

Post-Legislative Scrutiny in the UK Parliament:

Adding Value

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Legislatures appoint committees for different purposes. The UK Parliament is unusual in that both Houses utilise committees to engage in post-legislative scrutiny. We examine why each engages in this type of scrutiny, given competing demands for limited resources. Distributive and informational theories are utilised to explain the difference between the two chambers, identifying why the form of asymmetrical bicameralism to be found in the United Kingdom facilitates scrutiny that would otherwise not be undertaken. The genesis and impact of post-legislative scrutiny committees are considered, with a focus on the House of Lords and why the use of such committees plays to the strengths of the House.

The UK Parliament, like other legislatures in Westminster systems of government, has been characterised by an emphasis on chamber deliberation at the expense of specialisation through committees. Although provision for the appointment of investigative committees (select committees) is longstanding, such committees were rarely used after the emergence in the 19th Century of party-dominated adversarial politics. The 20th Century was characterised primarily by House of Commons committees set up on ad hoc basis (albeit known as standing committees) to facilitate the passage of government legislation. In the unelected second chamber, the House of Lords, virtually all business was conducted through the chamber. The use of committees by the House of Commons was explicable in terms of partisan theory (Cox and McCubbins 1993). Given the chamber-oriented emphasis, the use of distributive and informational theories, used especially to explain legislative committees in the US Congress (see Shepsle 1978, Weingast, 1979, Gilligan and Krehbiel 1990,

Krehbiel 1990, 1992, Martorano 2006), had little salience. What committees that did exist were not the agents of the individual members or of the full chamber.

Recent years have seen both chambers become more specialised through the appointment of permanent select committees. In the House of Commons, a comprehensive set of committees exists to shadow government departments, as well as examine such matters as environmental audit, science and technology, and public administration. In the House of Lords, committees have been appointed to cover cross-cutting issues, such as the constitution, economic affairs, communications, and international relations, complemented by the appointment of ad hoc committees for short-time inquiries on specific topics. The committees in both Houses are separate from those that are responsible for detailed consideration of bills once introduced. In the Commons, bills are referred normally to public bill committees (succeeding the misnamed standing committees in 2006) and in the Lords either to grand committee or committee of the whole House.

This paper examines a specific type of scrutiny by committee, one that is variously, but not extensively, undertaken (Dr Vrieze and Hasson 2017) and one not much studied: post-legislative scrutiny. The principal scrutiny undertaken by legislatures is of bills after they are formally introduced. Bills are considered in committee, either prior to or post plenary debate (see Shaw 1979). That is when legislatures are at their most powerful inasmuch as they may amend or reject measures. However, the role of the legislature may extend beyond the formal deliberative stage to encompass the period prior to formal introduction, examining bills in draft (pre-legislative scrutiny) to see if they can be improved prior to being laid before the legislature, and after the measure has been enacted and implemented (post-legislative scrutiny).

In looking at what the legislature can do after a measure has been enacted, one can distinguish between oversight and scrutiny, in effect between the legal and the political. There is checking that the law has been brought into effect and, once brought into effect, examining the consequences to

ensure that they meet the intended purposes of the legislation (see Dr Vrieze and Hasson 2017, p. 12; Law Commission 2006, p. 7). One is formalistic, the other more interpretative. Secondary legislation may be utilised as a means of bringing provisions of primary legislation into effect, and thus fall within the legal, or formalistic, dimension. To fall within the political, or interpretative, dimension, one would need to assess the consequences of the secondary legislation.

Given that with pre- and post-legislative scrutiny, the exercise entails no formal capacity to amend or reject, the power exercised is persuasive rather than coercive (see Lukes 2005: 36, Norton 2013: 5). The task of scrutiny is assigned to committees who then rely on others (the chamber, government) to act on their recommendations.

Where legislatures utilise some measure of post-legislative scrutiny, the form and extent vary. Some focus on oversight, others on scrutiny (Dr Vrieze and Hasson 2017). In any event, the practice is limited and usually selective. In some, the role is one of being ‘passive scrutinizers’ (Griglio 2019). South Africa offers an example of where the absence of political will has militated against the creation of a permanent scrutiny mechanism (Hasson 2019). Where there are dedicated bodies (as in Indonesia and Switzerland), they are bodies assisting the legislature rather than committees of the legislature. Although there is a growing research interest in post-legislative scrutiny, scholarship rather reflects the exercise itself in that it is not yet extensive.

Here we consider the limited development of post-legislative scrutiny in the UK and the lessons to be drawn from it. What post-legislative scrutiny has been undertaken has differed between the two chambers. In the House of Commons, it has been committee-driven. In the House of Lords, it has been chamber-driven.

We address post-legislative scrutiny in terms of *why*, *how* and with *what effect*. The emphasis is on the explanatory, encompassing why post-legislative scrutiny is undertaken and why the differences

between the two chambers in engaging in such scrutiny. In considering the operation and impact of post-legislative scrutiny, we look specifically at the second chamber, the House of Lords, which employs a systematic means of engaging in such inquiry. We conclude by examining *what effect* post-legislative scrutiny has had, primarily its effect on executive actions, including introducing amending measures. Our principal interest is in explaining the differences and why they may benefit the health of the political system.

