

**Scottish Parliament, Standards,
Procedures and Public Appointments
Committee, Procedures for
Considering Legislation.**

A Submission by:

**The Chartered Institute of Public
Finance and Accountancy**

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CIPFA, the Chartered Institute of Public Finance and Accountancy, is the professional body for people in public finance. CIPFA shows the way in public finance globally, standing up for sound public financial management and good governance around the world as the leading commentator on managing and accounting for public money.

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1. EXECUTIVE SUMMARY

- 1.1 CIPFA considers scrutiny to be a key element in promoting 'good governance'. Scrutiny has a clear role to play in upholding the six principles of good governance as outlined in "The Good Governance Standard for Public Services."¹ CIPFA has previously advocated the importance of legislative scrutiny in previous submissions² and we consider that the current inquiry is not only relevant but, against the background of significant public service reform, to be timely.
- 1.2 Here we aim to address issues in relation to the form and process of legislative scrutiny, with a particular focus on scrutiny of the financial implications of legislation and how this links through to the wider financial scrutiny cycle within the legislature.
- 1.3 We consider that scrutiny of the financial implications of legislation should form a major part of the legislative scrutiny process. Legislation can potentially entail significant financial implications which once enacted, constitute a statutory commitment on public sector budgets, which can extend far into the future. Thus, financial scrutiny should be incorporated into all stages of the legislative process to ensure that the financial implications of legislation are reasonable, justified and sustainable going forward.
- 1.4 Our view is that legislative scrutiny should commence at the earliest possible point of policy development. A set of robust tests should be introduced at the point at which legislation is proposed with the following clear four-point test of scrutiny:
1. the impact of existing legislation is clear and has been tested;
 2. the case for new legislation has been made;
 3. the cost and consequences of the new legislation are transparent: and that
 4. there is a clear timescale for post-legislative impact assessment to determine whether the legislation is having the impact claimed in the original case for legislation. (para 2.9).
- 1.5 We have also designed and recommend a principle-based, but practical, integrated scrutiny model which tests legislation from the draft stage through to policy implementation and to the point of post-legislative scrutiny. This model has been designed to integrate with financial scrutiny and we recommend that this is embedded in what will be a new cycle of scrutiny. We have set out in detail the scrutiny steps and the type of challenge necessary (para 3.11 to 3.13).
- 1.6 In addition we make recommendations in relation to:

¹ Independent Commission on Good Governance in Public Services, [The Good Governance Standard for Public Services](#), 2004

² CIPFA, [Response to Inquiry into post-legislative scrutiny](#), Scottish Parliament, Standards, Procedures and Public Appointments Committee, February 2013. CIPFA, [Response to Inquiry into Procedures for Transparency, Scrutiny and Debate of Financial Resolutions](#), Scottish Parliament, (Standards Procedures and Public Appointments Committee), February 2010; CIPFA, [Submission to Scotland's Independent Budget Review Panel](#), April 2010; [Joint Submission by: CIPFA & the CIPFA Scottish Directors of Finance Section. The Commission on Future Delivery of Public Services](#), March 2011; Joint submission by CIPFA, the CIPFA Directors of Finance Section & the Scottish Local Authorities Chief Internal Auditors Group, [Consultation on Reforming Police and Fire and Rescue Services in Scotland](#), November 2011; CIPFA, [Consultation on Integration of Adult Health & Social Care in Scotland](#), September 2012; and CIPFA, [Commission on Scottish Devolution: The Future of Scottish Devolution within the Union](#), 2009.

- ensuring there is time in the legislative scrutiny process for effective consultation and engagement with interested parties (para 2.10)
- information required in the policy memorandum (para 2.11);
- consistency in the preparation of financial memoranda (para 4.5);
- budget allocations and actual costs associated with past and present legislation (para 4.6); and
- support and information required by MSPs to enable the development of a legislative scrutiny framework (para 5.4).

