

**THE SCOTTISH PARLIAMENT  
STANDARDS AND PROCEDURES  
COMMITTEE: INQUIRY INTO POST-  
LEGISLATIVE SCRUTINY**

**A Submission by:**

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

**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.

Further information about CIPFA can be obtained at [www.cipfa.org](http://www.cipfa.org)

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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."<sup>1</sup> CIPFA has previously advocated the importance of post-legislative scrutiny in previous submissions<sup>2</sup>] 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 We recognise that the inquiry is based on the consensus view that such scrutiny is desirable. We will not rehearse the reasons for supporting post-legislative scrutiny but we will address issues in relation to the form and process of post-legislative scrutiny.
- 1.3 Our main message is that the starting point of legislative scrutiny should in fact commence at the earliest possible point of policy development. As early in fact as development of party manifesto proposals although we recognise that this is not within the aegis of the Committee. A set of robust tests should be introduced at the point at which legislation is proposed with clear four-point test of scrutiny. (para 2.8).
- 1.4 We have 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 4.10).
- 1.5 In addition we recommend the following:
- The key limitations to post-legislative scrutiny can be mitigated by introduction of a clear framework in which that scrutiny is assessed using the pre-legislative test outlined in this submission (para 3.5);

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<sup>1</sup> The Good Governance Standard for Public Services, Independent Commission on Good Governance in Public Services, 2004, <http://www.jrf.org.uk/system/files/1898531862.pdf>

CIPFA Response to Inquiry into Procedures for Transparency, Scrutiny and Debate of Financial Resolutions, The Scottish Parliament, (Standards Procedures and Public Appointments Committee), 'Public Sector Reform', [February 2010],

CIPFA submission to Scotland's Independent Budget Review Panel, (panel commissioned by Scottish Government), [April 2010]

Joint Submission by: CIPFA & the CIPFA Scottish Directors of Finance Section, The Commission on Future Delivery of Public Services ('the Christie Commission', established by the Scottish Government), [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 (Scottish Government), [November 2011]

CIPFA submission, Consultation on Integration of Adult Health & Social Care in Scotland (Scottish Government), [Sept 2012] [http://www.cipfa.org/-/media/files/regions/scotland/cipfa\\_submission\\_integration\\_of\\_adult\\_health\\_social\\_care\\_consultation.pdf](http://www.cipfa.org/-/media/files/regions/scotland/cipfa_submission_integration_of_adult_health_social_care_consultation.pdf)

CIPFA submission, Commission on Scottish Devolution: The Future of Scottish Devolution within the Union (the 'Calman Commission'), [2009]

- development of the post-legislative scrutiny framework should have regard to support required by MSP's to ensure scrutiny skills are maintained at the required standard (para 5.3);
- specification of the legislation to be subject to post-legislative scrutiny should be clarified during passage of the legislation, setting out the appropriate date at which post-legislative scrutiny should be considered (para 6.4); and
- Significant secondary legislation should justifiably be subject to post-legislative review (para 6.5)

## 2. ROLE OF POST-LEGISLATIVE REVIEW IN THE WIDER SCRUTINY CONTEXT

2.1 This submission will consider various issues as they affect the ability to achieve the four key objectives for undertaking post-legislative scrutiny, as identified by the Law Commission report on post-legislative scrutiny<sup>3</sup>. These objectives were stated<sup>4</sup> as:

- “to see whether legislation is working out in practice as intended
- to contribute to better regulation
- to improve the focus on implementation and delivery of policy aims
- to identify and disseminate good practice so that lessons may be drawn from the successes and failures revealed by the scrutiny work”

2.2 While the focus of the inquiry is on post-legislative scrutiny, CIPFA suggests that the Committee should initially consider a holistic view of legislative scrutiny in determining the appropriate approach to post-legislative scrutiny. The Centre for Public Scrutiny identifies a cycle of different types of scrutiny<sup>5</sup>.

- 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.
- post-scrutiny review of the effectiveness of the policy and implementation, leading to further policy development”

2.3 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<sup>6</sup>. This should clearly be established before and during legislative development.

2.4 This framework approach was also recommended in a briefing note to the Northern Ireland Assembly<sup>7</sup>. This primarily focused on the scrutiny of budgets and financial information and stated<sup>8</sup>.

