



## HOUSE OF LORDS CONSTITUTION COMMITTEE: INQUIRY INTO THE LEGISLATIVE PROCESS

ICAEW welcomes the opportunity to comment on the Call for Evidence in the [House of Lord's Constitution Committee inquiry into The Legislative Process](#) published on 16 September 2016.

This response of 21 October 2016 has been prepared on behalf of ICAEW building on the input of the Business Law Committee and the Tax Faculty. The Business Law Committee includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

Internationally recognised as a source of expertise, the ICAEW Tax Faculty is a leading authority on taxation. It is responsible for making submissions to tax authorities on behalf of ICAEW and does this with support from over 130 volunteers, many of whom are well-known names in the tax world.

Appendix 1 sets out the ICAEW Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark proposals for changes to the tax system. With suitable adaptation, we believe that these principles provide a good model for assessing all business and regulatory legislation.

ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 147,000 member chartered accountants in more than 155 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

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## MAJOR POINTS

### A welcome and urgently needed inquiry

1. We welcome the Constitution Committee's inquiry into the UK legislative process. Clearly drafted, proportionate legislation that has been through appropriate due process is essential to ensuring that businesses and individuals can operate, and transact with each other, with certainty and confidence. Good legislation supports economic growth. Good tax legislation secures the tax base as well as giving confidence to taxpayers.
2. The inquiry is particularly timely as we prepare for a UK exit from the European Union. Although the proposed 'Great Repeal Bill', which we understand would grandfather existing EU law in the UK, reduces the urgency of the task of dealing with the legislative consequences of Brexit, it is not a panacea. The grandfathered law will need maintenance; key policy and competitive initiatives arising from the UK's future as an independent nation will require legislative action; and keeping pace with international compacts we remain committed to will require our legislation to be able to react to developments in these. It is fundamental that a structure be put in place now to address these pressures.

### Principles for effective consultation

3. Having an effective process in place for consultation is fundamental to the production of good legislation. In our opinion, consultation should be:
  - Time Sufficient - We recommend a minimum of 12 weeks for major consultations. Much shorter recent consultation periods have given too little time for representative organisations to adequately consult their membership.
  - Targeted – Consultations will often include many technical aspects. The comments of those best able to address these appropriately should be proactively sought. This would entail more than a publicly accessible web page. Prior to this (perhaps at the pre-consultation policy formation stage) the net should be thrown much wider.
  - Not a 'tick box' process – To be genuinely useful engagement the process should be entered into in the right spirit, without a pre-determined outcome or as a defence mechanism.

### Consequences of ineffective or inefficient legislation

4. For several years now ICAEW has been tracking the length of successive Finance Acts in our popular report, Big Ben's Statutory Tax Burden, a copy of which is being submitted to accompany this evidence. At 649 pages long, Finance Act 2016 is the second longest ever, and adds to a tax code that by 2009 had already been reported to have surpassed the length of India's as the world's longest. In our opinion this unduly lengthy and complex legislation is partly a reflection of it having been rushed through parliament with a lack of scrutiny. For example, the recent provisions regarding entrepreneurs' relief as originally released were poorly drafted. Much post-enactment consultation and hard work was then necessary to get the law amended back to where it should have been in the first place.
5. It seems that government is sometimes unable to keep up with its own initiatives and this results in inconsistency and more inefficiency. For instance, the 2008 charity accounting regulations applicable in England and Wales have still not been updated to refer to the new charity SORP (Statement of Recommended Practice), leaving the Charity Commission in the unenviable position of explaining to charities why it might be acceptable to apply the new SORP in apparent breach of the requirements of the regulations. By contrast the regulations in Scotland were amended to refer to the new SORP.
6. These shortcomings place an incremental burden on business and consequently addressing them would provide a positive benefit to the economy. That is good news in ordinary times. But in preparation for Brexit a more efficient, higher quality, legislative process is imperative. In this evidence we set out some initial thoughts in response to the specific questions posed in the

Inquiry. The short consultation period of four weeks, coupled with the lack of a single recognised source of reference for Parliamentary Calls for Evidence which might have brought it to our attention sooner, has meant that we ourselves have not been able to consult as widely as we would normally do before responding to an important Inquiry. This response is based on the views of our Business Law Committee, and our Tax Faculty in relation to tax legislation. ICAEW, and in some instances our members themselves, also engage in the process of statutory development in other contexts. We look forward to engaging with the Inquiry as it progresses and to having sufficient time in the final three stages of the Inquiry to consult more widely with our stakeholders.

