 2002 was chosen following the above process but it was also becoming clearer through debates and the media that this was an important issue. In contrast, the inquiry into the Control of Dogs (Scotland) Act 2010 didn't come out of the process but was added to the list of Acts requiring review on the basis that the idea that something was wrong with the legislation was gathering momentum (Interview O4).

In summary, there was a common theme in interviews around the committee not having the subject expertise to be able to prioritise Acts for review earlier on in the process. However as the process continued and the committee gained more experience and confidence, it did seem better able to identify suitable candidates on its own. It would have been interesting to see how this experience and confidence would have developed further over the course of subsequent sessions. As a new process it took time to bed in, but there is evidence that it was working, despite a lack of confidence at the beginning of the process.

Standout inquiries

Despite the committee not having subject specific knowledge and experience, there were still inquiries which stood out to both officials and Members.

One such inquiry was the Control of Dogs (Scotland) Act 2010 inquiry. It stood out to Members in terms of them having received a lot of correspondence about the issue over a considerable period of time (Interview M1).

There is also some evidence, at least later on in the process of the inquiry becoming more Member led, which is common in Westminster.

In that regard, Interviewee M1 noted that with the control of dogs, the inquiry was "harrowing" as they had heard from post office officials who reported attacks on their staff as well as the parents of children who had been injured as well as killed by dogs (Interview M1). What was also notable from Interviewee M1 was that they felt that the committee was investigating something that really needed to be looked at – i.e. doing important work.

As prior research has found in other legislatures [12] , this sense of making a difference or making a contribution is important for continued engagement with post-legislative scrutiny.

In addition to the above, the inquiry on the National Fraud Initiative also caught the imagination of Members, on the basis that it was the one which was most closely aligned to their original audit function (Interview M2; Interview O3).

Impact of post-legislative scrutiny

The impact of the inquiries varied from issue to issue.

Interviewee O3 noted that in the Control of Dogs (Scotland) Act 2010 inquiry, the Scottish Government were fairly proactive in launching consultations, although the committee was less pleased with the timing as the debate on the post-legislative scrutiny report had not yet taken place and the consultation pre-empted issues that were going to be discussed (Interview O3). Recommendations around training and education around dangerous dogs were accepted and taken forwards. However, it was noted that on the tougher issues, in

relation to getting the legislation changed, less progress was seen (Interview O3). That being said, the interviewee noted that a lot had been done in relation to the creation of a database and microchipping, but that many of the legal issues were harder to resolve (Interview O3).

Interviewee O4 also raised the Control of Dogs (Scotland) Act 2010 inquiry as being one of the more successful inquiries. They highlighted that the committee raised the profile of the issues with the legislation (Interview O4). The committee also carried on pursuing the issue, it was not just about the report (Interview O4).

> Members noted how listening to the evidence had stuck in their heads, and this is clearly a factor in the committee being determined to keep pressure on the Scottish Government in order to push their recommendations further. Often impact is measured in terms of the initial response of the government. However with committees being unable to force action, the need to persuade necessitates follow up and keeping up the pressure. This keeps the issue in the minds of ministers who are getting repeated correspondence and questions and it is also more likely to get traction with the media.

Interviewee O4 also noted that they felt the Freedom of Information (Scotland) Act 2002 inquiry was fairly impactful to the extent that it did come up with clear recommendations for what needed to be changed and done differently (Interview O4). The committee also highlighted areas where better implementation was required (Interview O4).

Members were also broadly positive about the impact of both the inquiries into the Control of Dogs (Scotland) Act 2010 as well as the Freedom of Information (Scotland) Act 2002, on the basis that they dealt with concrete issues which were at least partially addressed by the government (Interview M2; Interview M1).

Both Members also highlighted the review of the Lobbying (Scotland) Act 2016 as also being particularly impactful (Interview M1; Interview M2).

Interviewee M2 did note that the committee fell short when it came to following up on inquiries and recommendations (Interview M2) although this is a common trend from committees in other legislatures too [12][7].

> Follow up is not necessarily committees' strong suit, although it is something for them to bear in mind when dedicating time to post-legislative scrutiny as the time-frames for work can be long and, as such, follow up is necessary to achieve the maximum impact possible.

During the interviews there was also exploration of the relationship between the committee and the government, which is an important element in developing successful and impactful inquiries. Without buy-in from the government, committees have limited routes for influence as they cannot force the government into action.

The Public Audit and Post-Legislative Scrutiny Committee could have, in theory, found itself in a more challenging position as it is not a subject committee with a specific Cabinet Secretary reporting to it, this could have impacted the nature of the relationship. However, the officials interviewed did not believe there was a negative impact of the committee being a non-subject committee undertaking post-legislative scrutiny.

Interviewee O3 noted that because the Public Audit Committee is always convened by a opposition MSP, and because the committee had strong minded MSPs on it, it was willing to challenge Ministers and there was no reluctance to hold the government to account (Interview O3). They had no issues in getting Ministers to attend the committee's evidence session nor in responding to its reports. However, Interviewee O3 did note that perhaps the nature of post-legislative scrutiny was at play here on the basis that the committee was criticising the legislation itself rather than the government directly (Interview O3). They also noted that two out of the six inquiries conducted were on Members' Bills – i.e. Bills not introduced by the government - which made them a bit easier to handle politically (Interview O3).

Interviewee M1 noted though that they did not feel that the Scottish Government took the committee as seriously as it merited (Interview M1), although he also mused that he did not feel that the government paid much attention to committees generally and that this was a structural issue rather than a political one. The interviewee also reflected upon the fact that the media does not particularly take the committee seriously, although that might now be changing (Interview M1). The lack of media attention could also impact on how the committee is seen by Ministers too. Interviewee M2 thought that the engagement from the government was fine - ministers appeared in front of the committee as requested and there was no impediment to the work the committee was doing (Interview M2). There is perhaps a political difference here in terms of the view of how far the government was willing to go. Interviewee M2 also noted that the committee does not usually engage much with Ministers, on the basis that they deal with accountable officers from various public organisations (Interview M2).

Interviewee O4 noted that subject committees are able to introduce their own Committee Bills (Interview O4) which could be a useful tool to try and bring about legislative changes if the government will not do so themselves.

However it was not clear whether the Public Audit and Post-Legislative Scrutiny Committee had the power to do that on the basis that it is not a subject committee which undertakes legislative scrutiny. This means that subject committees have an extra tool at their disposal to push the recommendations of their inquiries. It should be noted though that only ten committee bills have been introduced in the last 25 years and most have focused on matters internal to the parliament. Therefore this has not developed into a well used procedure which is likely to lead to committees engaging with it less as there is less experience and time remains an issue.

