Executive Summary

- More effective legislative scrutiny, both before and after a Bill enters Parliament should be a priority so that legislation passed is fit for purpose and the need for post legislative scrutiny is decreased. This would allow optimum use of Parliament's resources;

- Where it is required, an effective and transparent system for post legislative scrutiny would be a valuable attribute for the Scottish Parliament;

- The process should be owned by the Parliament as part of its role in holding the executive branch of government to account, but must include substantive input from government, external agencies, independent experts, legal profession and representative bodies;

- Our suggested mechanism for post legislative scrutiny would be a dedicated Parliamentary Committee which would act as the overseeing body to filter legislation and decide how scrutiny should be carried out;

- Post legislative scrutiny can take many forms depending on the nature of the measures in question so flexibility is key, but a core set of criteria could be developed to be applied by the Committee;

- Scrutiny should not look at enactments in isolation but consider secondary legislation, previous enactments and codes of practice as well as cumulative effects where appropriate.

- Adequate resources will be key to the success of post legislative scrutiny. It would be better to conduct an effective in-depth review of one or two areas of law than a superficial review of a number of enactments.

Introduction

Scottish Land & Estates is a member organisation that represents the interests of both land managers and land-based businesses in rural Scotland. Scottish Land & Estates has over 2,500 members with interests in a great variety of land uses, from farming, forestry and sporting to housing, conservation and renewable energy. The vast majority of our members’ activities fall within the devolved competencies of the Scottish Parliament so monitoring and, where possible, influencing Scottish legislation are important parts of our role in representing our members. We therefore welcome the opportunity to respond to this consultation.
General Comments

We welcome the fact that the Scottish Parliament is taking the issue of post legislative scrutiny seriously. Particularly in the early years, there has been such a volume of legislation for the Parliament to deal with that there has been little time to reflect on legislation already enacted. Where legislation has been reviewed this has tended to be ad hoc or as a result of political or media pressure rather than any formal or systematic review. A clear system for review of legislation may avoid the ad hoc nature of scrutiny and create more consistency in the process.

One difficulty in determining how best to go about post legislative scrutiny is that the term “post legislative scrutiny” itself means different things to different people. For some it will be a technical evaluation of the effectiveness of the drafting. For others it could be a much more wide-ranging review of the policy behind the legislation. We believe any system of post legislative scrutiny has to be able to deal with the whole spectrum, and therefore flexibility will be key.

The existing workload and time commitments of the Scottish Parliament are significant so it is difficult to envisage how adequate time can be allocated to conduct effective post legislative scrutiny if new legislation (both primary and secondary) continues to come forward at such a rate. The Scottish Parliament will ultimately be judged on the quality of its legislation rather than the quantity. We would therefore urge government to take time to reflect on what has been done and not to rush further legislation unless it has been through a robust pre-legislative scrutiny process, with wide consultation and draft Bills where possible. Much of the time taken in Parliament, for example with stage 2 amendments, could be avoided if there was consultation on a draft Bill where government could seek views from a range of experts, those affected directly by the legislation and legal practitioners who will be implementing the legislation after enactment.

During the passage of Bills we would also urge the Parliament to allocate additional time (particularly at stage 2) so that Bills, as passed, have been tested insofar as possible to reduce unintended legal consequences, ambiguity or error. While acknowledging that there will always be political differences in the Committee, the more technical scrutiny of Bills should, where possible, be politically neutral. Legislative draftsmen often get blamed for ineffective drafting but, even with the clearest policy direction, they cannot be expected to be experts in all sectors of business and society and in drafting legislation will inevitably not be able to contemplate all eventualities. They must have access to (and be prepared to take) guidance from experts on the intricacies of any particular sector or group affected by the legislation. Legislation on farm tenancies is an example of this where input from legal practitioners or the Land Court at an early stage could have avoided contentious and time consuming litigation post enactment.

Greater pre-legislative scrutiny as suggested above, both before and after a Bill enters Parliament, could reduce the need for post legislative scrutiny at all. This would ultimately be a more effective use of our Parliamentarians’ valuable time. This call for greater scrutiny at the pre-Bill and parliamentary stages underlies much of what we say below in answering the Committee’s specific questions.
Answers to Inquiry Questions

The Committee has indicated it is particularly interested in the following questions—

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

  A rigid formula for post legislative scrutiny should be avoided but there should be a procedure during the pre-legislation stage where consideration is given to review after enactment. This could include consideration of whether pre-planned review is appropriate (e.g. setting a review date in the Act itself or use of a sunset clause) or whether scrutiny should be triggered by specific issues post enactment.