2 ROLE OF LEGISLATIVE REVIEW IN THE WIDER SCRUTINY CONTEXT

2.1 CIPFA suggests that the Committee should initially consider a holistic view of legislative scrutiny, which incorporates scrutiny of the policy objectives and financial implications of legislation at every stage of the process, and feeds into the wider cycle of financial scrutiny. The Centre for Public Scrutiny³ identifies a cycle of different types of scrutiny:

- policy development;
- pre-scrutiny of a proposed policy decision;
- a process to challenge and require a rethink of a decision in exceptional circumstances, for example, if it is believed that standing orders have not been complied with on-going monitoring and challenge of performance, implementation, financial management etc; and
- post-scrutiny review of the effectiveness of the policy and implementation, leading to further policy development.

2.2 A more holistic approach is also supported by the Law Commission which noted that effective post-legislative scrutiny required clarity on the policy objectives of the legislation.⁴ This should clearly be established before and during legislative development.

2.3 This framework approach was also recommended in a briefing note to the Northern Ireland Assembly.⁵ This primarily focused on the scrutiny of budgets and financial information and stated:

“To make such a contribution, the legislature must engage at different times – before expenditure is committed, at the policy development/budget planning stage (ex ante), and after, at the financial reporting stage (ex post)”

2.4 CIPFA has previously recommended that the following tests should be applied and passed, prior to new legislation being brought forward:

- the impact of existing legislation is clear and has been tested;
- the case for new legislation has been made;
- the cost and consequences of the new legislation are transparent: and
- there is a clear timescale for post-legislative impact assessment to determine whether the legislation is having the impact claimed in the original case for legislation.⁶

2.5 In addition to the above tests, the legislative scrutiny process should also maximise the opportunity for effective consultation and engagement with interested parties. The process should have time for such engagement built in at all stages, even when there may be political desire to ‘fast track’ a piece of legislation.

Policy objectives of legislation

³ [Centre for Public Scrutiny](#)

⁴ The Law Commission, [Post-Legislative Scrutiny](#), October 2006.

⁵ Northern Ireland Assembly Research and Information Service, [Effective Legislative Scrutiny](#), Paper 84/12 April 2012.

⁶ CIPFA, [Consultation on Integration of Adult Health & Social Care in Scotland](#), September 2012.

2.6 There is a clear role, prior to the passing of legislation, for the relevant committee to seek clarity on the policy objectives of the legislation. This should include within the four tests described above, the following:

- *Policy outcomes sought*– for example the envisaged impact on society, service users, business and the environment. This would presumably include an assessment of the pre-legislation situation.
- *Outputs expected* – for example service performance expectations such as the number of service users, expected caseload or anticipated uptake of benefits
- *Inputs anticipated* – the expected forms and level of resources expected to be required in both financial and volume terms (e.g. 100,000 nursing hours at an expected cost of £x)
- *Efficiency targets* – the predicted or desired level of efficiency (conversion of inputs to outputs) that the legislation and financial memorandum are based on
- *Sustainability* – an indication of the expected sustainability of the legislation, including financial, environmental and other factors. This may provide guidance as to the appropriate timing of post-legislative scrutiny
- *Evidence base*: the evidence base used as the foundation for assessing the need and form of legislation could be cited.

2.7 The Law Commission report recommended that the Regulatory Impact Assessment (RIA) would be an appropriate document in the Westminster legislative process to clearly establish policy objectives prior to legislation.⁷ The RIA could, on a more formal basis, be used to inform post-legislative scrutiny.

2.8 The Standing Orders of the Scottish Parliament provide that a Bill should be accompanied by a policy memorandum⁸ to set out:

- the policy objectives of the Bill;
- whether alternative ways of meeting those objectives were considered and, if so, why the approach taken in the Bill was adopted;
- the consultation, if any, which was undertaken on those objectives and the ways of meeting them or on the details of the Bill and a summary of the outcome of that consultation; and
- an assessment of the effects, if any, of the Bill on equal opportunities, human rights, island communities, local government, sustainable development and any other matter which the Scottish Ministers consider relevant.