Interviewee 04 also noted that the nature of audit work helped when it came to more iterative forms of following up on committee work as the committee was used to receiving responses/correspondence and determining whether it needed to get further evidence/ information (Interview 04). The audit work of the committee was raised a couple of times during the interviews as aiding the committee in its post-legislative scrutiny work. For instance, the National Fraud Initiative was mentioned as a hook to get the committee engaged with post-legislative scrutiny in the first place.

Challenges

The Public Audit and Post-Legislative Scrutiny Committee faced a number of challenges when undertaking post-legislative scrutiny as part of its role.

One of those challenges was the issue of resourcing in terms of the number of Members and clerks available to undertake this additional work (Interview O4). Resourcing is often a challenge. However, there was evidence in the interviews of a feeling that the additional remit was limiting the committee's public audit work, which the committee was originally established to complete (Interview O3; Interview M2). The committee also found it difficult to select legislation without wider subject knowledge, particularly about the context in which legislation was sitting.

The consensus from all interviewees is that the committee did some good post-legislative scrutiny work and that the quality of the scrutiny itself was not impacted by a lack of subject knowledge, but that the committee seemed to lack confidence, especially initially in terms of whether it was prioritising the right legislation for scrutiny.

Interviewees O4 and M2 noted that the work of the Public Audit and Post-Legislative Scrutiny Committee was stand alone and there was not much engagement with subject committees in this area (Interview 4; Interview M2).

> Better co-ordination was clearly needed and should be explored in more detail if this exercise is to be repeated again.

Capacity was also an issue given the large scope of the committee's remit. As a result, Interviewee O4 noted that the committee learned that it was not enough to just write a report. If they wanted change to happen, they needed to carry on pursuing it and this was difficult in the context of the other audit work the committee was undertaking (Interview O4).

Interviewees also noted that while the committee undertook some good scrutiny, it was not clear where specifically the committee was adding value beyond what a subject committee could add (Interview O4). Interviewee M1 noted that a challenge all committees face is leaving party colours at the door and acting in a cross party manner. They reflected that perhaps the Public Audit and Post-Legislative Scrutiny Committee "got lucky" to the extent that the majority of its Members were able to do that (Interview M1). This could potentially also be a reflection of audit work more generally which tends to be less party political as government ministers are not scrutinised directly.

The view that the committee was more consensual was also endorsed by Interviewee M2. They found the process of post-legislative scrutiny to be straightforward but agreed with

Interviewee O4 that it was difficult to identify what the committee's priorities should be (Interview M2). Indeed, Interviewee M2 was clear that they believed that post-legislative scrutiny should be undertaken by subject committees, on the basis of the expertise they develop over time (Interview M2).

Justice Committee

The Justice Committee undertook one major piece of post-legislative scrutiny during the course of Session 5. It should be noted that despite the remit for post-legislative scrutiny being given to the Public Audit Committee, the Justice Committee made it clear that it wished to retain its right to select Acts for review.

The Justice Committee undertook a review of the Police and Fire Reform Act 2012 in 2018. The Act had been in place for six years at the time and the committee took the decision to review it as it had received four consecutive Section 22 audit reports on the Scottish Police Authority (Interview O5). A Section 22 report is prepared by the Auditor General for Scotland if any specific concerns or issues have been raised in the audit of one of the public bodies for which he/she is responsible. As a result of these reports there was also media interest in the subject (Interview O5). Interviewee O5 noted that four consecutive reports in a row was unprecedented (Interview O5) and that this is why the committee decided to take a deeper look at the Act.

Interviewee M4 also noted that a number of MSPs on the Session 5 committee were also on the Session 4 committee which passed the legislation (Interview M4). Interviewee M3 noted that from their perspective, there was a widely held concern about the way that the reform of the police service had taken place (Interview M3). This was a view shared by both those Members who were against the legislation from the first instance as well as those who were supportive. There were also concerns among the public and stakeholders as well (Interview M3). Indeed, Interviewee M4 noted that there was a political aspect to it from both sides, with opposition Members thinking there was a bad news story to take from the legislation, while government Members thought there was a good news story to present too (Interview M4).

Despite the different motives of its Members, Interviewee M4 noted that the committee did for the most part find unanimity (Interview M4).

> There is an issue to note here that because the legislative function of committees sits alongside their accountability function it means that there is the potential for partisanship to enter the process, compared to committees undertaking post-legislative scrutiny in Westminster. This is however a structural issue with the committee system.

In the interest of fairness and on the basis that the Act introduced wholesale change for both the Police and Fire Services, the committee decided to address both aspects of the Act, despite the reports they received from the Auditor General only focusing on the Scottish Police Authority, (Interview O5). Interviewees M3 and O5 recalled that despite the inquiry focusing on both sides of the legislation, there was much less of a concern in relation to the fire service (Interview M3). This was further supported by Interviewee M4 who argued that as the committee had a policing sub-committee its membership was

perhaps more inclined to focus on policing too (Interview M4).

Interviewee M3 noted that the inquiry had exposed a fair bit of evidence about what had not worked as had been intended or expected when the legislation was making its way through the legislative process (Interview M3) . Interviewee M3 also raised the issue that undertaking a review of the entire Act was a challenge due to its size (Interview M3), and that it compromised the effectiveness of the post-legislative scrutiny. There is commonality here with the experiences of the House of Commons Culture, Media and Sport Committee in Westminster, which struggled with its review of the Gambling Act 2005 due to its size and many clauses [12] . The Member's view was that in hindsight it would have been better to have had a discussion about whether post-legislative scrutiny required you to look at the whole Act (Interview M3). There was a feeling that the committee could have been more forensic if they had not been so overburdened. That being said, interviewee M4 noted that despite the concerns about the size of the Act, they felt that they got the information they needed (Interview M4). The issue linked to the size of the Act was compounded by the fact the committee only had eight months to undertake the scrutiny given the legislative priorities of the Scottish Government (Interview O5). This is a key issue which subject committees face when undertaking post-legislative scrutiny. There is not usually a substantial gap in the work programme in order to undertake a full inquiry.

The interviewees were asked about where they felt that post-legislative scrutiny fitted within the committee's agenda given the dual role of scrutinising legislation and holding the government to account. Interviewee M4 noted that when they first joined the parliament, it was not very good at doing post-legislative scrutiny but that the past two sessions (five and six) have seen a change (Interview M4). They cited the Justice Committee's inquiry into the Police and Fire Service Act as a very good example of post-legislative scrutiny. That being said, the Justice Committee was noted to be a very legislatively intensive committee meaning that a lot of legislation passes through it which has to take priority (Interview M4). Given these circumstances, the committee felt that it did post-legislative scrutiny as well as it could.