  For any legislation, particularly that which affects business decisions, there is a balance to be struck in terms of business confidence and ensuring legislation is effective. This is another argument for better pre-legislative scrutiny rather than post enactment review, and is exemplified by agricultural holdings legislation. Where a particular sector has been subject to significant legislative change, some of which is retrospective in effect, this affects business confidence. Individuals are reluctant to make long term decisions in an unstable legislative environment and a period of stability is required in order to restore confidence. In such circumstances a pre-determined review would be damaging and would risk stagnation in the sector where businesses are unwilling to make decisions if further legislative change is anticipated/threatened.

  The format for scrutiny will need to be flexible depending on the nature of the legislation in question. Not all enactments will require in-depth post legislative scrutiny and resources, if nothing else, would prevent a blanket scrutiny of all measures. It would be far more preferable to have an effective review of one or two pieces of legislation in a year rather than a tick box exercise for a number of measures.

  There should be some method of filtering the measures to be scrutinised. That process should also be capable of determining the appropriate format for scrutiny, whether a narrow technical review or a more wide ranging policy review. This in turn should dictate who is best placed to carry out that review.

  There are options as to the appropriate mechanism to employ. One option would be for government to take the lead in reviewing legislation. However, while government clearly should have a significant part to play in the process, we feel that Parliament should take ownership of the process as part of its role in holding government to account.

  There is some merit in allocating the role to subject committees. MSP personnel on subject committees may change regularly but clerks and other support staff develop expertise over time. However, subject committees often carry a heavy workload of legislation and revisiting areas that they have
already devoted time and energy to, may not be a priority. In addition, if left to subject committees, some committees may face a disproportionate burden. There is little distinction between the legislative and scrutiny roles of subject committees and the review may fall by the wayside where there is a heavy programme of legislation.

We are persuaded of the merits of a dedicated mandatory committee to deal with post legislative scrutiny. Such a committee would have as its focus and priority the review of legislation, both primary and secondary. This may reduce the temptation for Parliament to feel it had done its job once a Bill passes Stage 3 and may focus the minds of government and subject committees to ensure legislation it is fit for purpose as it will be held up to further parliamentary scrutiny in future. This committee should have an overseeing role and would filter which measures should be scrutinised as well as how that should be achieved. It should have flexibility in how it achieves its objectives and should not overlook the expertise developed by subject committees and their support staff. It could for example decide that a subject committee would be best placed to carry out a review or it could hold its own inquiry or co-opt relevant non-partisan experts.

Government should be encouraged to regularly report on the effects of legislation and to make these reports available to the Committee. The Committee should be able to ask government for information such as an assessment of how an Act has worked in practice, whether it has achieved its policy objectives, a description of delegated legislation, guidance or other material issued, indication of legal difficulties or matters of public concern. The Committee should also be able to seek views from independent experts, the legal profession, judiciary, representative bodies and commission independent research if necessary.

Whilst flexibility is key, there could be a core checklist of matters for the Committee to consider, which might include the following:-

- Has the law led to a significant number of challenges on interpretation indicating that it was not clear and unambiguous?
- Has there been litigation or judicial comment?
- How have the courts implemented the law? Does this reflect the intention of Parliament?
- Has it has any unintended legal, economic or other consequences?
- Has it been overly burdensome?
- Do steps need to be taken to improve effectiveness operation of the law?
- Have the policy objectives been achieved?
- Has any part of the legislation not been commenced, and if not why not?
- Have things changed so it is no longer needed?
- Did the legislation grant powers to delegate matters to secondary legislation? If so how have these powers been used?
What is the cumulative effect of this legislation? Does this measure amend or repeal an earlier enactment? Should the associated enactments also be reviewed?

Some of the issues above were identified by the Law Commission in England and Wales when it looked at post legislative scrutiny in the context of Westminster in 2006. The Law Commission also made the point that there is also a case for specifically looking at what has worked well or exceeded expectations. We would agree that governments might be more persuaded of the benefits of post legislative scrutiny if there is a chance that success will be identified. The whole process does not need to be about criticising or allocating blame. One of the most valuable outcomes should be lessons learned for future legislation.

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

We believe the major barrier to effective post legislative scrutiny is resources. Parliament is already stretched in terms of its workload and we have seen time and again the considerable commitment of time and energy made by subject committee MSPs and staff particularly during the passage of Bills. Whatever system is devised should not overload parliament’s resources otherwise will be ineffective. The sheer volume of secondary legislation alone would place a significant resource burden on whatever body is tasked with post legislative scrutiny.