2.8 These requirements for information to be provided in the Policy Memorandum could be extended to incorporate the inputs, outputs, outcomes, targets, sustainability and evidence base as outlined above (para 2.5).

⁷ The Law Commission, [Post-Legislative Scrutiny](#), October 2006.

⁸ Standing Orders of the Scottish Parliament, [Chapter 9: Public Bill Procedures](#), Rule 9.3 Accompanying documents (3).

Recommendations

- 2.9 We recommend that the following tests should be introduced at the point at which legislation is proposed with four clear points of demonstrable challenge by MSP's:**
- 1. that the impact of any existing legislation is clear and has been tested;**
 - 2. that the case for new legislation has been made;**
 - 3. the cost and consequences of the new legislation are transparent; and**
 - 4. there is a clear timescale for post-legislative impact assessment to determine whether the legislation is having the impact claimed in the original case for legislation.**
- 2.10 The scrutiny of legislation should allow time for effective consultation and engagement with interested parties, not only during the initial stages of scrutiny.**
- 2.11 The Standing Orders should be extended to require the Policy Memorandum to provide further details of the policy objectives of the Bill, including the expected inputs, outputs, outcomes, targets, sustainability and evidence base (as outlined in para 2.5).**

3 AN INTEGRATED SCRUTINY MODEL

3.1 We consider that scrutiny of legislation should be integrated within the wider on going scrutiny function. CIPFA worked with the National Assembly for Wales' Finance Committee to introduce a modernised system of financial scrutiny.⁹ The system was implemented for the 2013-14 budget scrutiny round. The structure of the scrutiny was based on the following principles:

- *Affordability*; considers the wider context of whether the available resources are enough to meet the budget choices that have been made;
- *Prioritisation*, limited public resources means that choices have to be made across and within programmes; and
- *Value for money*, are public resources being spent economically, efficiently and effectively.

3.2 We have subsequently designed a cycle of scrutiny which would embed these three objectives of financial scrutiny into the pre-legislative period, through implementation and to the post-legislative period. An integrated process would mean a seamless link between legislative scrutiny and scrutiny of the Scottish Government budget.

A Summary of Integrated Scrutiny in Practice

3.3 At the pre-legislative stage the above three tests would form the basis of Committee scrutiny. Although likely to be conducted in most detail at Stage 1 of the legislative process, the three principles of financial scrutiny should be revisited at both stages 2 and 3, to ensure that the financial implications of any amendments are also scrutinised. This may require more time, or the opportunity for the Finance Committee to re-visit the legislation during these stages.

3.4 Application of the affordability test would be to examine the robustness of the financial memorandum. Central to testing affordability would be assessment of the long term sustainability of the legislation as well as present day affordability. Transparency of costs should therefore be presented on a long term basis as well as a short term basis.

