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**UNIDEM Campus Trieste
Seminar**

“LEGISLATIVE EVALUATION”

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REPORT

“EVALUATING LEGISLATION: THE BRITISH EXPERIENCE”

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A Drafting Exercise

- Draft an offence of causing unnecessary noise outside hospitals
- Unnecessary noise
- Outside hospitals

Draft an offence of causing unnecessary noise outside hospitals

- What noise will constitute the offence?
- Level of decibels may provide certainty but
- How many hospitals?
- How many decibel machines for each hospital?
- The cost of monitoring 24/7?

Draft an offence of causing unnecessary noise outside hospitals

- Reasonableness?
- Less precise
- Leaves discretion to the courts
- Much less expensive

Calculating the Cost of Legislation Some Preliminary Questions

- The cost of what legislation?
- The cost to whom?
- The cost of what?
- Is the cost justified?

The cost of what legislation?

- All normative texts
- Primary legislation
- Secondary legislation e.g. regulations
- Less formal normative texts which may have limited legal effect e.g. codes of practice, guidance notes

The cost to whom?

- Private sector
- Public sector
- And if there is an increased cost to the public sector, there is inevitably a cost to the private sector in additional taxation

The cost of what?

The public sector

- Additional legislative regulatory and compliance regimes lead to increased bureaucracy
- Staffing implications
- Therefore financial implications
- Direct costs? E.g. grants or tax incentives for housing or small businesses

The cost of what?

The private sector

- Extensive regulatory or compliance provisions require private sector staffing
- Ultimately paid for by the customer
- Direct costs? E.g. taxation, fees

The cost of what?

Other public sector private sector interaction

Excessive regulatory or compliance provisions are ultimately

- a burden on the taxpayer – less profit means less tax revenue
- a burden on the community – less tax revenue will eventually mean fewer or less extensive public services

The cost of what?

Other public sector private sector interaction

- Similar considerations apply to inadequately considered or badly drafted legislation
- May not achieve its objective
- May achieve it expensively
- May lead to expensive litigation to resolve textual ambiguities

Is the cost justified?

Decision is taken to regulate banks more intensively

- Public sector costs: more investigative staff; more training of staff
- Bank costs: more staff to respond to increased regulation
- Bank costs passed to the customers
- Maybe reduction in banking business
- Reduction in banking business reduces tax revenue

Is the cost justified?

Decision is taken to regulate banks more intensively

- But a less rigorous regulatory regime may result increased dangers of money laundering and a lack of international confidence in the banking system
- That may lead to a reduction in the international economic and political support for the state

Is the cost justified?

- Would the considerations that apply to bank regulation be the same for greater regulation of....
- Doctors?
- Establishments licensed to sell alcohol?

Legislative Evaluation: U.K. Responses

- Consultation
- Drafting Legislation
- Background Papers with Draft Primary Legislation
- Evaluation of Financial and Staffing Implications
- Regulatory Impact Assessment (RIA)
- Deregulation
- Pre-Legislative Scrutiny
- Post-Legislative Scrutiny

Consultation

- U.K. (like many jurisdictions) consults widely on policy initiatives and proposed legislation (both primary and delegated)
- Strong emphasis on electronic consultation though Government Department websites

Consultation

- General Consultation
- Specific Consultation

Consultation

General Consultation

- Responses from a wide range of interests
- 360-degree assessment of the issue
- but....

Consultation

- Low quality of response
- Misinformed
- Provides information already known

Consultation

General E-Consultation

- Material can be more easily managed and analysed
- Quality of response can be enhanced by
- Providing hyperlinks to other sources of Government information and analysis
- Providing hyperlinks (by agreement) to informed interest groups outside Government

Consultation

Specific Consultation

- Those with particular expertise
- Those individuals, companies etc likely to be affected by the proposed policy or legislation

Consultation

- Higher quality of response likely but....
- Danger of pre-determining outcome of consultation by unnecessarily narrow focus
- Consultation from lists of pre-determined sources which are not frequently reviewed

Consultation

- An ideal solution is general and specific consultation
- Achieved more easily by e-consultation
- General e-consultation can include hyperlinks to specific discussions in a specific consultation web-site
- Specific consultation website can include direct links to responsible officials

Consultation

- E-consultation facilitates speedy and effective Government response to consultation participants
- Encourages participants to respond to future consultations
- Reduces consultation fatigue

Consultation

- E-consultation is not just a technique of Government
- UK Parliament adopts it to take evidence and to inform about its consideration of proposed policy and draft legislation
- Civil society increasingly uses the technique

Drafting Legislation

- Primary Government legislation is drafted centrally and not in individual ministries
- For U.K. by Office of Parliamentary Counsel on instructions from each ministry
- “Cleaner” instructions?
- Consistency of style
- Avoids additional bureaucracy of post-drafting centralised scrutiny

Drafting Legislation

- Delegated legislation is almost invariably drafted by the legal staff in individual ministries
- Despite various style manuals, less consistency in drafting style
- Quality of drafting impaired?
- But does this always matter?