WHY POST-LEGISLATIVE SCRUTINY?

In the UK, government (and some private members') bills are drafted by specialist lawyers known as Parliamentary Counsel. The bills are drawn up with an eye to the parliamentary process. As Sir Henry Thring observed, 'Bills are made to pass as razors are made to sell' (Engle 1983, p. 7). In other words, they are drafted to get through Parliament. 'That', as Lord Rodger of Earlsferry observed, 'is the draftsman's principal task. No minister will thank him for preparing a Bill which is so splendidly drafted that it might win plaudits from the Plain English Society or the Hansard Society, if its form is such that it will not go through and so it never actually becomes law' (Rodger of Earlsferry 2013, p. 80).

Until 2008, the criterion of legislative success was a bill achieving Royal Assent. Ministers were keen to have their bills introduced, passed if possible largely without amendment, and to get them on the statute book. For both ministers and backbenchers, Royal Assent was the end of the legislative process.

Little attention has been given to the outcomes of legislation. If a measure has consequences that are unintended and disastrous, there may be a public outcry: regularly cited examples in the UK are the Local Government Finance Act 1988 (introducing the community charge, or 'poll tax'), the Child Support Act 1990 and the Dangerous Dogs Act 1991. However, if measures have consequences that

are unintended, but not catastrophic, very little may be heard. They may simply not have any impact or they may deviate in a way that is unintended, but not unduly problematic. Even if there is a recognition that they are not working quite as intended, there may not be the mechanisms available for assessing precisely how the implementation has deviated from what was intended or what corrective steps may be necessary.

For a minister, success has thus been defined in terms of getting a bill enacted and not whether it then achieves its desired effect. However, the past two decades have seen a notable shift in perspective, with a recognition that the legislative process neither begins when a bill is introduced into Parliament, nor ends when Royal Assent is announced.

Pre-legislative scrutiny

Throughout the 20th Century, Parliament had limited impact on legislation brought forward by government. The way in which it dealt with legislation was criticised as being the weakest links in its relationship to the executive (Commission to Strengthen Parliament 2000, p. 22). Calls for greater parliamentary involvement began to be voiced (Hansard Society Commission on the Legislative Process 1993; Commission to Strengthen Parliament 2000). The main development was in respect of pre-legislative scrutiny. Although government departments variously consulted outside organisations when preparing legislation, there was criticism of the speed by which bills were drawn up. As the report of the Hansard Society Commission on the Legislative Process noted, ‘As a result of inadequate or defective consultation, it is argued, bills are too often introduced to Parliament “half-baked” and with lots of the detail insufficiently thought out’ (Hansard Society 1993, p. 14). The Commission recommended not only wider consultation, but also more structured involvement by Parliament. This, it considered, could normally take the form of House of Commons select committees examining proposals embodied in Green or White Papers. However, where a fuller inquiry may be justified, and where legislation was not needed in a hurry, select committees should be

specially appointed to carry out pre-legislative inquiries (Hansard Society 1993, pp. 80-1). It also noted that this may sometimes be done by joint committees of the two Houses.

The Labour Government returned in 1997 began publishing some bills in draft, with most submitted to Parliament for scrutiny. Between 1997 and 2010, 76 bills were published in draft, with most considered by House of Commons select committees or – in the case of large complex or constitutionally significant bills – by joint committees (Norton 2013, pp. 82-3). Under the coalition government of 2010-15, a total of 31 bills were subject to pre-legislative scrutiny (Kelly 2015).

The Constitution Committee of the House of Lords in a report on *Parliament and the Legislative Process* in 2004 recommended that pre-legislative scrutiny should be the norm and not the exception (Constitution Committee 2004, para. 175, pp. 43-4). The government appeared sympathetic to that view. It appeared likely that pre-legislative scrutiny would become more prevalent, whereas there was little expectation that post-legislative scrutiny would become a feature of parliamentary scrutiny. Government had not acted on previous recommendations and it was not clear it would welcome parliamentary examination of its measures, not least its flagship measures. In the event, pre-legislative scrutiny continued, but not on a linear upward trajectory, whereas post-legislative scrutiny became a feature, albeit limited, of parliamentary life.

Post-legislative scrutiny

Post-legislative scrutiny may be seen as a public good (Norton 2018). It is designed to ensure that measures of public policy deliver on what the representatives of the people voted for. It means assessing the consequences against the purposes identified when the measures were introduced.

The case for it was recognised both by the House of Commons Procedure Committee (1990, para. 315) and the Hansard Society Commission. The Commission recommended that ‘the operation of

every major Act (other than Finance Acts and some constitutional Acts) and all the delegated legislation made under it, should be reviewed some two or three years after it comes into force' (Hansard Society 1993, p. 95). However, no action resulted from this proposal.