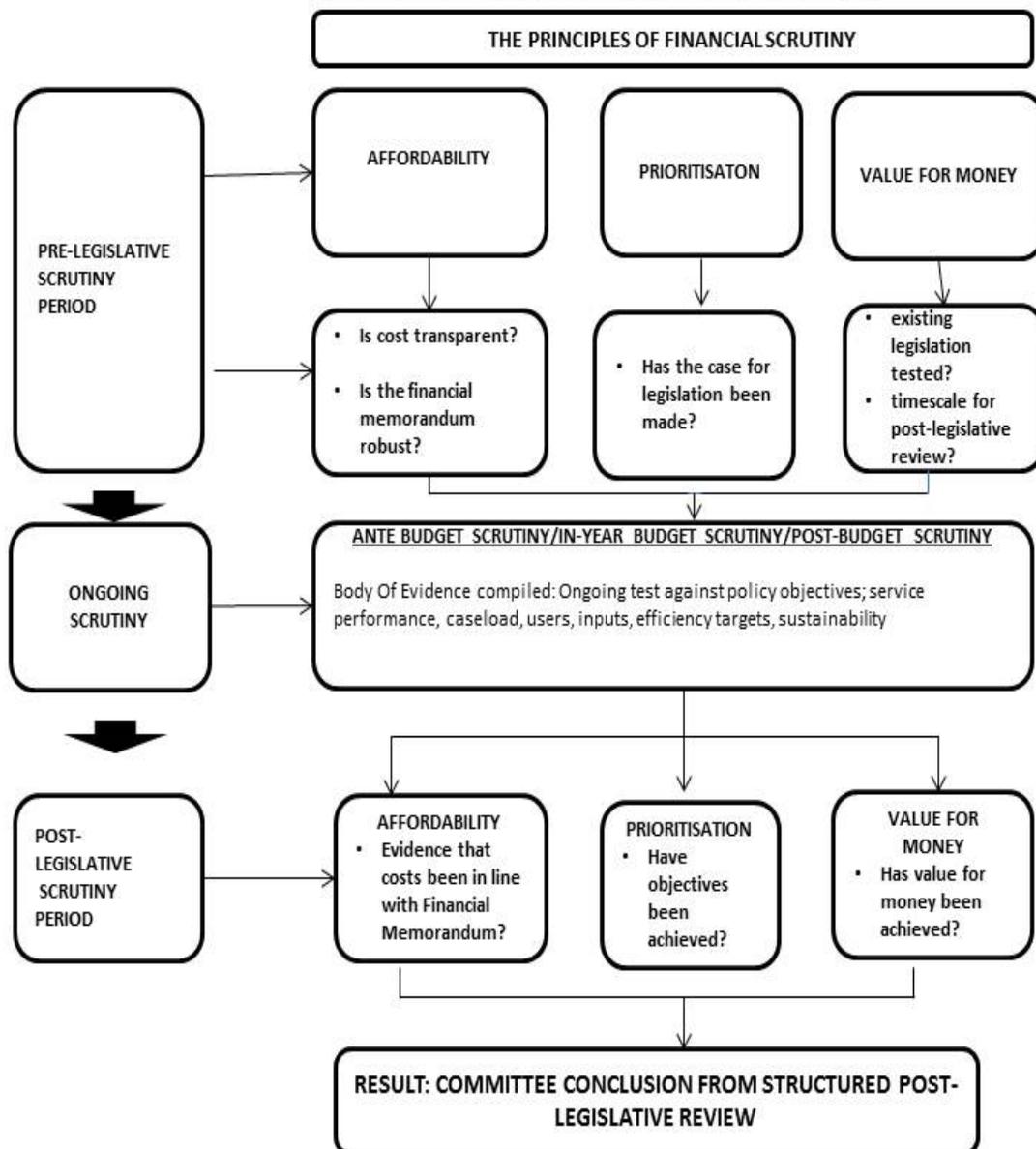
3.5 Application of the test of prioritisation would balance the availability of limited public resources against the set Scottish Government objectives and will test whether the case for legislation has been clearly made and where legislative intervention fits with those objectives. Budget priorities have to be set and clarified.

3.6 There is a cost to legislative intervention and application of the value for money test at the pre-legislative period will be concerned with ensuring that any existing legislation has been robustly assessed for effectiveness. There is a direct link to prioritisation and it is at this point that a clear timescale for post legislative review should be set. Crucial to this test would be clarity on what outputs and outcomes would be expected to emerge to allow on-going as well as post-legislative scrutiny

⁹ National Assembly for Wales, Finance Committee, [Scrutiny of Welsh Government Draft Budget 2014-15](#), November 2013.

- 3.7 On-going financial scrutiny would also apply the three principles but will not be focused on the draft budget only. It will take place at three separate points, *ex-ante* (draft budget), in-year and *ex-post* (post-budget). Throughout, a body of evidence will begin to be compiled which will enable on going scrutiny to be undertaken.
- 3.8 Post-legislative scrutiny can then be undertaken again by using the three principles as the core structure. The focus will be to ensure that the costs of the choices made have been in line with the financial and policy memoranda. Evidence will be required that policy objectives have been achieved from the legislative intervention and that overall, value for money has been achieved.
- 3.9 Setting the timescales for post-legislative scrutiny at an early stage, as suggested above, may aid in encouraging such scrutiny to be undertaken at a later, pre-defined time. However, this should not preclude the post-legislative scrutiny of legislation already passed for which such timescales have not been set. Also, the setting of such a timescale for post-legislative scrutiny of legislation should not preclude ongoing post-legislative scrutiny. It may be of value to revisit legislation after many years to determine whether it remains fit for purpose.
- 3.10 This integrated model can be summarised in diagrammatic form as follows:

