Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

This response has been prepared on behalf of the Society by members of our Constitutional Law Sub-Committee (‘the committee’). The committee is comprised of senior and specialist lawyers (both in-house and private practice).

The committee welcomes the opportunity to consider and respond to the call for written evidence on the Inquiry into the procedures for considering legislation and has the following comments to make.

General Comments

Public Bill process - overview

Question 1: Does the current three stage process deliver legislative scrutiny that is fit for purpose? In particular, how effective are the procedures for each of the main stages, the timescales allowed for these stages, and the time allowed between stage? To what extent does the current legislative process encourage engagement from interested parties?

The purpose of legislative scrutiny is to ensure that the legislative actions of Government are subjected to analysis and measured against principles concerning the making of good law. The "Good Law Project" promoted by the UK Office of the Parliamentary Counsel identifies good law as law which is:-

(a) Necessary;
(b) Clear;
(c) Coherent;
(d) Effective; and
(e) Accessible

Legislative Scrutiny ensures that elected representatives hold Government to account by examining proposals for legal change and testing them against these principles.

The current three stage process of legislative scrutiny in the Parliament could be improved in a number of ways.
Improved pre-legislative scrutiny

Prior to stage 1 there is currently inadequate pre-legislative/pre-introduction scrutiny of government Bills. Often the Government will have consulted on a proposal and occasionally there may be a draft Bill attached to a consultation but this is not a usual occurrence. Frequently the first opportunity to examine the proposed Bill is when it is introduced.

It is appreciated that, until a Bill is introduced, it is not subject to the Parliament’s control. Nevertheless, in order to encourage the Government to carry out adequate pre-legislative scrutiny, it is suggested that that for each Bill presented to Parliament which has not previously been published in draft, the Government should provide an accompanying statement setting out why the Bill was not published in draft and therefore not available for pre-legislative scrutiny.

The House of Commons Political and Constitutional Reform Committee reported in 2013 on “Ensuring standards in the quality of legislation” (HC85).

“(a) that there should be a set of standards for good quality legislation agreed between Parliament and the Government...

(b) that for each Bill presented to Parliament which has not previously been published in draft, the Government should provide an accompanying statement setting out why the Bill was not published in draft and therefore not available for pre-legislative scrutiny.”

These recommendations should be seriously considered by the committee.

Stage 1

The current arrangements for stage 1 scrutiny are generally speaking satisfactory if there is adequate time for stakeholders to consider a Bill and accompanying documents and to prepare submissions and also to provide oral evidence. Many committees are open to taking evidence from a broad range of stakeholders.

Parliamentary procedures should encourage evidence from a broad range of stakeholders. Accordingly innovative ways of engaging with the public who may be affected by proposals contained in Bills should be considered including more localised meetings of committees, using sub-committees to take evidence outside the parliament and report back and greater use of e-democracy tools. It is a challenge to reconcile traditional means of engaging Parliament and the people and advances in technology. The use of blogs and social media such as Facebook and Twitter can help to connect Parliament and people. These media can also enhance scrutiny as those affected by proposed legislation can have the opportunity to make their voices heard.

Stage 2

The arrangements for stage 2 are generally satisfactory.
Stage 3

This is the area with the greatest potential for improvement. The Society has recommended in the past that stage 3 comprise two components.

1. A stage 3, part 1 which will consider and approve amendments to Bills at stage 3; and

2. A stage 3, part 2 debate on the Bill as amended at stage 3, part 1. It would be permissible to propose amendments at stage 3, part 2 but only with the consent of the Presiding Officer. This will enable evident mistakes which have occurred during the earlier stages of the Bill to be corrected. Some controversial Bills have occasionally resulted in the final decision being taken to pass a Bill only shortly after significant changes to the detail of the Bill have been agreed and members have had no opportunity to consider the contents of the Bill as amended.

Frequently a considerable number of amendments from both the government and opposition can be considered at stage 3.

The current standing order at rule 9.8.5C allows a member in charge of the Bill to propose, after the last amendment has been disposed of, that the remaining proceedings be adjourned to a later date. There is a strong case to amend parliamentary rules so that the splitting of stage 3 becomes the normal practice. Stage 3, part 2 (or stage 4) would also provide a limited opportunity for further correcting amendments. To take account of small uncontroversial measures which are only amended in minor ways at stage 3, a motion to conflate stages 3 and 4 could be considered by the parliament prior to stage 3 beginning.

Accompanying documents

Question 2: Are any changes needed to the rules on the supporting documents which should accompany a Bill on introduction?

