The Law Society of Scotland—Written evidence (LEG0025)

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 Sub-Committee’). The Sub-Committee is comprised of senior and specialist lawyers (both in-house and private practice).

General Comments

Question 1: How effective are current practices in Government and Parliament at delivering clear, coherent, effective and accessible draft legislation for introduction in Parliament?

The current practices in Government and Parliament for delivering draft legislation with the qualities of clarity, coherence, effectiveness and accessibility are of variable effectiveness. Firstly, pre legislative consultation requires to be undertaken in a clearer and more accessible way. It is relatively easy for professional organisations, campaigning bodies, experts in the relevant fields, and those accustomed to civil service and political structures to respond to consultation papers. It is less easy for those whose interaction with government or legislative authorities is sporadic. There are issues concerning the language used in consultation in consultation papers, the assumptions made of prior knowledge and understanding of the constitutional and legislative backdrop militate against a broad range of participation from a broad range of people. Some may be intimidated by the machinery of government or the image presented by Parliament. Some potential consultees may be put off by a sense of political detachment documented in reports such as the Hansard Society’s regular Audits of Political Engagement; For example in the most recent Audit, only 7% of those polled said they had participated in a public consultation (Hansard Society, Audit of Political Engagement 13: the 2016 Report).
The current practices in Government and Parliament for delivering draft legislation frequently require reference to legislation which has already been made. However, once legislation has been made it can frequently be difficult to find an up to date version of legislation (or one which makes sense due to the cumulative nature of the statute book, where a later statute amends an earlier one in various ways to differing degrees). Accordingly reading a statute requires both training and expertise which requires specialised education. Furthermore legislation.gov.uk as the repository of statute law which is freely available to the public is not kept up to date quickly enough and can give a misleading impression of the law in force at any given time. Commercial statute law databases show it is not impossible to provide an up to date version of statute law on-line in a way which is readily accessible and minimises the “cut and paste” approach of the pre internet days.

Question 2: Are there mechanisms, processes and practices at this stage of the legislative process that hinder the development of ‘good law’?

The mechanisms, processes and practices which hinder the development of ‘good law’ include the relative obscurity of consultation documents and their supportive evidence, the time made available for responses and the need for expertise and resources in order to properly participate in the consultation process. The evidence upon which the consultation proceeds needs to be robust and broadly drawn. Good research which provides solid evidence should result in sound policies which make good law.

Question 3: Are there improvements that could be made at this stage of the process that would result in law that is more easily understandable by users and the public?

Improvements which could be made at this stage of the process would include the use of plain language in consultation papers and draft bills. We endorse suggestions made by the House of Commons Political and Constitutional Report “Ensuring Standards in the quality of legislation (2013 HC85). Where possible a consultation document should be accompanied by a draft bill. If Government presents a bill to Parliament which has not previously been published in draft there should be a Ministerial Statement setting out why the bill was not published in draft. More draft legislation should be self-contained, and there should be more consolidation measures bringing
together series of statutes in a readable fashion. Finally, codification (where all the law on a given area is codified in a statute expressed in a way which is accessible) should be proposed. Codification is a function of the Law Commissions, but Governments will need to plan with them how this process could be taken forward to statutory legislation. Initiatives such as the “Good law” project from the Cabinet Office and Office of the Parliamentary Counsel and the Guidance on the drafting of primary legislation from the Scottish Government’s Parliamentary Counsel Office are welcome and need constant reiteration. The use of technology to engage with the public at large and specialist users should not be underestimated. Outreach through the internet, blogs and social media about the existence of consultation, how to participate, where to participate and within what timescale would improve this aspect of the legislative experience. In particular government departments could conduct consultation meetings on important pieces of legislation in localities across the country and engage on a one to one basis with the communities affected by the proposed policy or legislative changes.

