STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE

INQUIRY INTO THE PROCEDURES FOR CONSIDERING LEGISLATION

WRITTEN SUBMISSION RECEIVED FROM THE ASSOCIATION OF BUSINESS RECOVERY PROFESSIONALS’ (R3) SCOTTISH TECHNICAL COMMITTEE

Introduction

1. R3, the Association of Business Recovery Professionals, is the leading professional association for insolvency, business recovery and turnaround specialists in the UK. It promotes best practice for professionals working with financially troubled individuals and businesses. It has UK-wide representation and debates key issues facing the profession. Most insolvency practitioners (IPs) operating in Scotland are members.

2. The Association’s Scottish Technical Committee (“STC”) welcomes the opportunity to provide evidence to the enquiry into the procedures for considering legislation in Scotland.

General comments

3. The STC is of the view that the general procedures and practice for considering public bills in the Scottish Parliament under Chapter 9 of the Standing Orders in the main should deliver legislation which is fit for purpose. However, certain amendments could be made to improve the quality of legislation passed by the Parliament.

4. In our experience, it is unclear whether powers which are available to MSPs and lead Committee members are fully utilised to ensure that the procedures work at their best.

5. We consider that there should be closer control of timescales between consultations and legislation which has been based on consultation responses, being laid in Parliament. There have been instances where due to a considerable lapse of time between the end of a consultation process and the laying of a draft Bill before Parliament significant change has taken place in the economic landscape. Such change may have impacted on the consultation responses and policy positions adopted.

6. We would suggest that greater emphasis is given to pre-legislative processes. In addition to the consultation documentation, consideration should be given to the circulation of draft legislation to key stakeholders with relevant technical expertise, prior to it being laid before Parliament. Consultation is important at two levels – a policy level and a technical level. This amongst other things would address problems where the drafting does not reflect the policy intentions. (A case in point is the Home Owner & Debtor Protection (Scotland) Bill where the Bill was criticised in the debates as being ‘badly constructed’ and linking together ‘two disparate sets of issues’ thereby creating ‘controversy,
confusion and disagreement). (Further it was said that the Scottish Executive should not come to a committee with legislation so unclear as a result of a last minute rush to address issues that might have been better dealt with in future legislation). It would also allow committees more time for a comprehensive pre-legislative scrutiny. Where a committee is lacking the appropriate level of technical expertise there will be an opportunity to seek such expertise and experience.

7. The tried and tested method of issuing Green Papers which set out details of specific issues and point out possible courses of action in terms of policy and legislation to stimulate discussion should not be overlooked. Discussion on Green Papers feeds into the subsequent White Papers. These are statements of policy that often set out proposals for legislative changes or the introduction of new legislation to be laid before Parliament. White Paper proposals invariably stem from comments received on the Green Paper.

8. Where pre-legislative consultations are issued we suggest that the detail of the consultation questions should be more specific. In our experience consultations have been broad and far-reaching which makes it difficult for respondents to identify the relationship between the policy intentions and the consultation questions.

Key questions

9. Public Bill process – overview
   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 stages? To what extent does the current legislative process encourage engagement from interested parties?

9.1 While we believe that the current three stage process provides an appropriate theoretical framework we consider that it could operate more effectively in practice and be improved.

   A shortcoming of the current procedures which we have identified is the limited remit of the lead committee to either recommend or reject a bill for Stage 1 debate. There is no opportunity at the initial committee stage for changes to be made to bills. Given there may be a potential lack of expertise particularly in highly technical areas, extending a committee’s terms of reference to delay a bill pending the receipt of further information, or to refer a bill back to the proposer to address significant issues which have arisen during the evidential stage, would improve the process.

   We would question whether sufficient time is allocated for an in-depth scrutiny of a bill between stages and to allow amendments to be lodged for the subsequent Stage 2 committee examination. In our experience, there can be a

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failure at a technical level to understand why proposed amendments have been suggested.

Poor drafting of bills has resulted in bad legislation. We would encourage the use of technical working groups to assist Parliament with the scrutiny of legislation to ensure that legislation is practical and in line with stated policy. We are concerned that there appears to be an acceptance of poor legislation and that in hindsight Guidance Notes can be used to remedy omissions or errors. The use of Guidance Notes without legal authority gives rise to further issues and avoids parliamentary scrutiny of issues.

Between Stage 2 and Stage 3 no comment is offered as to the committee’s views on proposed amendments. Further, it would appear that debate surrounds the proposed amendments and not the bill as a whole.