The post-legislative scrutiny role of committees is continuing to develop. Interviewee M4 noted that in their day to day committee work they were highlighting issues which might require post-legislative scrutiny in the future (Interview M4). Again Interviewee M3 noted that the interest in oversight of Police Scotland led to the re-establishment of the policing sub-committee and that it made sense after that to review the Act (Interview M3). This view was also supported by Interviewee O5. Interviewee M3 also noted that their experience on this committee and other parliamentary roles has reinforced the view that there are many ways to carry out post-legislative scrutiny other than just focusing on the entirety of an Act (Interview M3).

> There is an indication here that perhaps the parliament being a bit more open in the ways it can undertake post-legislative scrutiny has led to a resurgence of it as a result of the strategic priority of the Conveners Group during the course of this current session (Session 6).

While the inquiry was a large piece of work to undertake, it was noted in the interviews that once the process is started there is little difference to the process which Members undertake when looking at draft legislation, and so it was not that different from what Members were doing day to day (Interview O5). The inquiry was aided by the fact that the Scottish Government had been clear in terms of what it wanted the Act to achieve

(Interview O5), so it meant there was a metric to judge the implementation and effectiveness of the Act against.

The committee heard mostly from the police service and the fire service, but also took evidence from the public and stakeholders, e.g. Rape Crisis Scotland, Victim Support Scotland (Interview O5). The majority of the evidence from the public and stakeholders tended to be about their own interactions with the police complaints system in particular. Police officers also raised concerns about the system (Interview O5).

A number of different perspectives were presented during the evidence sessions. The committee heard from police and fire officers, their unions and staff associations and what came through was that their views had not really been heard when the legislation was proceeding through parliament initially (Interview O5). As they were within the service, it was still going through a transition and they took the opportunity to say where they thought improvements could be made (Interview O5).

One of the other things the committee did during the evidence gathering process was to look back at the issues which Members had raised during the initial passage of the legislation to see whether those issues and concerns had panned out in practice (Interview O5).

> There is clear evidence of good practice developing here with joined up scrutiny. During the inquiry there was an opportunity for both services and the public interacting with them to have their say. As the services were still in transition, this was also a major opportunity to influence the continued development of those services too. It is also interesting that the committee went back to the concerns raised during the legislative process as in Westminster committees are asked not to revisit these arguments, on the basis that proceedings can become overly partisan. However it is clear that if you are to do post-legislative scrutiny justice, these are important questions to ask when undertaking scrutiny, particularly if other issues are presenting themselves.

The committee took an indicative approach in relation to its recommendations and focused its attention in three areas: issues for the Scottish Government, issues for Police Scotland and issues for the Scottish Fire and Rescue Service (Interview O5).

The committee aimed to produce a balanced report which raised issues that needed to be dealt with but also highlighted areas of success as well (Interview O5). The bill was a contentious one as it passed through the legislative process with some parties and MSPs being against the creation of a single service, so there was an attempt to prevent the Justice Committee's inquiry from becoming a political football (Interview O5). There was also a desire to give credit to police officers and firefighters and the heads of the services for what has worked and the hard work they have put in. The services were still going through a transition and Members were keen to avoid negatively impacting on the morale of the staff who had worked hard on the implementing the reforms (Interview O5).

Members acknowledged that there was a partisan element to the inquiry, which is not surprising given the nature of committees in the Scottish Parliament, however they acknowledged that the partisanship was "fine" and did not detract from the task (Interview M4). The same Member argued that the Justice Committee has a good reputation for delivering good scrutiny, "we don't mess about" (Interview M4). Even when hearing from ministers, Members from the governing party were willing to challenge them on issues they

disagreed with (Interview M4). Interviewee M3 noted that the concerns from the inquiry were fairly well known, from the loss of a local connection, to an over-centralised service, as well as cuts in back office staff which were adding to pressures elsewhere (Interview M3).

Some Members were concerned that undertaking post-legislative scrutiny became more challenging when arguments made during the legislative process were being rehashed and the committee was operating along government versus opposition lines (Interview M3). At this point reaching a compromise became more challenging and the Member acknowledged that they thought there were some missed opportunities as a result (Interview M3).

It can be argued that one benefit of a subject committee, which dealt with the original legislation, also undertaking post-legislative scrutiny is that it should have sufficient expertise to carry out the work. However, the downside of course is that there is the potential for Members to "get back in the trenches" (Interview M1) and rehash previous political positions to the detriment of detailed post-legislative scrutiny. That being said, wherever there are ideological and party political differences on legislation, this is going to be reflected in post-legislative scrutiny regardless of who undertakes it. This should not be used as an argument not to review contentious legislation, as such legislation may actually be in most need of receiving post-legislative scrutiny.

When it came to the Scottish Government's response to the report, Interviewee O5 noted that the committee had received a 'pretty full response' to both reports prepared by the committee (one on Police Scotland, one on the Scottish Fire and Rescue Service). They also noted that the approach the government took was to respond to each recommendation in turn (Interview O5).

On this point it is worth noting that there do appear to be different approaches from different sections of the Scottish Government in terms of how they respond to recommendations on post-legislative scrutiny. This research examined government responses coming from a variety of portfolios within the Scottish Government and the responses to this inquiry were some of the most detailed.

Interviewee O5 noted that the Scottish Government acted upon on some of the recommendations through thematic reviews and, in particular, looked at the non-legislative changes (Interview O5). It is not usual for governments to focus on the non-legislative changes - prior research on post-legislative scrutiny has shown this to be the case in Westminster for example [10] . The interviewee did note though that because the Justice Committee had a sub-committee on policing that met every two weeks, it was getting continual feedback on what was happening within Police Scotland in particular (Interview O5).

Interviewee M4 felt that the government's response was warm and that they were pleased that the committee had been able to point out where the reforms had worked (Interview M4). However they were keen to stress that the committee had highlighted areas for improvement in this area and that they were more than just tinkering around the edges of the Act (Interview M4). They also highlighted that, at the end of this process, despite the partisanship, no one was advocating for Police Scotland or the Scottish Fire and Rescue

Service to revert back to the old system of regional organisations.

Interviewee M3 argued, though, that the government was always going to disagree with recommendations which where asking for bigger reform/changes. That being said, they were on safer ground in acknowledging challenges and committing to providing more support in areas where Police Scotland had been candid about issues around localism (Interview M3). The interviewee repeated that the inquiry still felt like a missed opportunity in this regard (Interview M3).

There is clearly a difference of opinion here in terms of how far the government went in terms of meeting their demands. As noted earlier in this section, you cannot remove politics from a political institution and nor should this be used as an excuse to avoid revisiting contentious legislation, it is something to note however. There is something to be said though as to whether ad hoc committees would be better placed to undertake post-legislative scrutiny of Acts which are considered contentious as the trenches of partisanship might not be so deeply developed as in a subject committee which scrutinised the original Act. That being said, there is also more that can be done structurally to foster a sense of cross party working in Scottish parliamentary committees to reduce this, such as conveners and committee members being elected to their positions by colleagues rather than appointed by party whips.