Drafting Legislation

- Strong parliamentary tradition of scrutiny of both primary and delegated legislation in U.K.
- Draft primary legislation is commonly amended in Parliament, often on Government initiative – although procedural rules allow the Government a measure of practical control over this

Drafting Legislation

- However, Parliament traditionally has had rather limited in-house legal resources to draft amendments to primary legislation

Drafting Legislation

- Delegated legislation cannot be amended but is commonly subject to annulment or formal approval by Parliament – again procedural rules give the Government a degree of practical control over this

Background Papers with Draft Primary Legislation

- Detailed commentary on the provisions
- Analysis of financial implications
- Analysis of public service staffing implications
- Regulatory impact assessment
- Environmental impact assessment
- Declaration on compliance with ECHR

Background Papers with Draft Primary Legislation

- Requirement of Government to provide this for Parliament means that ministries must undertake detailed evaluation of these matters in the preparation of the draft legislation

Evaluation of Financial and Staffing Implications

We will consider this in the context of the presentation of practical illustrations of legislative evaluation

Regulatory Impact Assessment (RIA)

“A policy tool which assesses the impact, in terms of costs, benefits and risks of any proposed regulation which could affect businesses, charities or the voluntary sector”

- U.K. Cabinet Office

Regulatory Impact Assessment (RIA)

UK government policy is that all departments and agencies where they exercise statutory powers, and make rules with a general effect on others, should produce a regulatory impact assessment

- Reflected in institutional structures and procedures of ministries

Regulatory Impact Assessment (RIA)

- Three stage process
- At each stage it is necessary to consider options that do *not* require regulation – or at least permanent regulation

Regulatory Impact Assessment (RIA)

- Rely on consumer choice, competition or innovation?
- Just improve advice or information?
- Industry self regulation?
- Use a code of practice?
- Use economic instruments? E.g. user charges, taxes or tax concessions
- Introduce a time limit on the regulation (“sunset clause”) or make it subject to automatic review?

Regulatory Impact Assessment (RIA)

- Officials are also required to consider the social impact of the options
- Will each option impose unfair costs on a specific or vulnerable group such as the elderly?
- Will it create a new vulnerable group?

RIA – the three stages

- Initial RIA
- General overall analysis based on existing easily available information

RIA – the three stages

- Partial RIA
- Developing work on each of the regulatory and non-regulatory options, with respect to their risks, benefits, costs and compliance
- Are risks or costs disproportionate for a particular group e.g. small businesses?
- Considering a specific checklist, so....

RIA – the three stages

- sustainable development
- environmental appraisal
- equal treatment appraisal (e.g. with respect to gender, race, age, disability)
- health impact assessment (including health and safety at work)

RIA – the three stages

- Full RIA
- More completely argued and formal document
- Submitted to the relevant Minister with a clear recommendation for action
- If approved, it is signed off by the Minister and published

Deregulation

- Fundamental purpose of the deregulation procedure was to reduce the amount of regulation of business within existing legislation
- Essentially intended as a mechanism to remove *existing* excessive regulation (whereas RIA is designed to avoid such excessive regulation in future legislation)

Deregulation

- Successive primary legislation since 1994 empowers Government ministers to amend or repeal, by order, primary legislation which imposes an unnecessary burden on business
- The orders are subject to a degree of parliamentary scrutiny and control

Pre-legislative Scrutiny

- Scrutiny by the legislature of draft legislation *prior to its formal introduction* for the enactment process
- Introduced in U.K. in 1998
- Only used on some Government draft legislation

Pre-legislative Scrutiny

- Largely undertaken by ad hoc committees (which take written and oral evidence on the draft legislation)
- Commons' departmental select committees, and other parliamentary committees with more limited terms of reference (for example, compliance with the Human Rights Act and the nature and scope of enabling provisions) also involved

Pre-legislative Scrutiny

Advantages

- Government likely to be more receptive to suggestions for change at this stage
- Parliament more likely to be in contact with views of interests affected by legislation
- Should lead to less time being needed at later stages of the legislative process
- Should lead to better legislation and less likelihood of subsequent amending legislation

Post-legislative scrutiny

- Government post-legislative scrutiny may depend on political factors rather than systematic analysis: e.g. public concern over the effects or adequacy of provisions

Post-legislative scrutiny

- Parliamentary post-legislative scrutiny under active review in the U.K.
- How is the "bench mark" for review determined?
- Specify the objectives of the legislation when it is initially published in draft?
- Purpose clause in the legislation?

Post-legislative scrutiny

- Should such review apply to all legislation or only some of it?
- Who should determine the question?
- When should it be determined?

Post-legislative scrutiny

- Who should undertake the initial review of the legislation?
- Government? With the government review then examined by Parliament?
- Parliament? What are the implications for parliamentary staffing?

Post-legislative scrutiny

- What committees in Parliament should undertake the parliamentary aspects of post-legislative review?
- Committees that presently undertake pre-legislative scrutiny?
- New committees?

Two general conclusions

- Evaluation is essentially a never-ending loop
- “Bad law wastes money”
Hon Mr. Justice Brooke, chairman of the Law Commission, presenting the annual report of the Commission in 1994