The Lords' Constitution Committee, in its 2004 report, recommended that post-legislative scrutiny should be a routine feature of parliamentary scrutiny. The Committee took a holistic view of the legislative process, encompassing not only the passage of a bill after introduction, but also pre and post-legislative scrutiny. On the latter, it observed 'Post-legislative scrutiny appears to be similar to motherhood and apple pie in that everyone appears to be in favour of it. However, unlike motherhood and apple pie, it is not much in evidence' (Constitution Committee 2004: para. 165, p. 42). It noted that when post-legislative scrutiny occurred, it was – in the words of Peter Riddell – 'patchy at best'. When it was used, it was when problems had become apparent.

The Committee advanced the principal arguments for regular post-legislative scrutiny:

Regular scrutiny will determine if Acts have done what they were intended to achieve; if not, it may then be possible to identify alternative means of achieving those goals. Scrutiny may also have the effect of ensuring that those who are meant to be implementing the measures are, in fact, implementing them in the way intended.

Such scrutiny may also impose a much greater discipline on Government. We have already touched upon the fact that Ministers often see achievement in terms of getting their 'big bill' on the statute book. They may engage in greater circumspection if they knew that in future the measure of their success was not so much getting a measure on the statute book as the effect that it had.

As such, post-legislative scrutiny may improve the quality of Government. It may also contribute to improvement in the legislative process... We have stressed throughout this report the importance of ensuring that Parliament has mechanisms to ensure that bills are fit for purpose, but how does Parliament know that the bills, once enacted, have actually proved fit for purpose? (Constitution Committee 2004, para. 170-2, pp. 42-3).

As the Committee went on to note, the case for such scrutiny was widely accepted. The problem was rather one of how to give effect to it. The principal obstacle, according to witnesses who gave evidence, was one of resources. One option put forward was selective post-legislative scrutiny. The issue, as the Committee noted, would then become one of determining the most appropriate method of selection. However, the Committee felt the obstacles were not such as to prevent routine rather than selective scrutiny. It recommended therefore that most Acts, other than Finance Acts, should normally be subject to review within three years of their commencement, or six years following their enactment, whichever was the sooner (Constitution Committee 2004: para. 180, p. 44).

In response to the Committee's report, the government acknowledged the value of post-legislative review, noting that it could contribute to helping ensure the government's aims were delivered in practice and that resources committed to legislation were committed to good effect. However, given that the term was, in the government's view, ill-defined, it referred the matter to the Law Commission to study options and who would be most suited to take on the role (Constitution Committee 2005, p. 9).

The Law Commission was set up in 1965 to promote reform of the law and is chaired by a senior judge. Looking at the legislative process was somewhat outside its usual role. It therefore consulted with parliamentarians, particularly the chair of the Lords Constitution Committee (who also wrote the 2004 report),ⁱ Parliamentary Counsel, Parliamentary clerks, government departments, academics and others (Law Commission 2006, p. 5). It found 'overwhelming support' for a more systematic

approach to post-legislative scrutiny as well as for that process being controlled by Parliament. It went on:

The more pertinent question is not whether systematic post-legislative scrutiny is desirable but whether there is an appropriate mechanism that can be used to achieve it. On that front, the way forward seems to us to be the setting up of a new joint Parliamentary committee on post-legislative scrutiny. (Law Commission 2006, p. 5)

In response, the government agreed with the Commission's overall approach, but felt it appropriate for post-legislative scrutiny to be undertaken by Commons' committees. Most Acts, three to five years after enactment, would be assessed in terms of whether they were achieving what they were intended to achieve. Each review would be undertaken by the government department responsible for the measure, with the review being published as a Command Paper and sent to the relevant Commons' select committee (Leader of the House of Commons 2008, paras. 9, 18, 20-22). The Government did not endorse the proposal for a joint committee.

In the event, there has been some, albeit limited, post-legislative scrutiny in Parliament. Since 2008, a total of 20 Acts of Parliament have been subject to post-legislative review (Caygill 2019a, p. 80), although a further 42 have received what Caygill has termed informal scrutiny (Caygill 2019a, p. 80), in other words considered as part of a wider inquiry. Our focus is on dedicated, or formal, scrutiny. In the Commons, the decision as to whether to undertake any post-legislative scrutiny is delegated to the select committees themselves. Some have undertaken such scrutiny, while a number have never done so. Scrutiny is therefore undertaken, but the scrutiny is sporadic and the inquiries may be relatively short. Although post-legislative scrutiny is now listed as a core task of Commons' select committees, most neglect it in favour of carrying out their other core tasks.

Although the House of Lords was not part of the process detailed in the government response, the House has ascribed itself the task of engaging in such scrutiny and now routinely appoints committees to engage in post-legislative scrutiny. Scrutiny in the Lords is therefore limited, but consistent: there is always some scrutiny being undertaken. The scrutiny of an Act also is in some depth, each committee having a year to complete the review and producing more recommendations than is the case with Commons' committees (Caygill 2019b, p. 94). The decision as to which piece of legislation is to be reviewed rests with the House.

