



SCRUTINY UNIT COMMITTEE OFFICE, HOUSE OF COMMONS

BRIEFING NOTE

Post-legislative Scrutiny

Introduction and context

On 31st January 2006 the Law Commission launched a consultation on post-legislative scrutiny. This consultation is the tangible outcome of an increasing interest in Parliament in post-legislative scrutiny. The Law Commission consultation concentrates on the mechanics of post-legislative scrutiny, taking as a starting point the broad consensus that post-legislative scrutiny would be a worthwhile exercise.

This note provides some background information, briefly sets out the purpose and potential benefits of post legislative scrutiny, identifies the existing mechanisms of post-legislative scrutiny, and outlines some of the current models for further post-legislative review that have been put forward for discussion.

Background

Over the past thirty-five years post-legislative scrutiny has been considered a number of times. There has been a shift from suggestions in the 1970's that post-legislative review be used selectively to look at specific pieces of legislation, to recent recommendations that post-legislative review be conducted more systematically, for most new Acts:

- In 1970–71 the House of Commons Procedure Committee considered the possibility of 'post-legislation Committees', recommending their use where appropriate.¹
- In 1976 the Study of Parliament Group proposed to the Procedure Committee that selective monitoring be done by specialised standing committees.²
- In 1992 the Hansard Society Commission report, 'Making the Law', citing support from the House of Commons Procedure Committee, suggested that every major Act (other than Finance and some Constitutional Acts) be subject to post-legislative review. This

¹ Procedure Committee, Second report of 1970-71, *The Process of Legislation*, HC 538

² For further details see Law Commission, *Post-legislative Scrutiny*, Consultation Paper Number 178, paragraphs 2.5 and 2.7

reflected a strong feeling that Parliament itself could do more to review how legislation works in practice.

- In 1997 the Modernisation Committee stressed the need for post-legislative scrutiny and envisaged a greater role for select committees.³
- In 2002 the Liaison Committee identified ‘examination of the implementation of legislation’ as a core task for Select Committees.⁴ The House endorsed this.
- In 2004 the House of Lords Constitution Committee recommended that most Acts, other than Finance Acts, should be subject to post-legislative scrutiny.⁵ Its report also suggested a systematic process of post-legislative scrutiny.
- The Law Commission’s 2006 consultation was announced in the Government’s response to the report of the Lords Constitution Committee. The Law Commission launched its consultation on 31 January 2006. The full consultation paper is available at http://www.lawcom.gov.uk/post_leg_scrutiny.htm.⁶

The purpose of post-legislative scrutiny

There has been some scepticism about the need for further post-legislative scrutiny (beyond that which already takes place). However, generally the potential benefit of increased and systematic post-legislative scrutiny has been widely recognised. In 2002, when he was Leader of the House and Chairman of the Modernisation Committee, Robin Cook submitted a memorandum to the Modernisation Committee in which he observed:

“A key weakness in Parliament’s scrutiny of legislation is that there is no consistent arrangement to monitor the implementation of laws once they have been passed... . Yet Members of Parliament, with their extensive constituency experience, are well-placed to monitor how new legislation is working out in practice.”⁷

The Hansard Society has argued that post-legislative review would increase the likelihood that defective legislation would be identified and rectified, and that such scrutiny might lead to improvements to legislation in the first place, reducing the need for amending legislation. The example of the 1989 Social Security Act, which was finally amended through the Social Security (Recovery of Benefits Act) in 1997, has been cited to demonstrate this point.⁸

³ Modernisation Committee, First Report of 1997-98, *The Legislative Process*, HC 190

⁴ Liaison Committee, First Report of 2002-03, *Annual Report*, HC 558

⁵ House of Lords Select Committee on the Constitution, Fourteenth Report of 2003-04, *Parliament and the Legislative Process*, HL 173-I, para 180

⁶ Law Commission, *Post-legislative Scrutiny*, Consultation Paper Number 178

⁷ Modernisation Committee, Second Report of 2001-02, *Modernisation of the House of Commons: A Reform Programme*, HC 440 (Memorandum submitted by the Leader of the House of Commons)

⁸ Hansard Society, Briefing Paper: Issues in Law Making 6, *Post Legislative Scrutiny*, May 2005, page 2

Knowing that there will be a post-legislative review might well sharpen the minds of policy makers and implementers, and therefore enhance the quality of legislation. Of course, those concerned would argue that their minds are adequately focused by their accountability to Government and Parliament (e.g. through questions to a Minister from a Select Committee).