## RESPONSES TO SPECIFIC QUESTIONS

### Creating good law

**Q1: How effective are current practices in Government and Parliament at delivering clear, coherent, effective and accessible draft legislation for introduction in Parliament?**

7. As might be expected, they vary. Well received and effective legislation has been enacted in recent years in some areas. Some radical and very welcome changes to the legislative framework have been made – for example we would highlight the Bribery Act 2010 which we consider to be exemplary. That Act was initially drafted following a Law Commission inquiry. We believe that the work of the Law Commission has in general been very effective and suggest this as a model for improving the process.
8. In other areas much is left to be desired. In particular we might highlight tax legislation. ICAEW has been tracking the length of the Finance Acts for some years now, illustrating their increasing length and complexity. At 649 pages long, Finance Act 2016 is the second longest ever, and adds to a tax code that by 2009 had already been reported to have surpassed the length of India's as the world's longest. These lengthy documents highlight the increasing complexity for taxpayers of an ever expanding tax code. In our opinion this unduly lengthy and complex legislation is partly a reflection of it having been rushed through parliament, with an unfortunate lack of scrutiny.
9. It is also unfortunate that the lessons of the Tax Law Rewrite project have not been remembered. For a short period, legislation was drafted in better English, making it more manageable. Lack of resource is presumably why this is no longer happening, but the consequences for those who seek to apply it, accountants, lawyers and the general public who are governed by it, are that it takes longer to work with and interpret, and mistakes are made.

**Q2: Are there mechanisms, processes and practices at this stage of the legislative process that hinder the development of 'good law'?**

10. It may be rather that good mechanisms, processes and practices are forgotten or ignored, when the need to respond to political issues takes priority over careful consideration and research. In terms of tax legislation, a framework for good legislation has already been agreed and has been in place since 2011 ([https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/89261/tax-consultation-framework.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/89261/tax-consultation-framework.pdf)). We believe this is an exemplary document that provides a sound basis for the development of legislation. Unfortunately in practice it is typically not followed as effectively as it might be. In particular HMRC do not tend to spend enough time at Stages 1 and 2 of the framework. As a result drafting often commences before the issue that the legislation is intended to address is properly defined, before the options for action are identified and before concluding whether legislation is the most effective response. This also occurs in other areas of the law, such as the introduction of the corporate register of Persons with Significant Control, which increased substantially the burden of small and medium sized enterprises, with doubtful value to law enforcement.
11. A perennial impediment to effective consultation is the short timescale often allotted to this crucial stage of the legislative process, and the timing of it. Again, from a tax legislation

perspective, once draft legislation appears in early December there is then normally only a short time for comment, by early February, but then the die is very much cast. Very few changes are typically accepted by government once the Finance Bill is published in late March. This cannot be a process designed to do all that is possible to produce effective legislation. In this sense the consultation process becomes a defence mechanism rather than a genuinely useful exercise.

12. Inevitably, this process then means that once a provision is deemed appropriate for inclusion in the next year's Finance Act the particular provision is on a 'treadmill'. At this stage it can be very difficult to convince government that more time is needed to get this particular provision into really good shape before it is enacted. Inadequate legislation then needs to be supplemented by HMRC guidance which does not have the force of law and creates uncertainty.

**Q3: 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?**

13. Yes; we suggest some below.

14. We note that the UK legislative drafting style is legalistic. There may be good reasons why it has developed as it has, but it has now reached its sell by point. Our laws should be readable for a reasonably educated 21st century citizen, not just lawyers and other professionals. The point is illustrated in the drafting of two recent legislative initiatives - the Persons of Significant Control register requirements and the auditor cessation regulations. Ironically, the EU approach to legislation has some advantages with its explanatory preambles and short provisions. The guidance to parliamentary draftsmen contains the following sage advice:

'it is especially important to take the reader by the hand and lead him or her in a logical way through the story you have to tell...Whether an effort to make a draft easy to understand has been successful is tested by whether the intended readers in fact find the draft easy to understand'.

It is a shame that it is not followed consistently. Responsibility for this lies not only with draftsmen, but with those who conceive regulation in broad terms with little understanding or concern for the complexities that will inevitably result.