Both Houses thus engage in post-legislative scrutiny – more legislation is reviewed than would be the case if it were confined to one House – but in different ways. Our focus is explaining the differences.

WHY DIFFERING APPROACHES?

As we have noted, legislative committee activity in the UK Parliament can be explained by partisan theory. The committees exist to enable the majority party to deliver its legislative programme. However, distributive and informational theories may be utilised to explain the difference between the Commons and the Lords in terms of the approach to post-legislative scrutiny.

Clearly, in appointing committees to engage in such scrutiny, there is an opportunity cost. Each House has a finite number of members and limited resources to support committee activity. These include not only administrative and research support, but also time. To create time would mean prioritising post-legislative scrutiny over other activities.

In distributive theory, committees are the agents of individual members. In informational theory, they are the agents of the House. Under the former, members see committees as means of achieving re-election. With the latter, committees are created 'to serve the parent chamber by providing specialization and expertise' (Matorano 2006, p. 206). In the House of Commons, MPs use their

limited time and resources to enhance their political standing, both with their leaders (to enhance prospects of promotion) and with their constituents (to bolster their chances of re-election and their standing with the local party). This behaviour is rational and leads to a preference to serve on the particularly high-profile committees, such as Foreign Affairs, Treasury, and Home Affairs. It has been enhanced by reforms implemented in 2010 (Russell 2011, pp. 612-33), with chairs of committees being elected by members of the House (and other members by their respective parties), thus raising their profile both in the House and the media. It is in members' interests to undertake high profile inquiries, generating evidence-taking from notable public figures and producing reports exposing misbehaviour by leading bodies, leading to extensive media coverage. Some committee chairs are seen now as being as well, or better, known than some government ministers.

For Members of Parliament, then, post-legislative scrutiny may be acknowledged as important for ensuring 'good' law, but there is little political pay-off for them undertaking such activity unless it contributes to profile raising over and above other inquiries. As the Lords Constitution Committee observed in its 2004 report, it was likely that if the departmental select committees did find time for scrutiny, it would be on 'high profile Acts that had gone wrong' (Constitution Committee 2004, para. 174, p. 43). The motivation has in practice been, as Caygill has found, one of the salience of the issues (Caygill 2019b, p.99). In choosing Acts to review, select committees have tended to be reactive, responding to representations from outside bodies (Caygill 2019b).

In the House of Lords, the process of selection has been more self-contained and pro-active, the House opting for reviews that are deemed important, timely, play to the strengths of the House, and are not overly contentious politically. Whereas the Commons will examine an Act if it knows the Government is thinking of making changes to it, the Lords prefers not to engage in work it deems already under way (Caygill 2019b, p. 94). The Lords also avoids any inquiry it thinks the Commons is likely to undertake. As such, the work of the two Houses can be viewed as complementary, rather than competing with, or duplicating, the work of the other.

Informational theory helps explain why the Lords differs from the Commons. The political imperatives that drive MPs on select committees are absent from the House of Lords. Peers are not subject to re-election. They are not usually office seekers. (They either have already held ministerial office or hold posts for which being a junior minister would be something of a step down.) There is little political incentive for them to engage in what may be termed ‘look at me’ activity.

Furthermore, the process of determining who serves on committees differs from that of the Commons and is geared to the perceived needs of the House and not the preferences of individual members.

Whereas MPs seek committee membership, peers (although they may proactively indicate an interest in being considered for membership) are approached to serve on committees. A committee is appointed by the House after discussions between the ‘usual channels’ (the party business managers and the convenor of the cross-bench peers)ⁱⁱ and peers are invited to serve because of their particular qualifications in the subject being examined by the committee.

Over the past fifty years, the House of Lords has essentially reinvented itself as a chamber of legislative scrutiny. Whereas members of the House of Commons have been able to take their legitimacy as given, deriving from election (input legitimacy), members of the House of Lords have not been able to make such a claim. They have relied upon the work undertaken by the House (output legitimacy). A failure to fulfil functions recognised as benefiting the nation is seen as an existential threat to the institution. It is therefore in members’ interests to sustain the institution through contributing to its work. Its role has been shaped by its relationship to the elected House, seeking to carve out a role as a complementary chamber, fulfilling roles that the Commons has not the time or political will, or sometimes the resources, to fulfil (Norton 2017). Scrutinising the detail of legislation – primary and secondary – adds value to the political process, playing to the strengths of the House without challenging the primacy of the House of Commons. Committees thus serve as agents of the chamber rather than of individual members. The commitment of members to the work of committees

is reflected in high attendance levels and, in marked contrast to the House of Commons, a culture of not only attending, but also staying for the duration of the meeting.

The House has variously sought to enhance its output legitimacy, for instance through reviewing secondary legislation, both in terms of its provision within a measure (the Delegated Powers and Regulatory Reform Committee) and its promulgation (the Secondary Legislation Scrutiny Committee). This has generated a capacity that is lacking in the Commons, but one that entails no challenge to the Commons.