Nevertheless, there is a strong argument that increased post-legislative review would lead to better legislation because it would encourage identification and dissemination of best practice. The House of Lords Constitution Committee pointed out that post-legislative review should be used, not only to look at legislation that has not worked well, but to look at effective legislation and to learn lessons from it.⁹

It could also be argued that more post-legislative scrutiny would lead to better regulation. With an ever-increasing volume of legislation reaching the statute books, including large quantities of secondary legislation, it is argued that this should be matched by increased, or enhanced, scrutiny. The National Audit Office (NAO) has commented on the volume and complexity of recent legislation, some of which it says is neither accessible nor even workable.¹⁰ The Law Commission have noted that between 1965 and 2003 the number of pages of legislation produced has more than doubled from 1,817 to 4,030.¹¹ The cross government “better-regulation” agenda has seen the establishment of a Better Regulation Commission.¹² Better regulation could be achieved by the examination of legislation once it has been brought into force in order to review its effectiveness.

In summary, the purpose and benefits of post-legislative scrutiny have been identified as:

- To determine whether a piece of legislation is working as it was intended to.
 - If not, to discover why; and
 - to address any problems quickly and cost effectively.
- Better legislation.
- Better regulation.

Existing forms of post-legislative scrutiny

Reviews by Government Departments

These mainly focus on policy implementation rather than looking at a specific piece of legislation. The depth, quality and outcome of these reviews is variable. Some legislation is not reviewed at all.

⁹ HL 173-I, para 168

¹⁰ National Audit Office, *Dealing with the Complexity of the Benefits System*, November 2005, 2005-06, HC 592

¹¹ Law Commission, *The need for post-legislative scrutiny*, Article Number 21, 2006

¹² www.brc.gov.uk

Regulatory Impact Assessments, which are now a requirement for all Bills, mean that the Government should have given consideration to the impact. RIAs should contain a reference to post-legislative review¹³, although few do.¹⁴ Experience within the Scrutiny Unit of examining RIAs is that they are rarely comprehensive or accurate. Furthermore, they are obviously limited by being written before the Bill has been through Parliament (where it is subject to amendment, including substantial amendment by government).

Reviews by Parliamentary Committees

- Select Committees in the House of Commons. One of the core tasks for Select Committees set by the Liaison Committee is to “examine the implementation of legislation and major policy initiatives” (task nine).¹⁵ Examples include the following:
 - Social Security Committee report on the Child Support Agency, which led to a White Paper and then the 1995 Child Support Act.¹⁶
 - Transport, Local Government and the Regions Committee review of the Local Government Act 2000.¹⁷
 - Education and Skills Committee examination of the Higher Education Act 2004 (not in a single inquiry but through relevant inquiries and oral evidence sessions).¹⁸
 - Northern Ireland Affairs Committee inquiry into Electoral Registration in Ireland, following the introduction of the 2002 Electoral Fraud (Northern Ireland) Act 2002. The report concluded that the Act had the unintended consequence of contributing to the steep and progressive decline in the numbers of voters on the register over recent years.¹⁹
 - Work and Pensions Committee inquiry into the introduction of pension credit (following the coming into force in 2003 of the State Pension Credit Act 2002).²⁰

¹³ See Cabinet Office Guidance at:

http://www.cabinetoffice.gov.uk/regulation/ria/ria_guidance/post_implementation_review.asp

¹⁴ In a sample of ten RIA's examined by the NAO, six made no mention of post-legislative review. See National Audit Office, *Evaluation of Regulatory Impact Assessments Compendium Report*, 2004-05, HC341, para 2.33

¹⁵ HC 558

¹⁶ Social Security Committee, Fifth Report of 1993-94, HC 470

¹⁷ Transport, Local Government and the Regions Committee, Fourteenth Report of 2001-02, *How the Local Government Act 2000 is Working*, HC 602-I