Local Government and Communities Committee

The Local Government and Communities Committee undertook three post-legislative scrutiny inquiries during the course of Session 5. Two of these inquiries were examined through interviews as part of this research, although it was only possible to secure interviews with officials who engaged with these inquiries. It was not possible to interview members of the Session 5 committee.

Community Empowerment Act 2015

The first inquiry to be examined was the inquiry into two parts of the Community Empowerment Act 2015 (Interview O6).

The committee met in 2019 with experts on localism, local government and community empowerment to help determine its future priorities. That led to the committee carrying out a public consultation exercise which asked what community meant to people and how thriving communities can be built and sustained.

Community empowerment emerged as the most important theme for respondents and, as a result, the Committee carried out post-legislative scrutiny of two key parts of the Community Empowerment Act 2015: Part 3 which introduced the right for a community to make a 'participation request', and Part 5 which provided powers for assets to be transferred into community ownership (Interview O6).

A decision was taken not to review the Act as a whole, given its size and the fact that it was separated into different parts. Indeed, the interviewee noted that the committee could have spent the entire session looking at the whole Act (Interview O6). The deputy convener of the committee at the time also had a particular interest in community empowerment, which helped to drive the committee's focus on the Act, alongside the

stakeholder and public consultations (Interview O6).

Community planning was also of particular interest to those Members who had a background in the public sector where community empowerment and planning are central (Interview O6). Members were really engaged with the inquiry as a number of them had a local authority background which gave them additional background knowledge and an interest (Interview O6). The inquiry was also connected with other areas of work such as empty homes, and town centres, which may have made it more relevant. Indeed, linking post-legislative scrutiny back to other areas of interest for committees is one way of ensuring Members engage with it.

In terms of the evidence they received, the committee were keen to ensure there was a balance of different opinions across different sectors. They also had to be mindful of geography so as to ensure that they heard views from both rural and urban areas and also from local authorities run by different political parties (Interview O6).

The committee held evidence sessions with academics, relevant organisations, and the Cabinet Secretary for Communities and Local Government, Aileen Campbell MSP. An online questionnaire also asked community organisations and public bodies about their experiences of asset transfers and participation requests.

The committee approached recommendations from the perspective of the issues which emerged from the evidence sessions. The key questions which were asked when it came to developing recommendations were:

1. What are the main issues being raised?

2. Is this backed up by evidence?

Recommendations were then developed and put to the committee for discussion (Interview O6).

One of the interviewees noted that politics is inevitably a factor in the final shape of recommendations on the basis that Members cannot always agree on them and, as a result, they need to be amended or come out all together in order to reach an agreement (Interview O6). Recommendations made as a result of the inquiry were met with some positivity by Scottish Government, or were in tune with action they were already taking (Interview O6). They were referenced by the Minister for Public Finance, Planning and Community Wealth, Tom Arthur MSP, in a debate in parliament in December 2022 to highlight progress made (Interview O6).

High Hedges Act 2013

The second inquiry studied was the review of the High Hedges Act 2013.

This inquiry was undertaken due to there being a sunset clause in the Act which placed a duty on the Scottish Parliament to report on the operation of the Act (Interview O7). The Act itself was short, certainly in comparison to the other legislation studied during this research, possibly because it was a Member's Bill as opposed to a piece of government legislation.

The committee found a number of gaps which required further consideration, and without post-legislative scrutiny, the parliament would not have known about the issues with the Act (Interview O7).

One of the biggest issues was that there was no requirement in the Act to collect data in relation to the legislation, so when the committee came to look at the Act, it struggled to find information because local councils were not told to collate it (Interview O7). At the time of the inquiry, the committee was focused on the budget, boundary commission issues and building regulations as a result of the Grenfell Tower fire in London (Interview O7). However, once the inquiry started Members were very engaged with it, as it was local and about people (Interview O7).

> This was clearly an inquiry on an issue which hit home when it came to local constituency representation and previous research in Westminster has shown that any topic linked to an MP's constituency role, or issues which matter to their constituents, is likely to attract their attention [4] .

So while it was a stand-alone inquiry which did not fit in with the wider agenda of the committee (Interview O7), it was still an inquiry which caught the committee's imagination.

In terms of its evidence gathering, the committee heard from individuals/homeowners impacted by the issue of high hedges and the Act itself. There was also engagement with a couple of charities and some local authorities too (Interview O7).

The committee found that the Act was not working well in some areas (beyond the lack of data collected) and that many individuals giving evidence were in disputes with their neighbours and were getting frustrated with the issue (Interview O7). As one interviewee noted,

> " the ability to give those people a voice to say that the law wasn't working … [was] really important (Interview O7)."

It all came down to people's quality of life and their home and how they were in darkness all day due to high hedges and could not get answers from local authorities because the Act was being interpreted differently (Interview O7).

The committee developed recommendations around the lack of data collection and inconsistency across local government in terms of interpretation which reflected the evidence that the committee had heard (Interview O7). There was also an acceptance that the wording of the recommendations in this inquiry was carefully drafted, on the basis that the committee was keen to ensure the government acted upon the recommendations. The committee, therefore, avoided language which would automatically turn off the government from dealing with the issues (Interview O7).

In this case, what mattered was what would work in order to get the government to resolve the issues highlighted in the inquiry. The recommendations needed to be workable, as well as time and cost effective (Interview O7). The committee, it was argued, was not being weak in this case but rather pragmatic and realistic, based on its inability to force the government to take action (Interview O7).

The government's response was viewed as positive. The focus of recommendations was on policy changes rather than legislative changes and over 80% of these were accepted, suggesting that the committee's approach in terms of the drafting of recommendations had worked. However, the interviewee noted that the committee did not pay much attention to the government's response (Interview O7). It was also noted that the committee would not have had time to follow up either way as it needed to move on to the next item on its work

programme . The interviewee noted that they would like to see a call for views set up on citizens space (an online platform used by the parliament to receive the views of the public on a variety of different projects) to ask those people who gave evidence what they thought and what further action might be required (Interview O7).

The experience of the Local Government and Communities Committee did vary between inquiries, but it is clear that both issues reviewed in this research were either issues which matter to MSPs based on their own experience or ones which mattered to their constituents.

The inquiry into the Community Empowerment Act 2015 was key to unlocking further post-legislative scrutiny into the Act during the course of Session 6. Indeed, even when a committee does not review an Act in full, it does not mean that it cannot return to the legislation in later sessions. The Session 5 committee recommended that its successor committee return to the issue.

The inquiry into the High Hedges Act 2013 highlighted issues with its operation which were personal to individuals affected but had been overlooked by local authorities and the Scottish Government. It shows the importance of post-legislative scrutiny in relation to identifying issues and working to resolve them for the benefit of citizens. Even if the Act itself might not be considered to be flagship legislation, all laws impact on citizens which is why they require review from time to time.