CIPFA'S INTEGRATED SCRUTINY MODEL



Recommendations:

- 3.11 We recommend that our approach to financial scrutiny, based on the three principles of affordability, prioritisation and value for money, should be embedded in what will be a new cycle of pre- and post-legislative scrutiny for the Scottish Parliament.
- 3.12 Although the majority of the financial scrutiny in the pre-legislative period will be likely to occur during stage 1, we recommend that the three principles of affordability, prioritisation and value for money are revisited at later stages to allow for scrutiny of the financial implications of subsequent amendments to the legislation.
- 3.13 Financial scrutiny should also be undertaken as part of post-legislative scrutiny to ascertain whether the costs and choices are in line with those stated in the financial and policy memoranda, and whether the legislation is delivering on its stated outcomes and providing value for money.

4 FINANCIAL MEMORANDA AND COSTS OF LEGISLATION

- 4.1 During consideration of the Scottish Government's Draft Budget 2014-15, CIPFA conducted analysis of recently enacted legislation and existing Bills to determine the overall financial impact of legislation on the budget.¹⁰
- 4.2 This analysis highlighted that the financial memoranda accompanying Bills was compiled in an inconsistent manner and did not readily lend themselves to identifying the financial consequences of legislation. This resulted in an inability to quantify a single figure or aggregate of figures for the Committee of what the financial impact from the proposed legislation would be.
- 4.3 Specific consideration was given to the financial memoranda of the following Bills:
- *Children and Young People (Scotland) Bill* – The financial memorandum stated additional costs of an average of £108 million per annum over the first 6 years, mainly costs which fall to be borne by local government. The Cabinet Secretary's statement to Parliament identifies an allocation of £190 million in the next two years to fund the bill providing an additional 125 hours of early learning and childcare for all 3 and 4 year olds and looked after 2 year olds.
 - *Public Bodies (Joint Working) (Scotland) Bill* – This Bill prescribes integrated working between local government and the NHS in the delivery of adult health and social care services. This Bill impacts on almost one third of the existing Scottish budget. The financial memorandum projected transition costs of £34 million over a five year period although this differs from the Cabinet Secretary's commitment to assist integration by providing £120 million in 2015-16. In addition, the Bill provides for secondary legislation which will enact much of the detail. It is unknown whether the financial consequences of secondary legislation has been fully identified and budgeted for.
 - *Police & Fire Reform (Scotland) Act 2012* – The financial memorandum indicated estimates for police and fire reform as £15 million in 2014-15 and £51.4 million in 2015-16. The Scottish Budget claims that efficiency savings totalling £1.7 billion will be delivered in the period up until 2018. The presentation of the 2014-15 budget and the indicative figures for 2015-16 do not enable any of these figures to be readily identified in comparison to previous years.
- 4.4 In addition to a lack of clarity on allocations made in the budget in respect of legislation, it is often difficult to identify the actual costs associated with legislation once it has passed. Post-legislative scrutiny should incorporate this as part of the value for money assessment of inputs, outputs and outcomes outlined above (para 2.5). This may require the production of reports or updates from government on the actual costs of legislation at regular intervals after it has passed.

¹⁰ Scottish Parliament, Draft Budget 2014-15, [Report of the Budget Adviser to the Finance Committee](#), September 2013

Recommendations:

- 4.5** There should be greater consistency in the preparation of financial memoranda, and these should clearly enable the identification of the potential costs (or benefits) of legislation and the timescale over which these are likely to be realised.
- 4.6** To enable better integration of scrutiny, the allocations associated with past and present legislation should be clearly identifiable within the Scottish Government's budget, and reports on the actual costs associated with legislation should be provided to the Parliament. This would enable any inconsistencies to be picked up and assessments of affordability and value for money to be conducted as part of wider financial or post-legislative scrutiny.

