

AT/PSC

Standards, Procedures and Public Appointments Committee
Scottish Parliament

By email to: sppa.committee@scottish.parliament.uk

21 March 2014

CALL FOR EVIDENCE – INQUIRY INTO PROCEDURES FOR CONSIDERING LEGISLATION

Dear Sir/Madam,

1. ICAS welcomes the subject of this inquiry and the opportunity to comment. We are a leading professional body for chartered accountants with over 20,000 members working across the UK and internationally. Our members work across the private and not for profit sectors.
2. ICAS's Charter requires its committees to act primarily in the public interest, and our responses to consultations are therefore intended to place the public interest first. Our Charter also requires us to represent our members' views and to protect their interests, but in the rare cases where these are at odds with the public interest, it is the public interest which must be paramount.
3. Our response does not directly address the specific questions of the Inquiry but seeks to provide key messages from the perspective of practitioners with responsibility for applying the legislation. These are drawn from examples which we have gathered from members operating across a range of sectors including charities, tax, insolvency, business and the public sector. We have also commented on the pre-legislative or policy development stage as consideration of this stage in the legislative cycle supports productive parliamentary scrutiny and is also relevant to ensuring legislation is ultimately fit for purpose.
4. Our main messages cover 3 stages in the legislative process:
 - Pre-legislative stage - preventing the development of flawed legislation through more consistent and robust application of better regulation principles and good practice;
 - Parliamentary scrutiny to identify and detect flaws and ensure that the legislation meets its intended purpose;
 - Post legislative review to create a cycle of continuous improvement.

Better regulation

5. Legislation is not made in a vacuum. At the policy development and drafting stage, robust application of regulatory and consultation good practice is essential to ensure draft legislation is fit for purpose. Although we understand that government policy is to apply [better regulation](#) principles, we would welcome greater consistency in how these are applied to minimise pockets of poor practice as this can have an adverse effect on the time and cost of those responsible for implementation. Early stage engagement of stakeholders including specialists and practitioners is important to aid understanding and minimise the risk of drafting flaws and unintended consequences.
6. We suggest that it would be useful if committees check the level and breadth of engagement, the extent which government have applied consultation and regulatory good practice, disclose what was not complied with and why. We would also add that to support parliamentary scrutiny, confirmation is required as to whether additional clauses have been added to a draft bill following the written consultation and therefore not subject to the normal consultation procedure with the implication that consultees have not been able to review the full picture. This can inform committees questioning and also be considered as part of an overall sense check (see paragraph 13).

7. Specialist and complex topics can involve a higher risk of error. Factors increasing risk may include: complexity and specialism of subject matter, level of impact, profile, availability of in-house expertise and resources, and time pressures. Better regulation practice is not a tick box exercise; we believe it would be useful for the parliamentary committee to scrutinise how the government policy team has assessed the level of risk and what has been taken into account in developing its approach to manage these risks.
8. We note that the approach adopted across policy teams can vary. For example, local authority accounting is a complex and specialist topic. In recognition of this, the relevant Scottish Government policy team conducted a skills requirement assessment and recruited a specialist and experienced chartered accountant several years ago to lead the policy development function of local authority accounting. As this is a specialist post, it is less subject to the traditional periodic civil service rotation (although specialists may choose to move to other roles within the civil service). This blend of stability, allowing knowledge and experience to be accumulated in a specialist topic has reaped rewards. It has resulted in the successful update of various regulations which would have been difficult to achieve in a reasonable timescale, to the same quality standard without staff consistency and expertise. In this example, it was recognised that a risk to delivering high quality policy in a technical area could be better managed by employing a specialist. We highlight this as an example of good practice which could be considered by other complex and specialist areas, for example tax, insolvency and charities, as a means of managing the particular risks of legislating in technical areas.