15. We also note that there appears to be a significant amount of evidence collecting taking place in consultations that have a short timeframe and, further, ask inappropriately open questions. The recent consultation on the transposition of the 4<sup>th</sup> anti-money laundering Directive could be said to read like a survey in places. It is not necessarily desirable to conduct an impact assessment as part of a legislative consultation. This is surely a separate process.
16. Moreover, in some recent examples we have observed 'tough new legislation' being announced to fix a problem for which there is already legislation in place (just not being used effectively, or not brought into force). The motives for this approach are unclear but the end product lamentably is all too often a 'cheap' solution.
17. Partly this may be due to there simply being too much legislation; a point also evidenced by the number of inconsistencies or contradictions. In the insolvency world for example, (heavily EU influenced) employment law requires insolvency practitioners to 'meaningfully' consult employees, which, if followed, might be at odds with their legal obligations to act in the interests of all creditors. A further example is the conflict between the Proceeds of Crime Act and the Serious Crime Act around the 'consent' defence. To address this, more analysis might be done before new legislation is introduced as to whether existing legislation could be amended to cover the point and to ensure that all potential implications have been taken into account.
18. Clarity could also be enhanced by improvements to web versions of legislation. These should be kept fully up to date, changes and prospective changes marked (and implementation dates

annotated) and links provided to all related legislation/regulations. At the moment this is done by external providers (at a cost), and these organisations have a key role in any developments here, but government should examine the extent and clarity of information it provides to determine how it can help in this process. In the democratic interests of UK citizens, sufficient information to reasonably enable compliance with the law should always be available free of charge.

19. Finally we would observe that there is no panacea for some of the issues leading to bad legislation, as sometimes this arises from bad policy initiatives. To some extent this result is inevitable and may even increase if the legislative process is made more agile. Robust processes for the review and replacement of defective legislation need to be maintained to redress the situation.
20. Our Ten Tenets for a better tax system are attached as an appendix to this response. We believe these provide a framework for effective tax legislation and indeed these intuitive principles can be easily adapted and applied to the wider legislative process.

## **Brexit**

### **Q4: 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?**

21. The UK's withdrawal will have a significant impact and government needs to begin to prepare for this now. Extra resource will undoubtedly be required even to maintain 'business as usual'. Proportionate and smart legislation, reflecting the UK context, is vital to national competitiveness in a post-EU Britain. It will need adequate resources to deliver this. Hard choices will need to be made about the distribution of resources for this task. The government will need to address competing claims for priority. These will not always be easy calls to make, but we suggest that if the government's priority is economic renaissance then those areas that contribute most productively to UK output need to be prioritised. Professional services is one area where we remain a world leader and where it is vital that our ability to compete is not shackled by poorly drafted legislation.

### **Q5: Will there be changes required to how the Government and Parliament deal with legislation following Brexit?**

22. Yes. It requires a paradigm shift and government will need to be resourced in good time to address the opportunities and challenges this presents. Government needs to be mindful that in time, as the opportunities for more proportionate and effective legislation become clearer, and as maintenance requirements accumulate, demands for legislative action will be made by an increasingly diverse range of groups. These will soon hit up against capacity constraints. Different groups will have different and sometimes conflicting objectives. For some contexts there will be a strong imperative not to change legislation, or to update it to follow EU developments in order to maintain equivalence. Elsewhere the demand will be to keep up to date with developments in international 'soft law', perhaps sometimes ploughing a different furrow to the EU. In still other cases stakeholders may seize the opportunity to develop distinctive UK laws that are reflective of local conditions. Sometimes all three considerations might be present in a single area and will need to be mediated. Our point is that all of this will require sufficient capacity to recognise, take account of, and respond to these demands.
23. To do this we make two specific suggestions. Firstly that the government as a matter of principle reflects more deeply whenever draft legislation would 'gold plate' international requirements. Simplicity should be the order of the day in a capacity constrained world unless there are compelling reasons for a more stringent UK regulatory regime. Secondly, that consideration be given to the role of non-governmental organisations, with some requirements currently contained in primary legislation relegated to become regulatory requirements, for example. We have consistently maintained that many of the specific provisions relating to accounting in the Companies Act (hitherto derived from the Accounting Directive) would be

better located in the UK accounting standards maintained by the Financial Reporting Council rather than in legislation.

## Technology

### Q6: How effectively do Parliament and the Government make use of technology at this stage of the legislative process?

24. In general the UK government have been proficient in the use of the internet for communicating with citizens and businesses. We are not commenting at length in this response on the possible uses of technology within parliament to make the process more effective, although there should be many opportunities here. As regards interaction with those wishing to comment on draft legislation we would caution against over-engineering the process as there is a risk that this distracts from other more pressing priorities. In fact the biggest improvements may not need development of new technologies, but rather more consistent use of the existing ones. The important point is that all of those with an interest in a particular legislative area can easily keep themselves up to date with developments, and that the pages they view to do so are comprehensive. Email alerts or RSS feeds they set from these sources should be expected to notify them of any and all new consultations in the areas selected. In practice we have experienced difficulties with the reliability and completeness of the consultation notification emails on gov.uk. We have also not been able to locate any single web site or publication that aims at listing all parliamentary Calls for Evidence as they are issued.