In the event, pressure for post-legislative scrutiny developed as the Lords was engaged in a review of its own procedures. A report from the Leader's Group on the Working Practices of the House in 2011 recommended a wide range of procedural changes (Leader's Group on Working Practices 2011). These included the creation of a Post-Legislative Scrutiny Committee 'to manage the process of reviewing up to four selected Acts of Parliament each year' (Leader's Group on Working Practices 2011, p. 37). The following year, as we shall see, the Leader of the House introduced proposals for a sessional ad hoc committee to undertake such scrutiny.

As the Leader's Group observed, legislative scrutiny enables the House to 'draw on the relevant knowledge and experience of Members of the House of Lords, and facilitate dialogue with ministers with specific policy responsibility for the legislation' (Leader's Group on Working Practices 2011, p. 22). This applies to legislation generally, but it applies especially to post-legislative scrutiny. The House has been characterised as a body of experience and expertise (Norton 2017, pp. 32-33). Members have been ennobled because of positions they have held (for instance, as Cabinet ministers, chiefs of the defence staff, heads of business, trade unions, charities) or because they are the leading experts in their field (such as the law, medicine, science, and philosophy). Post-legislative scrutiny committees have drawn usually on members with some knowledge of the subject.

To illustrate the point in the context of post-legislative review committees, the Committee on Adoption Legislation was chaired by Baroness Butler-Sloss. She had been the President of the Family Division of the High Court. Members of the Committee on the Equality Act and Disability included two disabled peers, Baroness Campbell of Surbiton, a former chair of the British Council of Disabled People, and Baroness Thomas of Winchester, a vice-president of Muscular Dystrophy. Other members included Baroness Pitkeathley, a former chief executive of the National Carers Association, and Lord McColl of Dulwich, a surgeon and president of the National Association of the Limbless Disabled. The chair of the Committee on the Natural Environment and Rural Communities Act, Lord Cameron of Dillington, had served as chair of the Countryside Agency. Its members included a fellow of the Royal Agricultural Society of England and former patron of the Women's Farming Union; and a former commissioner for the Historic Buildings and Monuments Commission.

One peer who had chaired a post-legislative scrutiny committee suggested in 2018 that such scrutiny complemented the Commons in that the Commons could focus on pre-legislative scrutiny, while the Lords focused on post-legislative scrutiny (Baroness McIntosh of Pickering, evidence, 11 July 2018). In practice, the complementarity has occurred in undertaking post-legislative scrutiny, each House being motivated to engage in such scrutiny, but for different reasons. The differences ensure a body of post-legislative scrutiny that exceeds what would be undertaken if confined to one chamber and which encompasses different types of legislation. The combination renders Parliament distinctive in terms of engaging in undertaking post-legislative scrutiny.

WITH WHAT EFFECT?

We focus here on the dedicated scrutiny undertaken by the House of Lords. In 2012 reforms initiated by the Leader of the House of Lords, following the report of the Leader's Group on the Working Practices of the House, were implemented and included the appointment each year of four ad hoc committee to investigate specified subjects. Each committee has a confined life span (the session)ⁱⁱⁱ

and once it has reported it ceases to exist, though within the time available it is sometimes possible to produce more than one report. The use of such committees has enabled the House to engage in targeted scrutiny, based on recommendations from peers – each year, members are invited to nominate measures that merit examination – and approved by the House. The reports elicit a Government response and are debated in the House.

At least one committee is appointed to review an Act or legislation in a specific field. As shown in Table 1, committees have been appointed to consider adoption and extradition legislation as well as seven Acts. In addition, the Delegated Powers and Regulatory Reform Committee in 2015 reviewed the Legislative and Regulatory Reform Act 2006, following the assessment of it by the Department of Business, Innovation and Skills (Delegated Powers and Regulatory Reform Committee, 2015). All the committees listed up to 2018-19 have completed their work and reported.

TABLE 1 ABOUT HERE

Post-legislative scrutiny has thus become an established part of legislative scrutiny by the House of Lords. However, it is limited, both in terms of the number of Acts reviewed and the time allocated for each review. As we shall see, there are other limitations. Nonetheless, it is a process that has gained a foothold and whether it should be extended is a live issue in the House. The House of Lords Liaison Committee embarked in 2018 on a review of the committee structure of the House^{iv} and one of the proposals under consideration has been a dedicated Post-Legislative Scrutiny Committee, as well as other changes to enhance the work undertaken by select committees. As part of its review, it took evidence not only from academics, but also from peers who have chaired the ad hoc committees. The evidence given touches upon the impact of the committees. The picture is mixed.

The post-legislative scrutiny undertaken by the House of Lords can be characterised as equivalent to the quarter or half-full bottle. What was an empty vessel has at least started to fill up, but only to a

limited extent. The merits of detailed scrutiny through the committees can be characterised as those of transparency, engagement, and impact.