Rural Economy and Connectivity Committee

The Rural Economy and Connectivity Committee did not undertake post-legislative scrutiny formally during Session 5. However, it did hold a brief scoping exercise into which post-legislative inquiries stakeholders would advocate for. This will be explored briefly as it sets up an exercise that committees should be encouraged to engage with to establish a more stakeholder-orientated approach to identifying Acts to review. Two interviews were conducted for this case study, one with a parliamentary official and one with an MSP.

The committee launched a call for views on 2 February 2018, welcoming suggestions for Acts which would benefit from an assessment to see if they are delivering their stated policy intentions. The call for views stipulated that these Acts must have been passed in parliamentary sessions 1, 2 or 3, as well as falling under the committee's current remit [13].

The committee identified 11 Acts which fell under its remit. The committee was very keen to try to take an approach that would identify appropriate candidates for post-legislative scrutiny, rather than jumping on a particular 'hobby horse' that individual Members might have had (Interview O2). The impetus to start the process of identifying Acts which were suitable for post-legislative scrutiny came from the convener who was keen to undertake scrutiny of an Act and challenged the clerk to identify a route to locate a suitable candidate (Interview O2). It was felt that the best approach would be to be transparent about the process and to ask stakeholders for suggestions based on their real life experiences and the challenges that they have faced in their respective sectors (Interview O2).

A key challenge of this approach was that the committee did not receive many responses. The main feedback the committee received was that crofting was a potential issue,

however the committee had already done some scoping work on the policy area (this wasn't post-legislative in nature) and the government had indicated that it was intending to review the legislation anyway (Interview O2). In the end the government ended up not acting on those concerns.

> This should perhaps form part of committee considerations around post-legislative scrutiny. A short inquiry on crofting may have applied pressure to the government to do something about the issue. There is perhaps an argument here as well for committees to have post-legislative scrutiny in mind when it comes to other inquiries they are undertaking and whether incorporating it into the scope might be of use.

Reflecting upon the process, Interviewee O2 noted that perhaps a standard call for views was not the best approach, rather, if they were to repeat the process again, they would host an event for stakeholders instead, where a discussion and exchange of views could take place. They also noted that there is a need to structure engagement around post-legislative scrutiny differently to ensure that stakeholders are aware of the nature of the process and why it is considered necessary. That way suitable candidates for review can be discussed in more detail, and stakeholders can make better-informed submissions (Interview O2). This is also important from the perspective of justifying the work as committees have large workload pressures, particularly from the viewpoint of legislative scrutiny, so any non-legislative work needs to be justified in terms of time and resources spent on it.

Overall this approach was successful from the perspective that engagement with stakeholders is always good. However, the outcomes were considered disappointing in terms of the small number of respondents (Interview O2). It was noted that the lack of engagement from stakeholders with this exercise might have perhaps been the result of them being content with past legislation. However, it was noted that it is also possible that the respondents didn't know what post-legislative scrutiny was. It was indicated that stakeholders are likely to have limited resources and are therefore more likely to engage with the legislative process as they understand it more and can see where their input might make a difference. In contrast, with post-legislative scrutiny you may be looking back 10 years at something which is running quite smoothly and therefore stakeholders don't see the benefit or need to engage with it (Interview O2).

The lack of substantive post-legislative scrutiny by the committee was referred to as an 'embarrassment' by the convener (Interview M5), with the main issue being that committees are 'hamstrung' by the amount of government legislation that comes in (Interview M5).

> This is an important reflection on stakeholder engagement and how the process can be adapted by other committees in order to identify suitable candidates for post-legislative scrutiny given committee time constraints. Although no substantive post-legislative scrutiny took place by this committee, the case study above does provide an insight for other committees on how to approach stakeholder engagement with regards to post-legislative scrutiny.

Challenges and next steps

This section addresses the general challenges which interviewees, both officials and Members, highlighted with undertaking post-legislative scrutiny in the Scottish Parliament. The goal along with the final section is to identify a potential path forward, where reforms to procedure and practice could enhance the experience.

Lack of time for post-legislative scrutiny

One of the biggest challenges facing subject committees in particular, which was repeated by a number of officials and Members was the issue of time (Interview O5; Interview M5; Interview M4). The timing issue is mainly caused by the amount of government legislation which also needs to pass through the same committee system, as well as the pre-budget scrutiny they undertake and the petitions they may need to consider. Indeed, an MSP on the Justice Committee noted:

> " I have mentioned that they [the government] might want to cut down on the legislation so we can actually get some post-legislative scrutiny done and so we can actually concentrate on other issues (Interview M4)."

The one exception to this rule in Session 5 was the Public Audit and Post-Legislative Scrutiny Committee. It did not have a legislative function, however it did have an audit function which also came with a substantial workload.

Time is always going to be a challenge when it comes to subject committees because their workload to some degree is dictated by the government. There is little the parliament can do to stem the flow of legislation coming from the government, but it is possible to work smarter in order get around the issue. Indeed a Member noted that

> " it seems to me that we have got better at being innovative in the way that we do … post-legislative scrutiny (Interview M3)."

They also suggested that, if committees can weave post-legislative scrutiny into projects already in their work programmes without having to stop and find dedicated space for it, all the better (Interview M3). According to this Member, this "could be inquiry work, some of it may actually just be in written correspondence which in so doing could be used to try to engage and measure views on how legislation is operating" (Interview M3). This aim would be to have a filtering process in order to identify candidates for more detailed scrutiny.

Politicisation of the post-legislative scrutiny process

A number of officials argued that post-legislative scrutiny could be included in Stage 1 debates on new bills in order to look back and help shape the new bill before them (Interview O5). This could be facilitated through specific calls for evidence on previous bills in the policy area to identify if there are any issues the government have not considered in their new bill. However, it was highlighted by some Members that the challenge with this approach would be the partisan nature of the legislative process and that tying in post-

legislative scrutiny would turn it into a partisan issue (Interview M5). Indeed, another Member noted that one of the bigger challenges with committees in general is Members not 'leaving their colours at the door' (Interview with M1), and operating along party political lines.

> The issue of post-legislative scrutiny becoming overly politicised is an important point. However, concern about this should not prevent committees selecting contentious Acts to review. Parliaments are political and it is one of the many reasons why they are often best placed to conduct post-legislative scrutiny as opposed to law commissions as the issues they are dealing with are often political. What matters instead is the framing of the activity, is it about highlighting challenges with the Act or using it to hold the government to account? If it is the latter, then you can see why Members would 'enter the trenches' as one interviewee put it.

One Member noted that the first six months of a new session is quite thin on the ground in terms of legislation and that this could be an opportunity for committees to undertake post-legislative scrutiny, although they acknowledged the challenge of new committee Members and staff needing to get their feet under the table at the same time (Interview M5). They also noted that it would be a good way of moulding committees around their respective subject areas by looking back at legislation and policy that came before.

