An Enabling Act

Productionising Digital Reform (Version 1.0)

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BIUS WORKING PAPER NO 8
(THIS DOCUMENT DOES NOT REFLECT THE VIEWS OF SCOTTISH GOVERNMENT)

Table of Contents

1   Introduction

1.1   Why an Enabling Act?

There are hard limits to the throughput of parliament – approximately 22 Bills per calendar year, and 400-odd Ministerial Orders.

Any proposal to change how the state creates digital systems is Janus-faced, one face looks back to perform Law Reform on statutes that accidently impede the best digital practices – and the other face looks forward to change how we specify new systems.

The first of these views threatens to overwhelm parliament with primary legislative changes which are intended to alter *policy effect* but not *policy intent*.

This paper outlines the upgrade cycle holistically, and shows where an Enabling Bill (one that allows changes to primary legislation to be made by ministerial order) is the appropriate mechanism, if and only if the appropriate oversight and restrictions on ministerial order are put in place.

1.2   Who are you?

A parliamentarian, minister, SPAD or engaged citizen.

1.3   Why should you read this?

Enabling Acts rightly are of concern to all democrats, and proposing them should not be done lightly.

2   The BIus Project

This is Working Paper No 5 of *BIus - Basic Law-Making For Legislative Computer Systems* which is a research project looking systemically at how the state creates the digital systems underpinning its services.

Working papers are being released gradually for comment:
Working Paper 0 – *The locus of change* (forthcoming)
Working Paper 1 – *Data and the rule of law* (published)
Working Paper 2 – *Rules as code* (published)
Working Paper 3 – *The Lego state* (published)
Working Paper 4 – *The remixable state* (published)
Working Paper 5 – *Law reform for data* (forthcoming)
Working Paper 6 – *A solera for data cleansing* (forthcoming)
Working Paper 7 – *Experimental digital legislative processes* (forthcoming)
Working Paper 8 – *An Enabling Act* (this document)

BIus working papers are designed to stimulate discussion about key elements of the relationship of the state to digital systems and their delivery. Your feedback, input, and particularly criticisms of this paper are most welcome. Feel free to distribute it however you wish.

Working papers are published via the *Digital Policy* SubStack.

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The author is an independent Research Fellow at Scottish Government under the First Minister's Digital Fellowship programme. The views of this paper do not represent the views of Scottish Government.

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[1] https://digitalpolicy.substack.com/
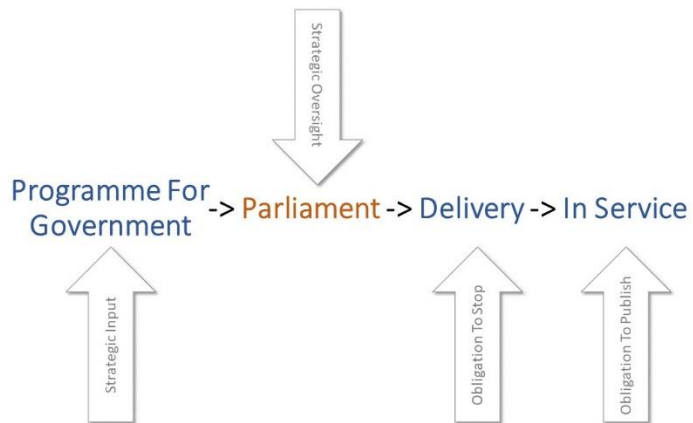
3 Background

This paper sketches out an architecture of oversight for digital projects and shows where an Enabling Act would fit.

The sketch of the future looks like this:

Each of these elements will be discussed in some detail separately.

4   Future Elements

4.1   Strategic Input

Advancing the digital agenda needs a 'brain' that is capable of co-ordinating and enforcing across departments and up and down the legislative ladder: primary, secondary and tertiary legislation and rules.

This needs to be institutionalised – and contains within it the paradox of decentralisation. To have successful decentralisation and fast iteration, where technical, policy and organisational decisions are devolved to delivery and operational teams there needs to be hard interfaces defined and managed by a central body.