Transparency. The report of each committee is, as is the practice in both House of Parliament, evidence-based, reasoned, and published. The conclusions of each committee and the reasons for reaching them are in the public domain, accessible to other parliamentarians, the media, the government and interested bodies. Any perceived flaws in legislation are highlighted. Two of the ad hoc committees – on the Mental Capacity Act and the Natural Environment and Rural Communities Act (NERCA) – found essentially that the legislation was not fit for purpose. Each committee engaged in post-legislative scrutiny advanced various recommendations for change. That on adoption legislation, for example, produced 61 recommendations, that on NERCA 45, and that on the Inquiries Act 35. As Caygill found, Lords’ committees tend to make more recommendations than Commons’ committees (Caygill 2019b, p. 99).

Engagement. The reports are not only published, but the government is committed to responding in writing if possible within two months of publication. This ensures the government’s views are on the public record. However, the House has the further advantage that if a committee recommends that its report be debated (rather than simply be for the information of the House), the report is debated. Ministers therefore have to appear at the despatch box of the House to respond to the debate and any criticisms that may be levelled at its stance. As one peer commented on the government’s response to the report of the committee on the NERCA, ‘To say that it was defensive is an understatement’ (*House of Lords Debates*, 2 July 2018, col.422). Debate enables members to pursue government responses and if necessary put the minister on the defensive or seek a more detailed or positive reply. Engagement is not necessarily confined to the public arena or to ministers. Committee members may engage with others outside the House, with ministers in private, and may determine to pursue the matter beyond debate in the House.

Impact. The reports may also have impact in terms of informing debate and eliciting government action. Information may be distinct from recommending change. Reviewing Acts may result in finding that little or nothing needs to be done. As Caygill recorded about the inquiry into the Freedom of Information Act, there was no subsequent action because the committee ‘gave the act essentially a clean bill of health’ (Caygill 2019a, p. 223). However, where deficiencies are found, committees may recommend action by the government. The government has variously acted on the recommendations, though the level of acceptance has varied. Ten of the recommendations of the Committee on the Inquiries Act, for example, were accepted. The Committee on Adoption Legislation had an even higher success rate. In response to the Committee’s final report, the government detailed acceptance of 39 of its recommendations and partial acceptance of a further 9. Only 13 were rejected (HM Government 2013). The most recent significant impact was that of the Committee on the Mental Capacity Act. The detailed report of the committee, in 2014, found that the Act’s Deprivation of Liberty Safeguards (DOLS) scheme was not fit for purpose. Following the report, and a high-profile court judgement, the Government asked the Law Commission to produce a report, which it did, recommending replacement of the scheme. In July 2018, the government introduced into the House of Lords the Mental Capacity (Amendment) Bill to provide for a replacement scheme. One cannot prove that the bill was the direct result of the report, but it was the report that first highlighted authoritatively the deficiencies of the scheme.

Post-legislative scrutiny can thus have consequences. Overall, Caygill’s detailed study found that of the recommendations made by committees in both Houses in the period up to 2017, 39% were accepted (Caygill 2019a, p. 163). Not all consequences, though, may be visible. The reports may inform debate within government and lead to later corrective action or inform how departments deal with the subject in future. Also unmeasurable is the deterrent effect, at least the prospective deterrent effect if the process of post-legislative scrutiny becomes prevalent. As we have noted, it may act as an important discipline upon government, ensuring ministers think more rigorously about potential consequences before introducing a bill.

There are nonetheless limitations to the process. The most apparent is the limited scope of post-legislative scrutiny. The number of Acts subject to post-legislative scrutiny pales beside the number of measures coming on to the statute book each year. The other limitation is that when an Act is reviewed, the committee is constrained in the time available to scrutinise it.

The other obvious limitation is that each committee has no formal powers to ensure that government acts on its recommendations. It may influence ministers, but it may not. The chair of the Inquiries Act Committee, Lord Shutt of Greetland, in evidence to the Lords Liaison Committee, emphasised that the government had rejected 14 of its recommendations, thus outweighing the number it had accepted (evidence, 11 July 2018). Each committee relies on the persuasive capacity of its report, debate in the House and the oxygen of publicity to influence government. If government resists, members individually may persist, but there is no guarantee that any action will follow.

In seeking to utilise the House to reinforce its impact, a committee is dependent on members taking an interest. Although reports are debated in the chamber, it is not unusual for members of the committee to form a large proportion, sometimes the majority, of those speaking in the debate. This is a feature of debates in both Houses on select committee reports and not confined to those undertaking post-legislative scrutiny.

Noting that members individually may persist highlights another difficulty, one particular to the form of scrutiny deployed in the Lords. Once an ad hoc committee has published its (final) report, it ceases to exist. At that point, it loses the protection of parliamentary privilege as well as the opportunity to engage in any follow-up reports. As a result, the Liaison Committee of the House decided in 2013 to invite committees to identify issues they thought likely to merit a follow-up a year after they had reported. The Committee can then pursue the issues with Government (Liaison Committee 2013: paras. 20-24).

THE WAY AHEAD?

The UK Parliament has thus moved to engage in some degree of post-legislative scrutiny.