“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*)”

2.5 CIPFA has previously recommended<sup>9</sup> that the following tests should be applied, and passed, prior to new legislation being brought forward:

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<sup>3</sup>Post-Legislative Scrutiny, The Law Commission, Law Com No. 302, [October 2006], [http://lawcommission.justice.gov.uk/docs/lc302\\_Post-legislative\\_Scrutiny.pdf](http://lawcommission.justice.gov.uk/docs/lc302_Post-legislative_Scrutiny.pdf)

<sup>4</sup> Paragraph 6.3, Post-Legislative Scrutiny, The Law Commission, Law Com No. 302, [October 2006]

<sup>5</sup> <http://www.cfps.org.uk/>

<sup>6</sup> Paras 2.22, 3.7-3.16,6.4 - Post-Legislative Scrutiny, The Law Commission, Law Com No. 302, [October 2006], [http://lawcommission.justice.gov.uk/docs/lc302\\_Post-legislative\\_Scrutiny.pdf](http://lawcommission.justice.gov.uk/docs/lc302_Post-legislative_Scrutiny.pdf)

<sup>7</sup> Effective Legislative Scrutiny, Northern Ireland Assembly Research and Information Service, Paper 84/12 April 2012, [http://www.niassembly.gov.uk/Documents/RaISe/Publications/2012/finance\\_personnel/8412.pdf](http://www.niassembly.gov.uk/Documents/RaISe/Publications/2012/finance_personnel/8412.pdf)

<sup>8</sup> Page 4 of the above

- 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 that
- 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

2.6 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<sup>10</sup>. The RIA could, on a more formal basis, be used to inform post-legislative scrutiny.

### **Recommendation**

**2.8 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:**

- **that the impact of any existing legislation is clear and has been tested;**
- **that the case for new legislation has been made;**
- **the cost and consequences of the new legislation are transparent: and that;**
- **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**

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<sup>9</sup> Page 3, CIPFA submission, Consultation on Integration of Adult Health & Social Care in Scotland (Scottish Government), [Sept 2012], [http://www.cipfa.org/-/media/files/regions/scotland/cipfa\\_submission\\_integration\\_of\\_adult\\_health\\_social\\_care\\_consultation.pdf](http://www.cipfa.org/-/media/files/regions/scotland/cipfa_submission_integration_of_adult_health_social_care_consultation.pdf)

<sup>10</sup> Paras 3.13-3.16, 6.4 - Post-Legislative Scrutiny, The Law Commission, Law Com No. 302, [October 2006], [http://lawcommission.justice.gov.uk/docs/lc302\\_Post-legislative\\_Scrutiny.pdf](http://lawcommission.justice.gov.uk/docs/lc302_Post-legislative_Scrutiny.pdf)

### 3. POTENTIAL BARRIERS TO POST-LEGISLATIVE SCRUTINY

3.1 The Law Commission noted three key possible limitations<sup>11</sup>:

- **The risk of replaying arguments:** significant self-discipline will be required to prevent simply repeating and re-engaging on, the original arguments debated during legislative development. Such 'replay' does not directly contribute to the objectives of post-legislative scrutiny.
- **The dependence on political will:** without political will and political belief in the benefits of post-legislative scrutiny, the development of an effective overall scrutiny regime is unlikely to occur.
- **Resource constraints:** resources, including parliamentary committee time, are limited. It will therefore be necessary to ensure that an appropriate framework should balance costs and benefits of post-legislative review.

#### **Risk of Replaying Arguments**

3.2 CIPFA considers that mitigating this risk is likely to involve:

- A clearly defined remit framework for post-legislative review for all participating individuals and bodies to adhere to;
- Focus on the achievement of the original policy objectives and not on the appropriateness of the policy objectives in the current post-legislative environment;
- An element of independent leadership, or oversight, of the review process; and
- Clear and unbiased leadership by MSP's of each review

#### **Dependence on Political Will**

3.3 CIPFA considers that mitigating this risk will require:

- Clear and unbiased leadership by MSP's of the review process;
- well-implemented legislation;
- Parliamentary leadership in communicating the lessons learned from each review. This is important not only to obtain political will but also to ensure that the lessons learned from any specific example (e.g. affecting one committee) are recognised in all future legislative development (e.g. by other committees). Feedback will also inform improvement of the post-legislative scrutiny process itself.

#### **Resource Constraints**

3.4 CIPFA considers that mitigating this risk is likely to involve:

- Recognition that undertaking post-legislative scrutiny will require either additional resources or the re-direction of resources from existing activities;

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<sup>11</sup> Paras 2.15-2.21, 6.3- Post-Legislative Scrutiny, The Law Commission, Law Com No. 302, [October 2006], [http://lawcommission.justice.gov.uk/docs/lc302\\_Post-legislative\\_Scrutiny.pdf](http://lawcommission.justice.gov.uk/docs/lc302_Post-legislative_Scrutiny.pdf)