Scrutiny of sections of Acts versus full Acts

Session 5 highlighted a couple of different approaches to post-legislative scrutiny. Some committees looked at Acts in their entirety whereas others selected specific sections of Acts to focus on. While it is up to committees to decide how best to approach the scrutiny they decide to undertake, one Member raised the issue of taking sections of Acts out of their wider context as being a challenge (Interview M5).

> There is a need to avoid post-legislative scrutiny being seen as a box-ticking exercise undertaken by committees, a balance needs to be struck between dedicated post-legislative scrutiny inquiries, looking at whole or parts of Acts and those inquiries which focus on a particular area and encompass a smaller piece/element of post-legislative scrutiny. This is something that the Conveners Group does need to keep in mind when it is reviewing committee activity during the current session.

Retaining knowledge between parliamentary sessions

A further challenge noted with post-legislative scrutiny was that with every new session 'you get new sitting Members, staff move around, new committees are set up' and the question is raised in terms of 'how do we retain the knowledge of the need to review legislation … based on the best judgement of those involved?' in the scrutiny from prior sessions (Interview O2). It then 'becomes a question of how do we record candidates for future post-legislative scrutiny?' (Interview O2).

A connected issue was raised by Interviewee O5, who noted that:

> " often issues come up when witnesses are talking about one bit of legislation that they'd like changed and it normally comes up when you're in the middle of an unrelated inquiry (Interview O5)"

They also indicated that it would be better to take all these ideas and place them somewhere. The same interviewee noted that:

> " I don't think we really coordinate between ourselves, regarding the issues that come up, from witnesses and Members (Interview O5)."

Capacity

Capacity was also raised as another issue, which does relate to the issue of time discussed above. While one approach is to work smarter and introduce a more flexible approach to post-legislative scrutiny, as the Conveners Group is currently doing, there is a need to ensure that full post-legislative scrutiny inquiries can still take place to avoid the process becoming a box ticking exercise. With this in mind, there is a need to consider how capacity in the parliament could be increased. One MSP mentioned that more Members might be needed (Interview M4) so that MSPs could sit on dedicated committees to undertake post-legislative scrutiny. Another highlighted the need for a second chamber (Interview M5) to undertake such scrutiny (alongside other tasks). However it is also worth considering expanding capacity elsewhere in the parliament. Interviewee O4 noted that there were issues with data being collected with regards to post-legislative scrutiny as well, although this was more acute for the Public Audit and Post-Legislative Scrutiny Committee. A number of officials and Members also noted a lack of confidence in selecting Acts for scrutiny, as such there may be a need to expand informational capacity in the Parliament as well (Interview O3; Interview O4; Interview M2).

One option to increase informational capacity would be to explore models established in other Parliaments (e.g. Sweden and Latvia) which have specialised units within their research and information departments. Such specialised units provide support and expertise in reviews, policy auditing, legislative interpretation, and can be made available to support committees with post-legislative scrutiny inquiries. The Swedish Parliament has a post-legislative scrutiny team called the Evaluation and Research Secretariat, a specialist team responsible for supporting committees in their work with follow-up and evaluating decisions taken by the parliament (including legislative based decisions). The Latvian Parliament has an analytical service which is able to carry out ex-ante assessments and ex-post evaluations (alongside other in-depth studies) and operates on a demand basis, with Members, standing committees and parliamentary groups being able to request research on a topic.

Next steps

Interviewee O5 suggested that there should be a dedicated post-legislative scrutiny committee, appointed with relevant expertise in order to undertake more detailed post-

legislative scrutiny (Interview O5). This would be different from the Public Audit and Post-Legislative Scrutiny Committee as it would not have this committee's dual function.

The experience of the Public Audit and Post-Legislative Scrutiny Committee does show the difference that a committee with a dedicated remit to undertake it can make. The committee completed six inquiries over the course of the session despite a heavy audit workload. It is possible that this could create more capacity in the committee system to undertake post-legislative scrutiny and to ensure that full inquiries are taking place. An alternative to this idea is to trial the establishment of ad hoc post-legislative scrutiny committees and allow MSPs to nominate themselves to sit on them to undertake scrutiny of a particular Act. This would follow a similar model to that of the House of Lords in the UK Parliament [4] . It would temporarily expand the capacity of the system to undertake post-legislative scrutiny.

The Conveners Group, alongside the Parliamentary Bureau could co-operate to identify suitable candidates for scrutiny, which subject committees are unable to find time to do. This should only be considered following a review of post-legislative scrutiny activity in Session 6 to determine how much scrutiny subject committees have been able to complete as a result of the strategic priority. While there are capacity constraints in terms of staffing, membership and meeting space, this idea should be considered in debates about the future of the parliament. An alternative model would be to allow MSPs to work informally on a cross party basis on post-legislative scrutiny in order to identify suitable candidates themselves, however this approach would lack formal resources.

Other suggestions for dealing with capacity issues fall outside of the remit of this research, however they are worth highlighting, given debates which have taken place in the Welsh Parliament over capacity in a post-devolution world. One Member suggests that the capacity issue around post-legislative scrutiny is why:

> " we ought to have a second chamber who carry post legislative scrutiny and why I think they ought to do Stage 2 debates in that [second] chamber rather than in committees (Interview M5)"

The Member in question suggested that any second chamber should be a directly elected chamber, with no more than about 35 to 40 people and it would be a part-time chamber who only come together when they are doing specific bits of work to assist committees (Interview M5). Another Member also raised the question as to whether the Scottish Parliament needed more MSPs in order to undertake a wider range of functions (Interview M4).

Outside of substantive changes to the parliament, either through additional MSPs and/or the creation of a second chamber, some other minor changes were suggested to alter the way the current parliament operates. One Member noted that 'we're only in here Tuesdays, Wednesdays and Thursdays' (Interview M5) and that there was scope for additional work to be undertaken. The Member also suggested that conveners should be elected rather than appointed by the political parties in order to make them more independent of the party machine, again mirroring how committees are elected in the House of Commons in Westminster. They also thought that committee conveners should be paid and have more power and responsibility 'as the conveners do in Westminster' (Interview M5).

> While this would not increase the extent of post-legislative scrutiny necessarily, it would generate a more consensual approach to all committee activity (including post-legislative scrutiny). Such reforms in Westminster have created a more assertive committee system which is willing to push back against the government.

There were also some specific suggestions in terms of how a more systematic process of post-legislative scrutiny could be established beyond what the Parliamentary Bureau and Conveners Group have already suggested. One Member suggested that, in the first year of a new session, each committee convener should report back to the Conveners Group on what Act they are going to carry out post-legislative scrutiny on during that session (Interview M5). This way subject committees could be held to account for the post-legislative work they are promising to undertake. It would then be up to them to report their progress to the Conveners Group. The Member's view was that:

> " if you did that then the benefits to my mind are that it would be quantifiable and measurable…and … it would flag up to the government that something was being done and … the government would have to prepare answers (Interview M5)."