¹⁸ Education and Skills Committee, oral evidence published in 2003-04, *Higher Education Bill*, 14 January 2004, HC 216; *International Education*, 7 June 2004 and 23 June 2004, HC 647-i and -ii; and *Admissions to Higher Education*, 25 November 2004, HC 41-i

¹⁹ Northern Ireland Affairs Committee, First Report of 2004-05, *Electoral Registration in Northern Ireland*, HC 131

²⁰ Work and Pensions Committee, Third Report of 2004-05, *Introduction of Pension Credit*, HC 133

- Joint Select Committees. For example the Joint Committee on Human Rights, which comments on the compliance of every new Bill with the Human Rights Act 1998. Sometimes this Committee also considers how sections of that Act are operating.
- House of Lords Committees. Some Committees look specifically at delegated or European legislation. However, this scrutiny is mainly *pre*-legislative.

Reviews undertaken by other bodies

- There are several existing bodies with a statutory duty to review legislation on a rolling basis (e.g. Commission for Racial Equality established under the 1976 Race Relations Act).
- The National Audit Office scrutinises spending on behalf of Parliament. Part of its work necessarily involves reviews which may involve an element of post-legislative scrutiny. For example it recently reported on the complexity of the benefits system, which has been the subject of six Acts and 364 statutory instruments in four years.²¹

Other bodies are individually tasked with a reviewing role by specific legislation such as :

- The Privy Counsellor Review Committee. Some Acts make specific provision for review by this or similar bodies.
- Law Commission Reviews. The Law Commission has a statutory duty to keep all law under review.

The Courts

The Courts have a general constitutional duty to interpret and apply the law according to the rule of law and the principles of interpretation developed through precedent and various Acts (including the Human Rights Act 1998). The Courts clearly play a role in highlighting the meaning and effect of legislation and may comment on whether or not the Act meets the policy maker's objective, but any such comment will be incidental to their primary role.

Sunset or review clauses

On occasion, post-legislative review is built into legislation using review or “sunset” clauses. Sunset clauses make specific provision that, for example, certain parts of the Act will cease to have effect on a certain date (e.g. Part 4 of the Anti-Terrorism, Crime and Security Act 2001). Review clauses set down that the Act will be subject to review by specified bodies.

Sunset clauses can be seen as a mechanism for delaying a difficult or controversial decision - because a law is enacted only for a set time with a guarantee of further parliamentary

²¹ National Audit Office, *Dealing with the Complexity of the Benefits System*, November 2005, 2005-06, HC 592

consideration before re-enactment. Extensive use of review or sunset clause runs the risk of clogging up the future legislative programme, leaving little time for new legislation.

Summary of proposed models

Possible models

Models proposed by the Study of Parliament Group and discussed by the Procedure Committee have included ad hoc select committees with members drawn from the original standing committee on the Bill, and special standing committees with investigative powers undertaking selective post-legislative monitoring.

More recently the House of Lords Constitution Committee proposal has become the basis for at least one of the options in the Law Commission's consultation paper. This model involves Government Departments reviewing Acts against assessment criteria set out in the Explanatory Memorandum on the Bill. Such reviews would then be sent to the relevant Departmental Select Committee for consideration.²²

The model of a Departmental Select Committee assessing a Department's assessment of its own legislation is similar to the process of Departmental Select Committees examining the annual reports of Government Departments. This is now done annually by most Committees.

The Lords Constitution Committee, whilst stressing that extra resources should be made available for Select Committees that want to undertake their own inquiries or commission research, also mentions the possibility of Joint Committees undertaking post-legislative scrutiny.²³ The idea of a Joint Committee on Post-legislative Scrutiny has been further developed by the Law Commission.

Such a Committee could act as a coordinating or sifting Committee, identifying legislation suitable for post-legislative review and the type of post-legislative scrutiny best suited to a particular situation. It could have the power (triggered by Departmental Reviews, evidence from the public etc.) to refer cases to a Departmental or ad hoc Committee or to another body or organisation, could investigate a case itself, or could commission academic research on the implementation and impact of an Act.

²² HL 173-I, para 189

²³ Paragraphs 191, 192

The Law Commission “Avenues”

The Law Commission has identified two potential “avenues”: the first relating to pre-planned post-legislative scrutiny and the second relating to post-legislative scrutiny for which there was no prior commitment (therefore relying on post-enactment “triggers”).