The tight timescales at the committee stages place pressure on interested stakeholders to respond timeously. These are not usually notified far enough in advance to encourage interested parties to engage. We would suggest that when a Bill is published a draft timetable is also published in order that all stakeholders are aware of the intended timescale for passage of the Bill through the various stages. Stakeholders who have participated at the committee evidential stage should also be specifically notified of the precise parliamentary timetable going forward. More transparency surrounding timetabling is required for stakeholders.

At present we consider that amendments could be passed at Stage 3 with unintended consequences and without appropriate scrutiny. In light of the Scottish Parliament not having a revising chamber we suggest that it would be beneficial to add a Stage 4 to the process where a ‘final’ bill is debated. This stage would pass or reject the Bill without amendments. We refer you to comments made by Tavish Scott MSP during the Stage 3 debate of the Bankruptcy & Debt Advice (Scotland) Bill3 (…“there has been no effective committee scrutiny of a great raft of changes that have been made to a piece of legislation that we are clearly going to pass this afternoon.” …. “I reiterate that I am not criticising the Government of the day or the minister responsible for the bill. My point is that, even in these circumstances, Parliament does not have a mechanism that allows us to look at such issues. We do not have enough time between stages 2 and 3 of a bill, to take the very point that Mr Ewing has correctly made. I ask that, in our consideration of our own procedures—because this is a matter for Parliament, not Government—we reflect on how we work.”)

10. Accompanying documents
Are any changes needed to the rules on the supporting documents which should accompany a bill on introduction?

10.1 We suggest that where Bills are introduced to Parliament these are accompanied wherever possible by draft Regulations. Too often the detail of

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the enactment is contained in secondary legislation which does not receive the same level of scrutiny. We further suggest that where a call for evidence on any of the accompanying documents is issued, this should be circulated widely. During the evidential stage of the current Bankruptcy and Debt Advice (Scotland) Bill a call for evidence on the Financial Memorandum was issued to a target group which did not include bodies representing insolvency practitioners.

11. **Purpose of stage 1**

   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?

11.1 The ability of the lead committee to take evidence and consider views from stakeholders in order to inform its report to either recommend or reject a bill is a major strength of the system. However, recent insolvency legislation making its way through Parliament has not had the benefit of the relevant draft regulations which provide the detail. As a result any scrutiny of the bill is incomplete. Conversely, Regulations have been passed and come into force before the “Act” to which they apply has been enacted. A recent example is the Protected Trust Deed (Scotland) Regulations 2013 which were not consulted upon and came into force on 28 November 2013. The Regulations have given rise to difficulties in their application in practice. Ensuring that bills are laid with all the relevant draft regulations will improve stage 1 scrutiny of bills.

12. **Time allowed for stage 1**

   Are changes needed to the timescales for stage 1 and how they are set?

12.1 There is little transparency as to how the timescales are set. What is important is that sufficient time is allowed for bills to be fully scrutinised. Whether a bill is referred back to the lead committee for further report on the general principles is dependent on members. One suspects that political allegiances will determine whether this option is exercised. The timing for issuing consultations and draft legislation has on a number of occasions failed to take into account holiday periods and no extension of time has been built in to accommodate these periods.

13. **Amendment stages**

   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 they any alternative approaches which might be less technical and more accessible?
13.1 As indicated above sufficient time must be allowed to carry out a proper scrutiny. It is felt that legislation is sometimes pushed through to meet timescales rather than to ensure that it is effective legislation. A draft timescale of the bill progress being published at the time of a bill being laid in parliament would assist stakeholders.

Our recent experience is that stage 2 does not operate effectively and does not result in a line by line consideration of a bill in committee but consists only of considering amendments lodged at that stage. There is therefore a considerable gap in the scrutiny between the principles of a bill and consideration of areas of the bill where no amendments are lodged.

We consider that it would be beneficial for a technical working group to work alongside the committee to examine a bill at stages beyond stage 1.

14 The role of secondary committees
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 bills at stage 2?

14.1 We have no comment on the role of secondary committees.

SETUTSI VAN LARE B.SC (HONS)
INSOLVENCY TECHNICAL SUPPORT
TECHNICAL POLICY & SERVICES DIVISION
ASSOCIATION OF BUSINESS RECOVERY PROFESSIONALS’ R3 SCOTTISH TECHNICAL COMMITTEE
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