Comparative research (De Vrieze and Hasson, 2017) suggests that while it is not a trail-blazer, neither is it lagging in terms of international practice. Few legislatures appear to have committees dedicated to post-legislative scrutiny. The extent of such scrutiny in some studies of post-legislative review appears exaggerated by the inclusion of scrutiny of secondary legislation which, at best, could be considered a form of oversight, but would not fall within the categorisation of post-legislative scrutiny. Review of the outcomes of primary legislation is limited and, where it occurs, usually selective.

The point reached by the UK Parliament in undertaking post-legislative review has some relevance for identifying best practice, but its most significant contribution may lie in its potential. If the recommendation from the House of Lords Constitution Committee, the Law Commission, and the House of Lords Leader's Group on the Working Practices of the House were to be implemented, it would be distinctive for having such a dedicated post-legislative scrutiny committee.

The potential for realising such a goal was enhanced in 2018 when the Liaison Committee of the House of Lords began its inquiry into the committee structure of the House. A motivation for the review was the likely demise of the House European Union Committee, and its six sub-committees, in the event of Britain's withdrawal from the European Union (Brexit). The disappearance of the EU Committee would free up members and professional resources (clerks, specialist assistants) which would be sufficient to sustain six new committees. Among proposals put to the Liaison Committee was that these resources could be deployed to support a dedicated Post-Legislative Scrutiny Committee and ad hoc committees for scrutiny of several Acts or body of legislation nominated by the committee. As is clear from existing practice, engaging in more systematic scrutiny would play to

the strengths of the House of Lords by drawing on members with experience or expertise germane to the legislation.

The UK Parliament thus has the potential to give a lead, or at least engage in scrutiny in such a way that merits emulation. As we have seen, the House of Lords may be deemed to add value to the work of the elected chamber through utilising the experience and expertise of its members. Other chambers may not necessarily have members with such expertise, but they may be able to draw on members with some relevant or related experience or may have the capacity to co-opt those who are experts. The potential may possibly be greatest in second chambers, given their generally more detached and reflective role.

The principal conclusion is that post-legislative scrutiny is important to the health of a political system, not least in terms of ensuring ‘good law’, and that there is a growing awareness of its significance among legislatures (Westminster Foundation for Democracy 2018). The UK Parliament is not necessarily at the forefront, but it has shown a growing institutional ability to undertake such scrutiny and has the capacity to develop such scrutiny on a more extensive basis. Extending that capacity, especially in the second chamber, is under active consideration.

REFERENCES

Caygill, T. (2019a), *A Critical Analysis of Post-Legislative Scrutiny in the UK Parliament*, PhD thesis, University of Newcastle-Upon-Tyne.

Caygill, T. (2019b), ‘A Tale of Two Houses’, *European Journal of Law Reform*, 2, pp. 87-101.

Commission to Strengthen Parliament (2000), *Strengthening Parliament*, London: The Conservative Party.

Constitution Committee, House of Lords (2004), *Parliament and the Legislative Process*, 14th Report, Session 2003-4, HL Paper 173-I.

Constitution Committee, House of Lords (2005), *Parliament and the Legislative Process: Government's Response*, Session 2004-05, HL Paper 114.

Cox, G. W. and McCubbins, M. D. (1993), *Legislative Leviathan: Party government in the House*, Berkeley: Cambridge University Press.

De Vrieze, F. and Hasson, V. (2017), *Post-legislative Scrutiny*, London: Westminster Foundation for Democracy.

Delegated Powers and Regulatory Reform Committee, House of Lords (2015), *Post-Legislative Assessment of the Legislative and Regulatory Reform Act 2006*, 20th Report, Session 2014-15, HL Paper 132.

Engle, G. (1983), "'Bills are Made to Pass as Razors are Made to Sell': Practical Constraints in the Preparation of Legislation, *Statute Law Review*, 4 (2), pp. 7-23.

Gilligan, T. W. and Krehbiel, K. (1990), 'Organization of informative committees by a rational legislature', *American Journal of Political Science*, 34 (2), pp. 531-64.

Griglio, E. (2019), 'Post-Legislative Scrutiny as a Form of Executive Oversight: Tools and Practice in Europe', *European Journal of Law Reform*, 2.

Hansard Society (1993), *The Report of the Hansard Society Commission on the Legislative Process*, London: Hansard Society.

Hasson, V. (2019), 'Establishing a Legislative Scrutiny Framework: The Case of Delegated Legislation in the Parliament of South Africa', *European Journal of Law Reform*, 2.

HM Government (2013), *Government Response to the Second Report of the House of Lords Select Committee on Adoption Legislation of Session 2012-13: Adoption: Post-Legislative Scrutiny*, Cm 8717.

HM Government (2014), *Valuing every voice, respecting every right: Making the case for the Mental Capacity Act*, June 2014, Cm 8884.

House of Commons Procedure Committee (1990), *The Working of the Select Committee System*, 2nd Report, Session 1989-90, HC 19-I.

Kelly, R. (2015), *Pre-legislative scrutiny under the Coalition Government: 2010-2015* Briefing Paper 05859, 13 August 2015, London: House of Commons Library.