Rule 9.3 of the standing orders detail the accompanying documents for a Bill. These are:-

a) A written statement signed by the Presiding Officer indicating that in the Presiding Officer’s view the provisions of the Bill would be within legislative competence and the stage by the member introducing the Bill which states that in the member’s view, the provisions of the Bill would be within the legislative competence of the parliament.

b) Rule 9.3.2 provides that a Bill shall be accompanied by a financial memorandum.

c) Rule 9.3.2A provides that a Bill should be accompanied by explanatory notes

d) Rule 9.3.3 and 9.3.3A provides that a Bill shall be accompanied by a policy memorandum.
e) Rule 9.3.4 provides that any provision charging expenditure on the Scottish consolidated fund shall be accompanied by a report signed by the Auditor General setting out his or her views on whether the charge is appropriate.

Accordingly, there is a potential for four separate documents to accompany the Bill with the legislative competence statement being attached to the Bill. The accompanying documents are perhaps the minimum that could be provided to an individual to assist them in understanding the Bill. That understanding could be increased if the Presiding Officer gave reasons why she considered a Bill to be within competence. Explanatory Notes do not fully explain a Bill. It would be helpful if the Explanatory Notes were a commentary on the Bill with references to policies, case law or comparative analysis.

That kind of approach to analysis is sometimes carried out by SPICE. A SPICE briefing note added to the accompanying documents could assist those dealing with the piece of legislation quite significantly.

Thought should be given to providing the lead committee with the legal advice which underpins the Presiding Officer’s statement on legislative competence, particularly on issues of EU or ECHR law. Thought should also be given to resourcing committees in order that they can take legal advice on competence issues if they feel that is necessary.

A Bill should also be accompanied by a regulatory impact assessment which should detail what alternative mechanisms for achieving the policy objectives have been considered and why they were rejected.

Purpose of stage 1

Question 3: Stage 1 involves a lead committee considering whether the general principles behind a Bill should be agreed to. In recent times stage 1 reports have frequently looked in detail at the specifics of a Bill, including recommending amendments at the amendment stages. Does the stage 1 procedure provide for adequate scrutiny? Are there any changes which could be made to improve stage 1 scrutiny of public Bills?

In the Society’s view the stage 1 procedure, subject to the above comments, does provide for adequate scrutiny of the Bill. The Society has no proposals to change stage 1.

Time allowed for stage 1

Question 4: Are changes needed to the timescale for stage 1 and how they are set?

Rule 9.5 of the standing orders on stages of Bills provides minimum time periods. The business programme sets out the time or times at which each stage shall take part. Rule 9.5.3A provides that the minimum period that must elapse between the day on which stage 1 is completed and the day on which stage 2 starts is 12 sitting days. Rule 9.5.3B states that the minimum period that much elapse between the
day on which stage 2 is completed and the day on which stage 3 starts is 10 sitting days.

In the Society’s view, these periods should be harmonised and extended to 12 sitting days between the stage 1 debate and the stage 2 commencing.

Rule 9.10 relates to amendments to Bills and provides in Rule 9.10.2 that where “a member intends to move an amendment to a Bill at stage 2… that member shall give notice of the amendment by lodging it with the clerk no later than the day (referred to as the final lodging day) that is the 3rd sitting day before the stage is due to start.”

Accordingly, if one wishes to have amendments considered at stage 2, they need to be with the clerk no later than 9 days after stage 1. This can sometimes be a tight deadline especially when dealing with a complex or difficult Bill.

Amendment stages

**Question 5:** The amendment stages involve line by line consideration of a Bill in committee (stage 2) and then in the Chamber (stage 3). Are any changes needed to the rules on the deadlines for lodging amendments? Is the procedure for considering amendments in committee and the Chamber (using a marshalled list of amendments and groups of amendments) sufficiently transparent and understandable? Are there any alternative approaches which might be less technical and more accessible?

See the comments regarding stage 3.

The role of the secondary committees

**Question 6:** Committees considering primary legislation receive reports from the Delegated Powers and Law Reform Committee (DP&LR) and the Finance Committee and from other subject committees which have an interest in a particular Bill. How well does this reporting process work in practice at stage 1? To what extent do the DP&LR and Finance Committees have an opportunity to scrutinise changes made to the Bills at stage 2?

The Delegated Powers and Law Reform Committees appear to have very little opportunity to scrutinise changes made to Bills at stage 2.

Generally speaking, the reporting roles of secondary committees seem to be quite well done. However, perhaps more proximate engagement between the DP and LR and Finance Committee could be organised. For example, having members of these committees attend the lead committee consideration at stage 1 or at stage 2.

Additional comment

Post legislative scrutiny

There should be more use of post legislative scrutiny. Bills, dependent on their topic, should contain provisions requiring proper post-legislative analysis.