- Prioritisation of the legislation that should be subject to review. This could be based on both quantitative and qualitative factors, such as:
  - scale – this will be related to cost, social impact, economic impact, environmental impact;
  - political impact – where there was a high degree of debate, either politically or in a wider social context, review will be appropriate. Where general consensus existed this aspect would be less relevant but the other considerations (e.g. scale) could still apply
  - significant impact on specific social groups, individuals or bodies;
  - significant successes or failures in implementation. This is relevant since the most extreme examples are likely to yield the most evident lessons for the future.
- Careful consideration of the cost-benefits of:
  - establishing any new bodies, posts or responsibilities for post-legislative scrutiny
  - undertaking each proposed post-legislative review
- An element of self-assessment, as generally supported by the Crerar Review<sup>12</sup> and information provision from bodies responsible for implementing legislation. This will need to be balanced with the need for an independence and unbiased view of legislative implementation. A self-reporting regime, or a public request for identification of legislation to be reviewed, could significantly assist in focusing resources.
- Use of available information from relevant external scrutiny bodies such as Audit Scotland, HMICS, the Scottish Housing Regulator and others.

## **Recommendation**

### **3.5 The key limitations to post-legislative scrutiny can be mitigated by introduction of a clear framework in which that scrutiny is assessed using the factors outlined above.**

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<sup>12</sup> Recommendations, para 10.5, The Crerar Review, The Report Of The Independent Review Of Regulation, Audit, Inspection And Complaints Handling Of Public Services In Scotland, [Sept 2007], <http://www.scotland.gov.uk/Resource/Doc/198627/0053093.pdf>



## **4 AN INTEGRATED SCRUTINY MODEL**

4.1 We consider that scrutiny of legislation both pre and post legislation should be integrated within the wider ongoing scrutiny function. CIPFA worked with the National Assembly for Wales Finance Committee to introduce a modernised system of financial scrutiny was implemented<sup>13</sup>. The system was implemented for the 2013/14 budget scrutiny phase. 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..

4.2 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**

4.3 At the pre-legislative stage the above three tests would form the basis of Committee scrutiny. 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.

4.4 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 choices have to be made

4.5 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 ongoing as well as post-legislative scrutiny

4.6 Ongoing financial scrutiny will 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 ongoing scrutiny to be undertaken.

4.7 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 memorandum. Evidence will be

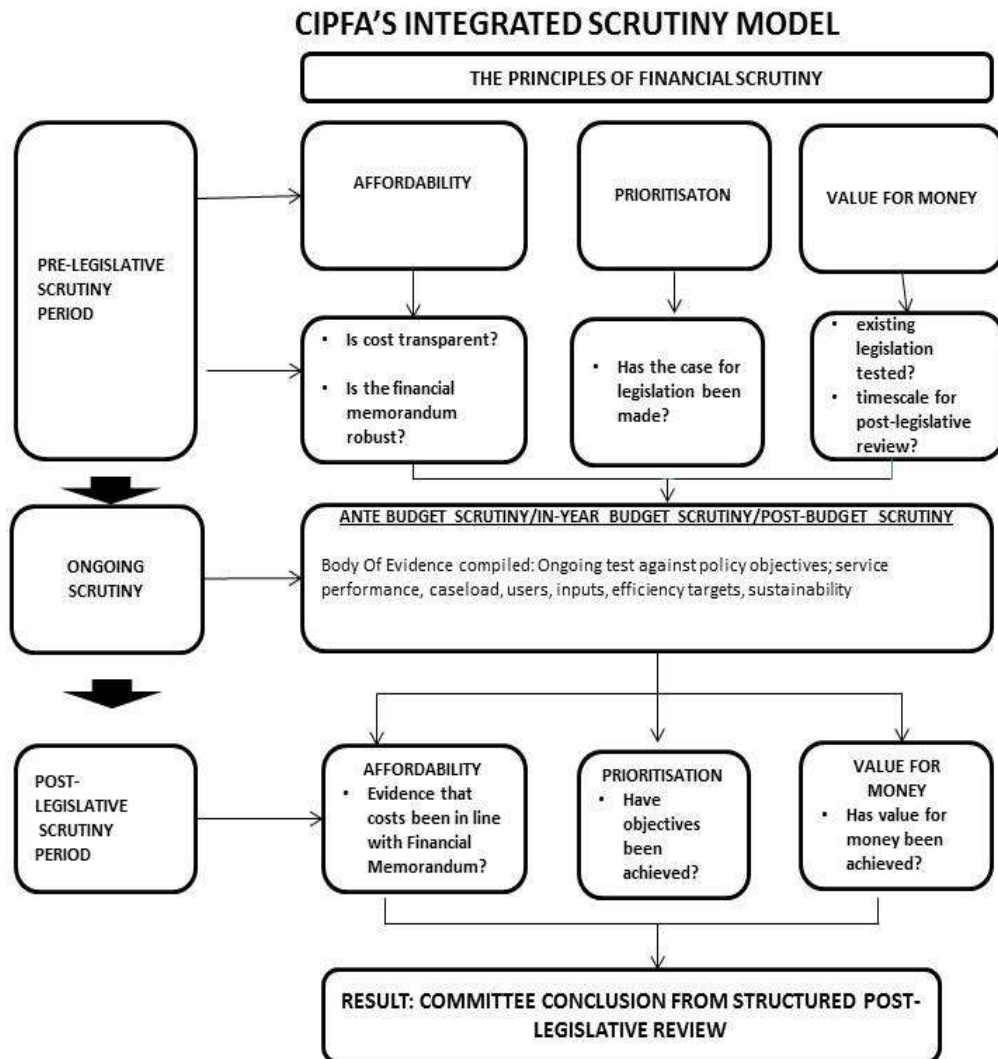
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<sup>13</sup> National Assembly for Wales, Finance Committee 2013/14 Budget Scrutiny Report