Krehbiel, K. (1990), 'Are congressional committees composed of preference outliers?' *The American Political Science Review*, 84 (1), pp. 149-63.

Krehbiel, K. (1992), *Information and Legislative Organization*, Michigan: University of Michigan Press.

Leader's Group on Working Practices, House of Lords (2011), *Report of the Leader's Group on Working Practices*, Session 2010–12, HL Paper 136

Law Commission (2006), *Post-Legislative Scrutiny*, Law Com No. 302, Cm 6945.

Leader of the House of Commons (2008), *Post-Legislative Scrutiny – The Government's Approach*, Cm 7320.

Liaison Committee, House of Lords (2013), *Review of select committee activity and proposals for new committee activity*, 1st Report, Session 2013-14, HL Paper 145.

Lukes, S. (2005), *Power: A Radical View*, 2nd edn., Basingstoke: Palgrave Macmillan.

McIntosh of Pickering, Baroness (2018), *Oral evidence*, House of Lords Liaison Committee, 11 July 2018.

Martorano, N. (2006), 'Balancing Power: Committee System Autonomy and Legislative Organisation', *Legislative Studies Quarterly*, 31 (2), pp. 205-34.

Norton, P. (2013), *Parliament in British Politics*, 2nd edn., Basingstoke: Palgrave Macmillan.

Norton, P. (2017), *Reform of the House of Lords*, Manchester: Manchester University Press.

Norton, P. (2018), *Opening address*, Westminster Foundation for Democracy (WFD) Academic Seminar on Post-Legislative Scrutiny, Institute of Advanced Legal Studies, University of London, 10 July 2018.

Rodger of Earlsferry, Lord (2013), 'The Form and Language of Legislation', in D. Fedlman (ed), *Law in Politics, Politics in Law*, Oxford: Hart Publishing.

Russell, M. (2011), "'Never Allow a Crisis to go to Waste": The Wright Committee Reforms to Strengthen the House of Commons', *Parliamentary Affairs*, 64 (4), pp. 612-33.

Shaw, M. (1979), 'Conclusion', in J. D. Lees and M. Shaw (eds), *Committees in Legislatures*, Oxford: Martin Robertson.

Shepsle, K. A. (1978), *The giant jigsaw puzzle: Democratic committee assignments in the modern House*, Chicago: University of Chicago Press.

Shepsle, K. A. and Weingast, B. R. (1981), 'Political preferences for the pork barrel: A generalization', *American Journal of Political Science*, 25 (1), pp. 96-111/

Shutt of Greetland, Lord (2018), *Oral evidence*, House of Lords Liaison Committee, 11 July 2018.

Westminster Foundation for Democracy (2018), Academic Seminar on Post-Legislative Scrutiny, Institute of Advanced Legal Studies, University of London, 10 July 2018.

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ⁱ I should declare an interest as the parliamentarian in question.

ⁱⁱ Cross-bench peers are members with no party-political affiliation. They comprise more than 20% of the membership of the House.

ⁱⁱⁱ A parliamentary session is normally one year. The use of a two-year session, 2017-19, led to committees being appointed specifically for a year.

^{iv} See <https://www.parliament.uk/business/committees/committees-a-z/lords-select/liaison-committee/inquiries/parliament-2017/hl-liaison-review-of-committees>

TABLE 1

HOUSE OF LORDS POST-LEGISLATIVE SCRUTINY: SELECT COMMITTEE REPORTS

Select Committee on Adoption Legislation, House of Lords, *Adoption: Pre-Legislative Scrutiny*, 1st Report, Session 2012-13, HL Paper 94; *Adoption: Post-Legislative Scrutiny*, 2nd Report, Session 2012-13, HL Paper 127.

Select Committee on the Inquiries Act 2005, House of Lords, *The Inquiries Act 2005: post-legislative scrutiny*, Session 2013-14, HL Paper 143.

Select Committee on the Mental Capacity Act 2005, House of Lords, *Mental Capacity Act 2005: post-legislative scrutiny*, Session 2013-14, HL Paper 139.

Select Committee on Extradition Law, House of Lords, *The European Arrest Warrant Opt-in*, 1st Report, Session 2014-15, HL Paper 63; *Extradition: UK law and practice*, 2nd Report, Session 2014-15, HL Paper 136.

Select Committee on the Equality Act 2010 and Disability, *The Equality Act 2010: the impact on disabled people*, Report of Session 2015-16, HL Paper 117.

Select Committee on the Licensing Act 2003, *The Licensing Act 2003: post-legislative scrutiny*, Report of Session 2016-17, HL Paper 146.

Select Committee on the Natural Environment and Rural Communities Act 2006, *The countryside at a crossroads: Is the Natural Environment and Rural Communities Act 2006 still fit for purpose?* Report of 2017-19, HL Paper 99

Select Committee on the Bribery Act 2010, *The Bribery Act 2010: post-legislative scrutiny*, Report of 2017-19, HL Paper 303.

Select Committee on the Electoral Registration and Administration Act 2013, 2019-20