The challenge is making this central body and its edicts as small as possible. It has several distinct roles:
- issuing standards – quality characteristics that devolved teams must meet – but which they are at liberty to meet using whatever tools or techniques suit them
- defining boundaries and alignments – this part of the organisation does this (and has the people, powers, finance to do it in its entirety) and it will expose itself to other parts of the organisation in this manner
- mandating reuse – this system is the sole owner of this data – and other services are to reuse that data via this mechanism

It should as much as possible not be a gateway process, but should be integrated into current processes:
- there is only the most cursory mention of any sort of digital assessment of bills in the L&PU *Bill Handbook* or the *Scottish Statutory Instruments Guidance*, and little training provided to Bill Teams as regards assessing the digital impact of their proposed legislation. The training that does occur aims to make law tech neutral rather than be a proactive intervention
- there should be a programme to identify and promote common software solutions for patterns embedded in the Parliamentary Counsel Office's *Guidance On Instructing Counsel – Common Legislative Solutions*
- the way in which legislation specifies common elements of digital systems (particular with regards to data) needs to be standardised and a common language/structure developed that can be injected into the *Interpretation and Legislative Reform (Scotland) Act 2010*. This is a key element of making legislative specification explicit – so that policy people know that they are making technical decisions rather than assuming that their policy work is disconnected from the delivery side

The model of the organisational unit should be the Scottish Law Reform Commission – which is a body under control of Scottish Ministers (it happens to be statutory). The Scottish Law Reform Commission has the duty of doing technical work regarding the operation of laws and bringing proposals to the attention of Ministers and Parliament – and has its own defined parliamentary procedures (see Strategic Oversight).

The legal mechanism that this body will introduce the majority of its legislative changes would be under the aegis of an Enabling Act – that is to say ministerial orders that have the effect of amending primary legislation.

4.2   Strategic Oversight

The thinking behind strategic oversight is that data resembles an asset. Money bills have their own structures, timetabling and parliamentary processes as well as a custom oversight/audit structure.

Data (and the systems built on it) has a very long life. Consequently decisions about digital systems have an impact that will span parliamentary sessions, elections and governments. It is appropriate that there is strategic oversight.

There are a number of components of this oversight:
- the bill pack should have a digital impact assessment of some description – this would require co-ordination between the L&PU and the Clerk's Office/Parliamentary Corporate Body
- the body making strategic input would need to have procedures for its own bills to be handled in Parliament – analogous to those for Scottish Law Commission, Consolidation, Codification, Statute Law Repeal and Statue Law Revision Bills
- digital transformation at scale will imply a huge number of changes to law and operations – potentially more than the current hard limits of 22 Bills and 400 Orders per year – mechanisms to handle this will need to be put in place. There are two models – it is likely that the oversight will contain both of these elements:
  - the Audit Scotland[2] model – a statutory body with the technical expertise to interrogate the work emerging from the *Strategic Input* and bringing appropriate elements to the attention of Holyrood
  - the Social Security Commission Model[3] of a body that takes proposed and nominally technical changes to legislation under its own consideration (as an appropriately expert group) before they come into the normal Delegated Powers & Law Reform Committee process at Holyrood
- the Strategic Oversight body should be the 'receiver' of Obligation To Stop responsibilities from Civil Servants

4.3   Obligation To Stop

Some professions have the ability to stop-the-line – halt work on doing stuff until their concerns are addressed. They are a mixture of 19th century-and-before professions (lawyers and accountants) and very specific modern ones (GDPR/Privacy). (I have written more extensively on it [here](https://digitalpolicy.substack.com/p/stop-the-line)[4].)

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[2] https://www.legislation.gov.uk/asp/2000/1/part/2
[3] https://www.legislation.gov.uk/asp/2018/9/section/97/enacted
[4] https://digitalpolicy.substack.com/p/stop-the-line

Government procurement and delivery has been plagued by runaway programmes that were known by insiders to be dead but which proved unstoppable while in a herd-rampage-fugue state.

After the debacle of the first 2 iterations of Universal Credit, Francis Maude changed the UK Ministerial Code to make Senior Responsible Owners[5] accountable to parliament. (This has not been implemented in the Scottish Ministerial Code which is more tightly focussed on Ministers alone.)