Legislative process and parliamentary scrutiny

9. We suggest that written responses to consultations, other relevant written representations and Business Regulatory Impact Assessments should be available for committees early on to support stage 1.
10. We believe that there is potential for greater use of specialists to brief and advise parliamentary committees, particularly for complex and technical topics.
11. We would welcome parliamentary challenge on the balance and appropriateness of matters included within secondary as opposed to primary legislation. The former is subject to less scrutiny and there may be a risk that if processes are not followed as intended, the committee may not be in a position to scrutinise the whole package. Recent examples include:
 - a) Revenue Scotland and Tax Powers Bill – provisions relating to penalties were added to secondary instead of primary legislation. The draft primary legislation was available to scrutinise but not the elements within the secondary legislation. In particular, it was not known whether there would be civil or criminal penalties, the range of severity of offences, and any mitigating factors. Our understanding is that although criminal penalties are normally set out in secondary legislation, the feedback from tax professionals is that the same logic is not useful for tax legislation as it is an important element to enable them to come to a view on the full package. This represented a gap in clarity and raised a question on the appropriate process.

We are pleased to note that in this example, there has been a recent update arising from the parliamentary scrutiny process addressing this concern which is resulting in an amendment - penalties will now be included on the face of the Bill and amendments for stage 2 to do this are currently being drafted.

- b) Land & Buildings Transaction Tax – provisions on leases and partnerships were added to secondary instead of primary legislation. The Bill is passed but no one knows the taxable bands or rates. Secondary powers can change reliefs and exemptions. Licence provisions have still not been announced and will be introduced under those provisions, perhaps. This is seen by tax professionals as incomplete which means that scrutiny of fairness, impact or unintended consequences is reduced.

12. An area requiring careful scrutiny is how the legislation interacts with other legislation, for example, legislation on reserved matters and therefore outside the remit of the Scottish Parliament. As an example, a charity can be incorporated under company law, which means that its trustees have company law directors' duties as well as charity law trustees' duties. There is currently no mechanism available which the Office of the Scottish Charity Regulator (OSCR) can use to manage any regulatory issues which arise in practise between these two sets of duties and the potential for conflicting duties was not addressed in the drafting or scrutiny process for the Charities and Trustee Investment (Scotland) Act 2005.
13. The Scottish parliamentary scrutiny process does not include a mechanism to conduct an overall sense check on a bill after it has been subject to amendments at stage 3 before it is passed. We believe that an additional stage in the process to review the effect of the amendments would be worthwhile. This could check that the various amendments have not inadvertently impacted on the original policy intention and that the legislation is still fit for purpose.

Post legislative scrutiny

14. We would support the introduction of post legislative scrutiny as an important process to review how well the regulation has met its policy intention and achieved what it set out to do. To strengthen accountability, we would encourage a stronger emphasis on outcomes i.e. what has actually been achieved and delivered through the introduction of legislation within a reasonable timescale. Post legislative scrutiny could be a way to help deliver this.
15. Post legislative review offers an opportunity to keep legislation up to date and reduce unnecessary regulatory burdens by reviewing whether the policy has changed, if the regulation is still required and removing those which are no longer needed.
16. Post legislative scrutiny could provide a mechanism to remedy genuine flaws or unintended obstacles inconsistent with the policy intention, on a more timely and efficient basis. It is a lengthy and time-consuming process to introduce an amendment and the option of introducing clarification via a Statutory Instrument is not always feasible if the matter needs to be dealt with in primary legislation.
17. A regular approach to post legislative scrutiny which is initiated and consistently applied across parliamentary committees would be welcome. Further thought is needed on what form this would take however, we suggest that consideration is given to how committees can leverage existing reports such as through inspection and audit programmes which could inform the committees' review.
18. Alongside a strong preventative approach based on applying better regulation principles during the pre-legislative/policy development phase to minimise legislative flaws occurring in the first place, post legislative review enables improvement points to be fed back and strengthens the cycle of continuous improvement.
19. We appreciate that there may be legislative timetable and resource constraints but would prefer a balance of high quality, well scrutinised legislation, which is subject to an evaluation of outcomes achieved against the policy intention.

We hope this is helpful.

Yours sincerely,

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ICAS