**Question 4: What impact will the UK’s withdrawal from the EU have on the volume and type of legislation and how will that affect this stage of the legislative process?**

At the moment it is difficult to predict the impact which the UK’s withdrawal from the EU will have on the volume of and type of legislation or how it will affect the legislative process. Much depends on the terms of the Great Repeal Bill, the withdrawal agreement and the post withdrawal EU-UK relationship. However it is predictable that there are some aspects of the UK’s withdrawal from the EU which will result in significant legislation at both UK and devolved administration levels. The repatriation of EU law to the UK will allow for the retention of those aspects of EU law which should be retained and the amendment and repeal of those aspects which should not. In some instances law which is repatriated from the EU will fall specifically within the devolved competencies of the Scottish Parliament, the Northern Ireland Assembly or the National Assembly for Wales. In these circumstances proper consultation will need to be carried with the devolved administrations to ensure the smooth transition of the legislative powers in the areas concerned (in the case of Scotland such as Agriculture, Fisheries, Environmental Law, and aspects of Civil and Criminal Law and procedure).
In this connection, it is understood that the Great Repeal Bill may contain “Henry VIII” clauses which would permit Ministers to amend EU law once it has been repatriated. Although the Law Society is not in favour of such clauses, there may be little alternative in this case but it is important to ensure that, if any repatriated EU law falls within the devolved competence of the Scottish Parliament, the Ministers who can exercise such a power should be Scottish Ministers and not UK Ministers. This is particularly important because UK subordinate legislation applying to devolved areas is not subject to the Sewel convention.

**Question 5: Will there be changes required to how the Government and Parliament deal with legislation following Brexit?**

The need to maintain stability in the law, repeal legislation and prepare new legislation to fill in gaps arising from leaving the EU will comprise a significant part of the domestic legislation which is passed at or following withdrawal. Bearing in mind the public interest in maintaining consistent application of the law concerning aspects of the freedom, security and justice legal framework, recognition and enforcement of citizens’ rights, CJEU pending cases, immigration, residence, citizenship and the impact of the UK’s exit on the devolved administrations, it is clear that a wholesale repeal of the law which has emanated from the EU over the years would be problematic, difficult to implement, and unduly disruptive.

We propose that domestic legislation is passed to ensure a “soft landing” in terms of legal change. In principle laws with direct effect (Treaties and Regulations) will cease to apply once the withdrawal agreement is in place, the UK is no longer a member of the EU and the European Communities Act 1972 has been repealed. However it would be inappropriate to include in any new law the wholesale repeal of direct effect provisions without making some alternative arrangements. These arrangements would ensure clarity and stability in the law and prevent legal uncertainty. Similarly EU law with indirect effect (Directives) has already been transposed into domestic legislation. This has been through primary or secondary legislation either at UK level or through the Scottish Parliament and other devolved structures. That law will continue to be part of the English and Scots Law until and unless it is specifically repealed. Many statutory instruments deriving from EU directives have been enacted under Section 2 of the 1972 Act and so would be repealed once the Act is repealed unless explicitly retained.
In order to reassure and create stability for citizens, business and consumers we believe it is vitally important that effective transitional arrangements are in place to ensure that all necessary provisions continue to apply unless and until they are specifically repealed and that alternative domestic provisions are put in place. It is likely that much of what the UK decides to retain will depend on the outcome of the withdrawal agreement and the new relationship between the UK and the EU. Because it is likely that UK Law derived from EU laws will continue in force, Parliament will still need to be aware of changes made in the EU and jurisprudence from the CJEU. Therefore some continuing Parliamentary scrutiny function will be needed particularly if changes made in the EU to law still applying in the UK would be advantageous to adopt into UK Law.

**Question 6: How effectively do Parliament and the Government make use of technology at this stage of the legislative process?**

The Society has not undertaken any statistical research as to how effectively Parliament and Government make use of technology at this stage of the legislative process. Our impression is that the Parliament website is generally quite good and relatively easily navigable.

The GOV.UK Website is a very large collection of documents and the grouping of consultations, consultation outcome and collections in a chronological order is not especially helpful. There are more than 3400 documents on the site and the organisation of this information could be improved. www.gov.uk/government/publications?publication_filter_option=consultations.