5 SUPPORT FOR MSPs

5.1 The development of a legislative scrutiny framework (within an integrated model) represents a significant investment. The undertaking will affect different stakeholders, including of course, the Members of the Scottish Parliament (MSPs) who will have to be well placed to not only meet the challenge of scrutiny but also to be advocates for it. The Good Governance Standard for Public Services¹¹ states:

“A governing body with elected members should commit itself to developing the skills that it has decided its members need, so that they can carry out their roles more effectively.”

“The necessary skills include the ability to scrutinise and challenge information received from the executive, including skills in financial management and the ability to recognise when outside expert advice is needed.”

“The governing body can improve its collective performance by taking the time to step back and consider its own effectiveness.”

5.2 The effectiveness of parliamentary committees in mainstreaming financial scrutiny has been repeatedly raised as an issue in recent years, particularly in relation to Westminster, and the information, capacity and support required to enable better financial scrutiny has been covered in a number of reports.¹²

5.3 MSPs will already have significant experience in effective questioning and constructively challenging within the committee environment. The development of a more formal comprehensive scrutiny framework however will represent a significant change. Therefore in supporting good governance MSPs are likely to require support in respect of:

- *Training:* It may be the case that existing MSPs may not be fully confident in aspects of financial scrutiny in an integrated manner and possibly also in post-legislative review. An initial investment of time and resources in providing training for relevant MSPs may therefore be required. This will apply to the acquisition of skills, clarity on roles and responsibilities and the operation of the finally determined process in the Scottish Parliament. As indicated earlier CIPFA considers that legislative scrutiny should be regarded as part of an overall scrutiny approach, rather than separated from other aspects of scrutiny.
- *Access to appropriate external skills:* Ensuring that MSPs have access to appropriate external skills will be critical to the success of legislative scrutiny. In part this may be achieved through

¹¹ Independent Commission on Good Governance in Public Services, [The Good Governance Standard for Public Services](#), 2004.

¹² Hansard Society, [Parliament and the public purse: Improving financial scrutiny](#), 1999; House of Commons Liaison Committee, [Parliament and Government Finance: Recreating Financial Scrutiny](#), 2008; and House of Commons Liaison Committee, [Select committee effectiveness, resources and powers](#), 2012.

- Appropriate witnesses: ensuring that a sufficient variety of relevant witnesses, presumably including service users where appropriate, are invited to provide evidence will assist. Consideration may be required on how to encourage potentially reluctant witnesses to participate.
- Additional external skills: access to external skills may be desirable to direct MSP attention to relevant question areas and evidence. Desirable support may include relevant expertise such as economists, statisticians, lawyers, financial analysts and cost experts, subject matter specialists and others. Some of this expertise may be available within the Scottish Parliament (e.g. SPICE and the Financial Scrutiny Unit), or the wider Scottish public sector wider public sector, for example in scrutiny bodies (e.g. Audit Scotland), government departments and bodies and local government. Where it is regarded as necessary, external advice may require to be obtained.
- *Access to information*: the ability to access appropriate information from a variety of sources will be vital. Such information should principally be expected to meet the normal qualitative characteristics of information (e.g. relevant, faithful representation, materiality, comparable, verifiable, understandable, timely, cost/benefit balance as utilised by international accounting standards¹³). Such information should also be provided at an appropriate level of detail to ensure that it is fit for purpose. The ability to access this for review purposes should be established, potentially during the initial development of the legislation or the initial assessment of whether to proceed with a specific review.

Recommendation

- 5.4 Development of the legislative scrutiny framework should have regard to support required by MSP's to ensure scrutiny skills are maintained at the required standard, and the support and information required is available, both from internal and external sources.**

CIPFA, 21 March 2014.

¹³ International Accounting Standards Board, [The Conceptual Framework for Financial Reporting 2010](#) (Chapter 3)