The distinction between planned and un-planned post-legislative review is made because pre-planning allows the setting of criteria against which legislation can be assessed, and also provides the opportunity for establishing data collection mechanisms.

Avenue 1 (pre-planned)

- The commitment to review
 - Ministerial undertakings
 - Review Clauses
 - Sunset Clauses
 - The departmental review
 - The parliamentary review
 - Departmental Select Committees
 - Lords committee
 - Ad hoc Joint Committee
- Or
- Permanent Joint Committee to investigate, refer or commission research

Avenue 2 (un-planned)

- Potential post-enactment triggers for post-legislative review:
 - Central Government
 - Parliamentary Committee
 - External body
- Decision to conduct review
 - Parliamentary Committee
 - Government
 - External (e.g. NAO, Law Commission)

And possibly

- Permanent Joint Committee to conduct preliminary investigation in reaction to post-enactment triggers and decide whether further review is needed

What should post-legislative scrutiny consider?

The Law Commission believes that post-legislative scrutiny should not be an opportunity to reopen the policy debates that took place during the legislation’s passage through Parliament. Rather, the Law Commission identifies the following as potential areas for consideration:

- Have the provisions been brought into force?
- Has the legislation given rise to difficulties of interpretation?
- Has the legislation had unintended economic or other consequences?
- Has it been over-cumbersome?
- Do any steps need to be taken to improve its effectiveness or operation?
- Have things changed so that it is no longer needed?

There are other practical considerations which the consultation paper identifies. These include: what types of legislation are suitable for review, and what the timetable for review should be.

Criteria for assessment

Whatever the form of post-legislative scrutiny, it would be facilitated by greater clarity of legislative objectives. This could be achieved (and is already achieved in some cases) through:

- Purpose clauses. A general clause at the start of an Act identifying its purpose. However, these clauses have been criticised as too general and may cause confusion where they conflict with specific clauses of the Act;
- Explanatory notes. The House of Lords Constitution Committee suggested Explanatory Notes be used to identify the intended legislative objectives of any Bill. Although the Government's response to the Committee's report stated that it already used explanatory memoranda to clarify the general purpose of legislation, it did not see it as appropriate to include criteria against which legislation should be assessed at a later date.²⁴ It suggested that there was ample opportunity to do this already in second reading or standing committee debates;
- Policy documents. These were suggested by the Government as an alternative to setting out criteria for assessment in Explanatory Notes;
- Regulatory impact assessments ("RIA"). These assessments should, as a matter of course, include mention of post-legislative review, but rarely do. RIAs are drafted before the Bill has passed through Parliament, where it may be amended considerably, and this could seriously limit their effectiveness;
- Pre-legislative scrutiny reports. Committees considering draft bills could identify whether the Bill should be subject to post-legislative review, and could potentially identify specific elements of the legislation for later scrutiny. At least one Committee report on a draft Bill (the draft Charities Bill) recommends a review of impact five years after enactment, and this suggestion was included in the actual Bill which is currently before Parliament.²⁵

²⁴ HL Paper 114, para 35

²⁵ Report from the Joint Committee on the Draft Charities Bill, 2003-04, HC 660-I

Post-legislative scrutiny of delegated legislation and European legislation

The Law Commission's consultation paper invites views on post-legislative scrutiny of delegated legislation and European legislation. In both cases the sheer volume of legislation may prohibit systematic post-legislative scrutiny. Nevertheless, the benefits of post-legislative scrutiny are equally applicable to delegated and European legislation.

International comparators

The Law Commission's consultation identifies a number of international comparators. It is notable however, that no countries have been identified which have a formal and comprehensive system for the post-legislative review of legislation. Many of the examples cited by the Law Commission make extensive use of "sunset clauses".

Further reading:

- Law Commission, *Post-legislative Scrutiny*, Consultation Paper Number 178: http://www.lawcom.gov.uk/post_leg_scrutiny.htm
- Hansard Society, Briefing Paper: Issues in Law Making 6, *Post Legislative Scrutiny*, May 2005
- House of Lords Select Committee on the Constitution, Fourteenth Report of session 1003-04, *Parliament and the Legislative Process*, HL 173-I