**Question 7: How could new or existing technologies be used to support the development and scrutiny of legislation?**

Technology could be used to support the development and scrutiny of legislation by allowing for further and better consultation for example by video with consultation groups and through social media. Witnesses should also be able to provide evidence by video link on draft legislation to Parliamentary Committees such as a Draft Bill Committee or Select Committees.

**Question 8: To what extent, and how effectively, are the public and stakeholders involved in this stage of the legislative process?**
The Society is not in a position to comment on the extent to which the public are involved in this stage of the legislative process. As a regularly consulted stakeholder we are engaged in a number of consultations with Parliament and Government (around 100 each year) and provide evidence regularly to Public Bill Committees in the House of Commons and Bill Committees in the House of Lords. The Society also briefs MP’s and Peers across the political spectrum on measures before either House. This is generally speaking a satisfactory process however earlier notification about the Parliamentary timetable would be helpful. Disclosure of the content of the Queen’s Speech in advance could also be helpful as would the exposure of draft clauses in a more general way.

Question 9: What factors inhibit effective engagement?

The factors which inhibit effective engagement include the large number of consultations, the timescale for responses, the number of inquiries and policy issues which require significant resources on the part of stakeholders to identify, analyse and respond to. The lack of resources generally amongst stakeholders means that legislation and policy matters are prioritised in order of impact on the stakeholder which may restrict the number of responses made.

Question 10: What mechanisms could be used to increase or improve engagement with the public and stakeholders?

Engagement with the public and stakeholders could be increased by some of the suggestions which we have made in response to Question 7.

Question 11: How effectively is information about potential legislation disseminated at this stage in the process?

A significant amount of, but not enough, information about potential legislation is disseminated prior to introduction of legislation; for example Government Departments frequently consult on issues which are to be legislated upon in the future. The Queen’s Speech sets out the Government’s programme for legislation. However the difficulty is that consultation can take place without relevant stakeholders or the public at large being aware of it. Therefore the usefulness of the consultation may be limited. ‘Doing less better’ - in the sense of having smarter, more focussed consultations would be one way in which proposals for change in the law or policy could be more effectively made. Reducing the range of matters consulted upon would give stakeholders and the
public a significantly enhanced opportunity to respond to those issues. Longer consultation periods would be a distinct improvement especially avoiding holiday periods (recognising that holidays are not uniform across the UK).

**Question 12: How useful is the information that is disseminated and how could it be improved?**
See the response to Question 11.

**Question 13: To what extent is Parliament, or are parliamentarians, involved in the development of legislation before it is introduced into Parliament?**
The Society approves of the process of pre legislative scrutiny by Parliament including the examination of draft bills and has participated in the evidence sessions relating to a number of them e.g. the Draft Deregulation Bill and the Draft Investigatory Powers Bill. This process could be applied to many other measures which would increase engagement with Parliament in this area.

Parliamentarians are of course involved in not only the scrutiny of draft legislation but also sometimes in the origination of draft legislation and Private Members Bills could be subject to more transparent arrangements for introduction and a similar system of pre legislative scrutiny and consultation as that which applies to Government Bills. In the Scottish Parliament Members Bills are subject to consultation before introduction and can only be introduced if they acquire sufficient support from other members. Frequently pre-introduction consultation highlights issues with the proposals made by the MSP which can result in a better Bill being introduced or in a change of direction by the MSP.

**Question 14: Is there scope for Parliament or parliamentarians to be more involved at this stage of the legislation process?**
Adoption of a system of consultation on Members Bills such as that applicable in the Scottish Parliament would enable the public, Parliament and parliamentarians to be more involved in the pre legislative process.
Ministers could be called more frequently to Committees to answer questions about consultations which their departments are conducting. Such inquiries could investigate the evidence base for the policy consulted upon and question the Minister about the engagement strategy being undertaken.

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