> An alternative approach would be to formalise the annual reports submitted to the Conveners Group detailing post-legislative activity. This approach is happening now on an informal basis.

The Member also argued that as the government are very good at telling committees when they are going to be scrutinising their bills, committees could tell the government what post-legislative scrutiny they are going to be doing as well (Interview M5).

> This is certainly an idea worthy of consideration, especially given the issues of capacity that committees have highlighted. They would have five years to meet their goal and find time to undertake post-legislative scrutiny. However, if this were taken forward, this should just be the start and committees should be encouraged to take forward other post-legislative inquiries through more flexible means. This would ensure that dedicated inquiries took place while also allowing committees to innovate in other areas.

Finally, the Member also suggested that the Scottish Parliament and Scottish Government establish a mechanism of post-legislative review to ensure that the government undertakes its own assessment of how an Act is performing five years after it becomes law and then presents its findings to committees for review (Interview M5).

This would mirror the process currently undertaken by the UK Parliament through the agreement between the Cabinet Office and House of Commons Committee Office [14]. Currently government departments are expected to conduct post-legislative review within three to five years of an Act becoming law. These reviews should provide information on [15]:

- the objectives of the Act

- the implementation of the Act and if any aspects have not been implemented

- any associated pieces of secondary legislation

- any legal issues which have been raised (e.g. From the courts or parliamentary committees)

- any other reviews that have been undertaken by external bodies.

Once those reviews are complete, they are sent to the relevant departmental select committee in the House of Commons [15].

Conclusions and Recommendations

This research has provided some important insights into the post-legislative scrutiny undertaken during Session 5 of the Scottish Parliament. Eleven post-legislative scrutiny inquiries were undertaken during the session by the Public Audit and Post-Legislative Scrutiny Committee, alongside three subject committees. Session 5 was a unique period in which both subject committees and dedicated committees undertook post-legislative scrutiny which has consequently allowed an element of comparison between the two.

In terms of committee outputs, there is evidence of impact both in terms of the recommendations they have produced which have been accepted by government, as well as evidence of impact from the case studies. 43% of recommendations called for changes to policy and/or practice as opposed to 7% of recommendations which called for legislative action. This, to some extent, is to be expected as all of the inquiries came to the conclusion that the legislative framework in question was broadly operating properly and that instead any shortcomings could be rectified through changes in approach and implementation. Policy and practice recommendations are also more easily implemented than legislative based recommendations, which could potentially require new legislation. Indeed, 67% of recommendations called for either 'small' or 'lower medium action'. This focus did have an impact on the level of acceptance though, with 60% of recommendations being accepted either in full or in part.

The research also showed that there were some differences between the two types of committees when it came to their recommendations. The Public Audit and Post-Legislative Scrutiny Committee was more likely to recommend legislative changes than subject committees and 7% of their recommendations called for 'upper-medium' or 'large action' compared to 2% for subject committees. The level of acceptance was broadly similar, although subject committees were more likely to get their recommendations accepted (65% to 60%). This may be reflective of subject committees having a better understanding of their audience in terms of a developed relationship between them and their respective Cabinet Secretary.

Officials and Members were also able to recount areas of impact from their own direct perspective of having worked on the inquiry as well. There are clearly positive outcomes from the scrutiny that has taken place, even if there are some differences in opinion on how positive those outcomes are from a party political perspective. Indeed, the inquiries which were undertaken by both the subject committees and the Public Audit and Post-Legislative Scrutiny Committee had real world relevance and the potential to have real world impact. This flags the importance of post-legislative scrutiny and serves as a reminder that the laws that parliaments pass impact on people's daily lives and that, if they are not working as intended, that might be having a negative impact on those people's lives.

The case studies also identified some interesting additional findings. It was clear that although the Public Audit and Post-Legislative Scrutiny Committee lacked confidence to begin with when it came to selecting Acts to review, this issue resolved itself as the committee gained more experience. There was also a clear benefit from having a dedicated committee undertaking detailed review as it undertook an additional six inquiries on top of the work of subject committees. The case studies of the subject committees also highlighted that lack of time to carry out post-legislative scrutiny (as a result of other priorities, including scrutiny of bills, draft budgets and petitions) was an issue given that

those committees also had to undertake legislative scrutiny. Having a dedicated committee with capacity to undertake substantive post-legislative scrutiny does take some of the pressure off the subject committees in this regard and there is a case to argue that a balance between both dedicated and subject committees could make a difference in terms of embedding the post-legislative scrutiny process.

Partisanship was also highlighted as an issue for subject committees, something which the dedicated committee did not seem to have an issue with. That being said, there is always going to be a political element to post-legislative scrutiny that should not be used to shy away from certain Acts, however, it does need to be managed. It was interesting hearing from those involved in the Public Audit and Post-Legislative Scrutiny Committee's inquiries who articulated that MSPs left their colours at the door. It flags the potential benefits that such a dedicated committee can add into the system. Not just delivering additional capacity, but also approaching post-legislative scrutiny from a more consensual perspective.

While there is additional research to complete on how post-legislative scrutiny is being delivered in the current session, there are some key recommendations which the parliament should actively consider in order to embed post-legislative scrutiny as a key function of the parliament. One key theme which stands out from the interviews with officials from various committees, as well as Members from across the political spectrum is how positive they were about post-legislative scrutiny and ensuring there is space to do it properly. The following quote sums up the overarching feeling towards post-legislative scrutiny:

> " We shouldn't fear trying to look and see if it's working or not. If it's not working as intended, we focus on what can we do to help fix it."

The following actions could enhance the performance of post-legislative scrutiny in the Scottish Parliament:

1. A repository could be developed where committee clerks and officials are able to flag future candidates for post-legislative scrutiny which are raised during the course of committees' scrutiny work. While committees do raise these issues in recommendations and legacy papers, the knowledge of the issues and where the recommendations are located over time will fade. A dedicated repository would help to ensure that this information is captured centrally for future reference.

2. A key part of Stage 1 of the legislative process could include the subject committee undertaking legislative scrutiny to identify, via the government, what the key objectives of the bill are in order to create a metric for successor committees to judge the legislation against. This would enhance the selection of legislation for post-legislative scrutiny in the future and also allow stakeholders to provide insight into whether those objectives have been met before a committee decides to launch a substantive inquiry.

3. The Conveners Group could encourage the standardisation of detailed responses to committee reports by government. It was clear during the study that the level of detail varied. Best practice would be to provide a recommendation by recommendation response as was the case for the government's response to the Justice Committee's inquiry into the Police and Fire Service Reform Act.