Another barrier to effective post legislative scrutiny is that the process could become unnecessarily politicised and become a replay of the arguments advanced during the passage of the Bill. The process must therefore be tightly controlled do that it is focussed on the outcomes of the legislation and not about allocating blame.

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

In the rural sector some areas of legislation are constantly under scrutiny partly due to their sensitive or controversial nature. For example the Tenant Farming Forum (TFF) is a cross industry body which was formed after the passage of the Agricultural Holdings (Scotland) Act 2003 with the specific goal of monitoring issues within the landlord/tenant sector arising from the legislation and to try to develop solutions. Whilst it has been criticised for polarising the sector at times, the Forum has been an invaluable tool in bringing issues to the fore and taking specific matters to government where change is required. The Cabinet Secretary has in the past specifically asked the TFF to develop proposals for amendment to the primary legislation which were then taken forward in secondary legislation under Public Services Reform (Scotland) Act 2010.
What information and support is required by MSPs in order to carry out effective post-legislative scrutiny?

MSPs are often subjected to a range of opinions, all equally sincerely held and “expert” but inevitably partisan. MSPs should therefore have access to, and should seek, a wide range of independent expertise particularly from the legal profession who will be tasked with interpreting and implementing legislation. The new committee referred to above should have the ability to commission research and to co-opt specific expertise when required.

The existing parliamentary information unit (SPICe) already provide an invaluable service and could be utilised in providing Briefings to assist with post legislative scrutiny.

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

The remit for post legislative scrutiny should not be limited. It should apply to primary and secondary legislation as well as looking at the cumulative effect of legislation, some of which might pre-date the Scottish Parliament and devolution. There should be the option of only looking at secondary legislation. In addition the increasing use of codes of practice can at times blur the distinction between law and guidance. Any post legislative review should include a review of the content and use of such codes.

One of the outcomes of post legislative scrutiny should be an improved access to legislation. In some areas of law, particularly devolved matters, legislation has become incredibly complicated to follow, for example where there is pre-devolution primary Act which has been amended differently for different parts of the UK and voluminous secondary legislation which has itself been amended a number of times.

Nature conservation law is an example with the Wildlife and Countryside Act 1981 from which has flowed a number of other pieces of primary and secondary legislation (the latest of which is the Wildlife and Natural Environment (Scotland) Act 2011 which in itself heavily amended not only the 1981 Act but also a number of other pieces of legislation such as the Deer Act 1996 and the 19th century Game Acts and has resulted in a number of pieces of secondary legislation and codes of practice.

Housing is another example of an area of law where a period of reflection and review would be desirable before embarking on further change. Pre-devolution there was a significant piece of housing legislation in the Housing Act 1988. Since devolution we have had primary Acts affecting the housing sector in 2000, 2001, 2006, 2010, 2011 and 2012. This is in addition to the Anti Social Behaviour etc (Scotland) Act 2004 which imposed a whole new regime of registration for private landlords. Each of these Acts has in turn resulted in secondary legislation which has itself been amended.
One of the functions of post legislative scrutiny should be to consider when consolidation is appropriate and necessary and to recommend this to government.

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

  Flexibility should again be the key in determining when legislation should be reviewed. One size cannot fit all. For some legislation there may be a pre-determined review date set in the legislation or promised in parliamentary debates. In others a sunset clause may have been deemed appropriate which will force government to justify the particular provisions at a specified time.

  It would be inappropriate to fix a period in stone such as 3 or 5 years after Royal Assent. In some cases Acts may be commenced in a phased manner over a period of years so the starting point would be difficult to define. In others there may be obvious practical problems which had not been flagged up in pre-legislative scrutiny but need a quick fix.

  In other cases the legislation will need a period of time to “bed in”. Evidence of a problem with the legislation may only come to light after a major court decision which may be years after the Act. For example the Salvesen v Riddell case under the Agricultural Holdings (Scotland) Act 1998 was 10 years after the Act.

- **Are changes needed to Standing Orders or other parliamentary procedures to facilitate improved post-legislative scrutiny?**

  This question is slightly outwith our expertise but we do not see anything in the existing standing orders which would prevent a new committee being created, although it would be preferable to amend chapter 6 to include details about the new committee and its remit in the interests of clarity.

We would be happy to provide further information or to elaborate or clarify any of the matters raised in this response.

**SCOTTISH LAND AND ESTATES**

1 FEBRUARY 2012