STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE

INQUIRY INTO POST-LEGISLATIVE SCRUTINY

WRITTEN SUBMISSION RECEIVED FROM LAW SOCIETY OF SCOTLAND

The Society’s Law Reform Committee has considered the Call for Views in connection with the inquiry and has the following comments to make:

General Comments

In the Committee’s view post legislative scrutiny is necessary when:

a. A court interprets legislation which shows a deficiency in the original act or order.

b. What the Hansard Society has described as “informal and haphazard” scrutiny takes place. Generally this happens when the provisions of an act have led to public concern, in that case political pressure drives post-legislative scrutiny; or

c. A parliamentary committee or other oversight or stakeholder body has identified a problem with legislation which requires investigation and inquiry. For example, in its “Manifesto for 2011” the Law Society called for “an evaluation to be made of the Scottish Statutes and subordinate legislation passed since 1999 and the effectiveness of that legislation” The Committee’s inquiry is therefore something which the Society supports and hopes will result in a systematic on-going structure for cohesive post-legislative scrutiny,

Specific Questions

• What is the most appropriate format for post-legislative scrutiny in the Scottish Parliament and, in particular, its committees?

The answer to this question depends on the objective of the post-legislative scrutiny. The Law Commission (England and Wales) in its report “Post Legislative Scrutiny” (October 2006 Law Com 302 Cm6945) indicated that the reasons for fostering a more systematic post enactment scrutiny regime;

1. Determining whether legislation is working out in practice.
2. Contributing to better legislation.
3. Improving the focus on implementation and delivery of policy aims.
4. Identifying and disseminating good practice. The purpose of this scrutiny is to identify the gap between the legislative intention and the results achieved from the operation of the law.

If these objectives are identified as being appropriate then the format for post-legislative scrutiny in the Parliament could be;
a. By requiring Scottish Government departments to conduct an internal post-legislative review or an independent research report and then submit a report to the Parliament.
b. By subject committees of the Parliament undertaking inquiries on their own account.
c. By establishing a Parliamentary post-legislative scrutiny committee with a remit focusing on this activity or
d. By specifically adding post-legislative scrutiny to the remit of either all existing parliamentary committees or to one particular parliamentary committee, (e.g the subordinate legislation committee) with a view to systematising the process.

- What are some of the barriers to undertaking post-legislative scrutiny and how can they be overcome?

Some of the barriers to undertaking post legislative scrutiny include

1. A shift of Parliamentary focus and political to the legislative programme or focus to other laws which require scrutiny,
2. Political pressures on Government and opposition parties.
3. The various demands that the legislative process already places on Parliament.

Government may not be attracted to revisit an area in which it has already invested time. It might discover that the policy has not worked out as was predicted. Much of Parliament’s time is spent on making laws and post-legislative scrutiny would increase that role even more, this would put an additional burden on committees and MSP’s. In a particularly heavy legislative session it may be unrealistic to expect MSP’s to undertake post-legislative scrutiny when the Government’s current legislative programme requires scrutiny.

- Are there examples of good practice in carrying out post legislative scrutiny inside and outside the Parliament which could be shared?

There are a number of examples of good practice in the Scottish Parliament for example:

In 2003 the procedures committee of the Scottish Parliament published its Founding Principles report which included a section on post-legislative scrutiny, the committee said that “Parliament is responsible for assessing the effect of legislation, whether it has achieved the state of purposes, whether it has had unanticipated consequences, and whether further legislation might be required”. The committee acknowledged the post-legislative scrutiny work of the Social Justice committee on the Housing (Scotland) Act 2001. That committee, which was succeeded by the Communities Committee, carried out a series of inquiries into the Housing Act which have been acknowledged by organisations such as the Hansard Society. Furthermore, the then Justice 2 committee conducted an inquiry into the Adults with Incapacity Act 2000 in 2004. These are considered to be good examples of post-legislative scrutiny in the Scottish Parliament.
However, the recommendations of the Procedures committee that the framework for scrutiny established by the Social Justice committee should be adopted across the Parliament’s committee, and that all committees should routinely consider whether to subject legislation which they have passed to post legislative scrutiny were not considered by the Parliament during the session in which the response was published due to lack of Parliamentary time. The Law Commission report contains details of post-legislative scrutiny in other jurisdictions including Canada, Australia, New Zealand and Germany, these examples would be worthwhile considering and updating.

- **What information and support is required by MSPs in order to carry out effective post-legislative scrutiny?**

MSP’s would need information from Government, Executive agencies and other stakeholders on the aspects of legislation. In particular, a note of the statements made by the promoters of the legislation before it was enacted regarding compatibility with EU and ECHR law and, where compatibility is not an issue, the likely interaction with background EU, ECHR, and UK law.

- **What type of legislation should be the subject of post-legislative scrutiny?**

The nature of the provisions in the act will determine the need for scrutiny. An unduly structured approach may not work, any act of the Parliament could potentially need post-legislative scrutiny. One type should be any legislation where, in the course of pre-legislative consultation, or during its passage through Parliament concerns were expressed about compatibility or interaction with EU or ECHR or applicable UK law.

- **When should post-legislative scrutiny be carried out following the passage of legislation?**

This all depends on the nature of the legislation but there seems to be a general consensus that post-legislative assessments should take place within three to five years of the passing of an act. In some instances such as the Crime and Punishment (Scotland) act 1997 a feasibility study was built into the act which required a report to be produced within three years of the implementation and for that report to be laid before Parliament.

The timing for scrutiny depends on the nature of the legislation and the objectives of the scrutiny

In cases where such is relevant - after the matter has been the subject of an unappeased judgment in the Scottish courts or has been the subject of a judgment of the Supreme Court, The EU Court of Justice or the European Court of Human Rights
• Are changes needed to Standing Orders or other parliamentary procedures to facilitate improved post legislative scrutiny?

    No comment.

I hope these comments are helpful.

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