required that policy objectives have been achieved from the legislative intervention and that overall, value for money has been achieved.

4.8 Our conclusion is that the effectiveness of financial scrutiny at the post-legislative stage is entirely dependent on embedding the principles of scrutiny at the pre-legislative stage and in the ongoing period of policy implementation.

4.9 This integrated model can be summarised in diagrammatic form as follows:



**Recommendation**

**4.10 We recommend that our approach to financial; scrutiny should be embedded in what will be a new cycle of pre and post-legislative scrutiny for the Scottish Parliament.**

## 5. SUPPORT FOR MSPs

5.1 The development of a post-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 Code for Public Services<sup>14</sup> 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.” (page 20)
- “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.” (page 20)
- “The governing body can improve its collective performance by taking the time to step back and consider its own effectiveness.”

5.2 MSPs will already have significant experience in questioning and 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 is unlikely that existing MSPs will have had extensive experience of post-legislative review. An initial investment of time and resources in providing training for relevant MSPs is therefore likely to 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 post-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 post-legislative review. In part this may be achieved through
  - **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), 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 will require to be obtained.

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<sup>14</sup> The Good Governance Standard for Public Services, Independent Commission on Good Governance in Public Services, 2004, <http://www.jrf.org.uk/system/files/1898531862.pdf>

- **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, timeous, Cost / benefit balance as utilised by international accounting standards<sup>15</sup>). 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**

**5.3 development of the post-legislative scrutiny framework should have regard to support required by MSP's to ensure scrutiny skills are maintained at the required standard**

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<sup>15</sup> Chapter 3, *The Conceptual Framework for Financial Reporting*, IASB (IFRS Foundation), <http://eifrs.ifrs.org/eifrs/bnstandards/en/2012/framework.pdf>

## **6. WHICH LEGISLATION SHOULD BE REVIEWED AND WHEN**

- 6.1 Resource constraints will mean that post-legislative reviews will be prioritised. That prioritisation can however be based on the influencing criteria set out at Section 3 above.
- 6.2 We suggest however that any intention to include or exclude legislation from post-legislative scrutiny could be clear. This aligns with a Law Commission suggestion<sup>16</sup>. Where a review is indicated as intended an appropriate timescale can be determined at the same time. This will also assist in supporting appropriate implementation given that all parties will be aware of the potential for review. Whether a review, either full or partial, is actually undertaken can then be regarded as a separate decision, dependent on the situation at the indicated time.
- 6.3 The Law Commission paper also suggested<sup>17</sup> that there was scope for secondary legislation to be subject to similar reviews. We concur with that view, noting that secondary legislation is often pivotal in determining the final practical impact of legislation. Consequently any review of primary legislation should include the review of the impact and operation of consequent secondary legislation.

### **Recommendation**

- 6.4 specification of the legislation to be subject to post-legislative scrutiny should be clarified during passage of the legislation setting out the appropriate date at which post-legislative scrutiny should be considered.**
- 6.5 Significant secondary legislation should justifiably be subject to post-legislative review .**

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<sup>16</sup> Para 6.6- Post-Legislative Scrutiny, The Law Commission, Law Com No. 302, [October 2006], [http://lawcommission.justice.gov.uk/docs/lc302\\_Post-legislative\\_Scrutiny.pdf](http://lawcommission.justice.gov.uk/docs/lc302_Post-legislative_Scrutiny.pdf)

<sup>17</sup> Para 6.13- Post-Legislative Scrutiny, The Law Commission, Law Com No. 302, [October 2006], [http://lawcommission.justice.gov.uk/docs/lc302\\_Post-legislative\\_Scrutiny.pdf](http://lawcommission.justice.gov.uk/docs/lc302_Post-legislative_Scrutiny.pdf)