The stop-the-line focus so far has been on projects that were clearly the walking dead at the end – NHS Spine, UC v1 and v2, but in the long term there are more insidious problems where the delivery programme delivers in the short term something that acts as a blocker in the long term – data sets that were supposed to be combined that end up being disjointed being the most obvious one – failure to reuse existing systems and platforms leading to rework. These more insidious problems are also often internally recognised long before they bubble up to the surface. These are essentially the problems that the Digital Assurance Office is designed to address.

There are competing views of how project assurance should be done – in caricature one model looks to a powerful body external to projects armed with sticks and clubs and empowered to dish it out and the other looks to empower individuals within projects to stop the line. The latter tends to work better than the former.

At this point in the process there is not an immediate focus on building out an Obligation To Stop. The reason for including it here is to emphasise the point that the other endpoint of such a power should live within the Strategic Oversight that the parliament provides.

4.4   Obligation To Publish

The reporting loop is broken. If the body doing Strategic Input is to work it needs to have access to a complete Service Catalogue, a decent map of data sources and basic performance information. Ditto the Strategic Oversight function.

There is a UK wide requirement[6] to publish basic information. Unfortunately only about 30% of services do so. Some class of gazette will need to exist to capture this information in a single, searchable and summarisable place. It will simply not be possible to build strategic programmes without it – and it will not be possible for proper scrutiny to be undertaken.

Again the development of the obligation to publish is a mixed bag, some steps can be taken immediately, some will require extensive work to build out.

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[5] Section 5.6
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1126632/Ministerial_Code.pdf
[6] https://www.gov.uk/service-manual/measuring-success/data-you-must-publish

But the key point is that the bodies doing both *Strategic Input* and *Strategic Oversight* need to be designed as future consumers of this sort of strategic information. Without a closed information loop, strategic programmes will drift off into la-la land.

5 Starting the journey

5.1 Strategic Input

The Strategic Input capability can be started with the programme team for the combined licensing proposal. They need to be instructed that they are not just creating software, but a function that can deliver that software in an appropriate manner. It is critical that this team includes an HR/training/change comms component to work out to deploy the new processes and skills to the other policy teams. It's remit should be insert the appropriate content in the L&PU *Bill Handbook* and training programme as well as working with the Parliamentary Counsel Office.

5.2 Strategic Oversight

The Strategic Oversight is harder to finangle. Holyrood will need a [standing committee](#)[7]. Perhaps its on a par with the Finance, Public Audit, Europe & External Relations, Equalities & Human Rights, Public Petitions and Delegated Powers & Law Reform committees. Perhaps it's a sub-committee of the DPLR. There may or may not be a statutory body alongside that. The goal should be to explore this space with the parliament.

I think we should aim for a temporary amendment of standing orders under Rule 17.1A[8] to create a special path for orders under the Enabling Act.

Rule 6.14 allows joint sub-committees, and Rule 12.7[9] allows for the appointment of external expert advisors. These advisors could charged with designing an oversight mechanism suitable to the parliamentary body as and when the temporary standing order is made permanent.

The changes to the Bill Pack should be declatory and very easy to comply with – the purpose of them is to force the Bill Teams to recognise that their work has a digital component – to make it explicit in the first instance.

I imagine the first draft as just asking people to declare that their system will:
- use the single digital sign-on
- publish its services in the gazette
- use the standard set of operational metrics and make them available in a dashboard
- use UPRNs for address details
- etc, etc

This is a first establish and then incrementally expand approach.

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[7] https://www.parliament.scot/about/how-parliament-works/parliament-rules-and-guidance/standing-orders/chapter-6-committees#topOfNav
[8] https://www.parliament.scot/about/how-parliament-works/parliament-rules-and-guidance/standing-orders/chapter-17-miscellaneous#topOfNav
[9] https://www.parliament.scot/about/how-parliament-works/parliament-rules-and-guidance/standing-orders/chapter-12-committee-procedures#topOfNav

I recommend this approach because it forces the parliament into thinking about what their role is with respect to digital systems and the services that are built on them, but also allows for the co-design of that oversight system with them. It makes explicit that there is a learning process going on.

5.3   Obligation To Stop

The first iteration of this should just be the existing Digital Assurance Office.

5.4   Obligation To Publish

The first iteration of this is the existing requirement to publish in the UK Government's *Service Manual*.

6 Relationship to other documents

This working paper should be read alongside - Working Paper 0 – ***The locus of change*** which fleshes out some of the institutional underpinnings.