4. The Scottish Parliament and Scottish Government could work together to establish a system of post-legislative review to be undertaken by the Scottish Government on Acts after they have been in force for five years. Under such a system, the government would produce a memorandum to determine whether the Act has been fully implemented, whether it is believed to be fulfilling its objects and what (if any) challenges were raised during its review. These memorandums would then be presented to subject committees for additional scrutiny. This system is an important trigger for post-legislative scrutiny in the House of Commons in Westminster and, would ensure that there is a better connection between the parliament and government when it comes to post-legislative scrutiny.

5. Starting in Session 7, conveners should, during the first half of a new session, identify suitable candidates for post-legislative scrutiny with the goal of undertaking scrutiny on them during the course of that session. This will maintain post-legislative scrutiny as a priority for committees and also give them a five year time period in which to undertake a substantive inquiry while still being encouraged to be innovative and to weave post-legislative scrutiny into other inquiries they undertake. Progress on scrutiny undertaken on candidates for post-legislative scrutiny could then be reviewed halfway through the parliamentary term.

6. The Scottish Parliament could trial the establishment of ad hoc post-legislative scrutiny committees to add additional capacity to the committee system. With this approach the Conveners Group and Parliamentary Bureau would co-operate to identify candidates for scrutiny which subject committees may wish to undertake but do not have the capacity to do so. As with the existence of PAPLS, the use of ad hoc committees would not preclude subject committees from undertaking such scrutiny. There is additional benefit here from allowing MSPs with an interest in the subject to sit on an ad hoc committee while not replicating the institutional

surroundings of the subject committee which reviewed the legislation in the first place – helping to reduce the partisanship of the process.

7. The Scottish Parliament could consider changes to its committee system in order to ensure it is more independent of government and party. While this is only partly possible due to the nature of the legislative process, it would make a step towards making committees more assertive. Conveners could be elected by the plenary in order to garner cross party support and members of committees could be elected by their own parliamentary colleagues to sit on committees they nominate themselves for. The experience in Westminster has shown that this has made committees more assertive, given them a stronger political profile (particularly in the media) and could enable committees to take a stronger lead in setting their work programme. There is also scope for conveners to be given an additional salary, in line with that of junior ministers in order to establish themselves as senior MSPs in the Chamber and in the media. This would strengthen the committee system further.

8. The Scottish Parliament should consider other modes of support for the undertaking of post-legislative scrutiny. An example would be to explore the models used by the Swedish and Latvian Parliaments. From the perspective of the Scottish Parliament, this could see the trialling of a specialist unit, potentially in SPICe, which would have expertise in undertaking reviews, supporting post-legislative scrutiny inquiries, policy auditing, legislative interpretation, and which could be made available to support committees with post-legislative scrutiny inquiries. This specialist unit would bring the benefit of additional expertise for subject committees, but also help identify candidates for post-legislative scrutiny and support committees in prioritising their post-legislative activities.

Bibliography

1   Scottish Parliament Standards, Procedures and Public Appointments Committee. (2013). Post-Legislative Scrutiny. Retrieved from https://webarchive.nrscotland.gov.uk/20220731112735/http://archive2021.parliament.scot/parliamentarybusiness/CurrentCommittees/69319.aspx [accessed 18 June 2024]

2   Law Commission of England and Wales. (2003). Post-Legislative Scrutiny. Retrieved from https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2015/03/lc302_Post-legislative_Scrutiny.pdf [accessed 18 June 2024]

3   De Vrieze, F., & Hassan, V. (2017). Comparative Study on Post-Legislative Scrutiny. Retrieved from https://www.wfd.org/what-we-do/resources/comparative-study-post-legislative-scrutiny [accessed 18 June 2024]

4   Caygill, T. (2021). Post-Legislative Scrutiny in the UK Parliament. Retrieved from https://www.wfd.org/sites/default/files/2021-12/2021-10-18-PLS-in-the-UK-Parliament-Dr-Thomas-Caygill-FINAL.pdf [accessed 18 June 2024]

5   Norton, P. (2019). Post-Legislative Scrutiny in the UK Parliament: adding value. *Journal of Legislative Studies*, *25*(3), 340-357. doi: https://doi.org/10.1080/13572334.2019.1633778

6   Law Commission of England and Wales. (2006). Post-Legislative Scrutiny. Retrieved from https://lawcom.gov.uk/project/post-legislative-scrutiny/ [accessed 19 September 2024]

7   Caygill, T. (2020). The UK Post-Legislative Scrutiny Gap. *Journal of Legislative Studies*, *26*(3), 387-404.

8   Standards, Procedures and Public Appointments Committee, Scottish Parliament. (2013). Post-Legislative Scrutiny. Retrieved from https://webarchive.nrscotland.gov.uk/20240327054925/https:/archive2021.parliament.scot/parliamentarybusiness/CurrentCommittees/69319.aspx [accessed 9 August 2024]

9   Public Audit and Post-Legislative Scrutiny Committee, Scottish Parliament. (2021). Post-Legislative Scrutiny . Retrieved from https://webarchive.nrscotland.gov.uk/20240327041823/https:/archive2021.parliament.scot/parliamentarybusiness/CurrentCommittees/105094.aspx [accessed 9 August 2024]

10   Caygill, T. (2019). Legislation under review: An assessment of post-legislative scrutiny recommendations in the UK. *Journal of Legislative Studies*, *25*(2), 295-313.

11   Public Audit and Post-Legislative Scrutiny, Scottish Parliament. (2016). Post-legislative scrutiny checklist. Retrieved from https://webarchive.nrscotland.gov.uk/20240327065943/https:/archive2021.parliament.scot/parliamentarybusiness/CurrentCommittees/106829.aspx [accessed 9 August 2024]

12   Caygill, T. (2019). A Critical Analysis of Post-Legislative Scrutiny in the UK Parliament. Retrieved from https://theses.ncl.ac.uk/jspui/bitstream/10443/4626/1/Caygill%20T%202019.pdf [accessed 19 September 2024]

13 Rural Economy and Connectivity Committee . (2021). Post-Legislative Scrutiny. Retrieved from https://webarchive.nrscotland.gov.uk/20240327041543/ https:/archive2021.parliament.scot/parliamentarybusiness/CurrentCommittees/107671.aspx [accessed 9 August 2024]

14 Leader of the House of Commons. (2008). Post-Legislative Scrutiny: The Government's Approach . Retrieved from https://assets.publishing.service.gov.uk/media/ 5a7c82caed915d48c24103d5/7320.pdf [accessed 19 September 2024]

15 Cabinet Office. (2022). Guide to Making Legislation. Retrieved from https://assets.publishing.service.gov.uk/media/62fe365fe90e0703e1bb4844/ 2022-08_Guide_to_Making_Legislation_-_master_version__4_.pdf [accessed 19 September 2024]