### Q7: How could new or existing technologies be used to support the development and scrutiny of legislation?

25. Technology provides the opportunity to socialise legislative consultation far beyond what was historically possible. To some extent this is already being done, with gov.uk providing free, 24 hour access to drafts from anywhere in the world. More could clearly be done to use electronic means to both explain the purpose of draft legislation and seek comments on it, but note our comments in paragraph 24 above regarding over-engineering. As a first step we would reiterate that the aim should be that at least those with an interest in responding to a particular proposal are able to be made aware of it. This is not consistently the case at present. As we have said in previous government consultations, consistent access to high speed broadband across the UK would aid in participation.

## Public involvement and engagement

### Q8. To what extent, and how effectively, are the public and stakeholders involved in this stage of the legislative process?

26. Members of the general public might not be heavily involved in the review of draft legislation. However, representative bodies such as ICAEW do play a significant role in the development of legislation. We have lengthy experience in doing so and have the networks to reach those affected and mediate opposing views through our internal consultation processes. Our networks have an important role to play in gathering comment and processing it into coherent suggestions. We commend the government for those efforts it does make to place this consultation at the core of the legislative process. In the current inquiry the committee may wish to investigate further the value that is gained from the interaction between government and representative bodies and how it might be more systematised.
27. To achieve effective consultation we believe that government should aim to enter into it with a genuinely blank slate as to what might work, rather than a pre-determined outcome. In practice this means starting a much wider "pre-consultation" consultation at a much earlier point.

### Q9. What factors inhibit effective engagement?

28. Inhibitors of effective engagement include short timeframes, as well as, in some cases, the simple fact that engagement might be undesirable to achieve the perceived goal of the

legislation. In this case we would suggest that good legislation is unlikely to emerge. See our comments under question 3 above.

**Q10. What mechanisms could be used to increase or improve engagement with the public and stakeholders?**

29. Allowing sufficient time and ensuring that interested parties can find the consultation/can be consistently alerted are key priorities. These apply equally, or even more so, to Parliamentary consultations as to ones by government, regulators or independent inquiries. We note that in the case of this Call for Evidence we had not been alerted with adequate time to respond. We would have welcomed an alert given that we are a seasoned contributor to this type of consultation and have deep knowledge on tax and other business law areas. Legal Services Board research indicates that accountants are the primary providers to SMEs of advice on 'regulation' (undefined, but we understand it to include not just requirements imposed by regulators, but also administrative, accounting and reporting requirements imposed by law).

**Information provision**

**Q11. How effectively is information about potential legislation disseminated at this stage in the process?**

30. The important point is that prospective legislation is discussed with those with an interest in commenting on it, and draft legislation is made available to them as soon as possible. At present it is not always easy to find out what consultations and inquiries are open in respect of potential legislation. We note particular difficulties when a piece of legislation is drafted by a department that does not usually legislate in that particular area. For example legislation to require mandatory Gender Pay Gap reporting was published earlier this year by the Government Equalities Office. These proposals affected corporate reporting but were from a department not typically involved in legislating in this area. Commendably all of the documents were published on gov.uk, but for those searching for corporate reporting consultations this was not an area of the website that they would likely come across (or be alerted to from their email alert settings).

**Q12. How useful is the information that is disseminated and how could it be improved?**

31. Consultees need to have the opportunity to comment on the objectives of prospective legislation, and the early plans for how these will be achieved by the planned legislation, as well as access to the draft legislation as it emerges. As long as this is made easily accessible it is difficult to see that further innovations can contribute much to the process of reviewing and commenting on legislation. Ultimately this will remain a human process. What could be improved would be to allow more time for constituents to scrutinise drafts. We recommend a minimum of 12 weeks for major consultations. Our review process typically involves significant consultation with our own stakeholders; having sufficient time means we can complete this satisfactorily. The [Government Consultation Principles](#) were last updated earlier this year.

**Parliamentary involvement**

**Q13. To what extent is Parliament, or are parliamentarians, involved in the development of legislation before it is introduced into Parliament?**

32. We are not responding to this question.

**Q14. Is there scope for Parliament or parliamentarians to be more involved at this stage of the legislation process?**

33. We are not responding to this question.

## APPENDIX 1

### ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see via <http://www.icaew.com/en/about-icaew/what-we-do/technical-releases/tax>).