

Article title:

The UK Post-legislative Gap

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The UK post-legislative scrutiny gap

It is now 10 years on from the introduction of the systematic approach to post-legislative scrutiny in the House of Commons and assessments have shown that it is yet to become a regular part of committee work, at least from the perspective of published reports. Although the procedures in the House of Lords are different, the extent of post-legislative scrutiny has also remained limited. This article attempts to identify the post-legislative gap and provides insight into why this gap is occurring. The article begins by analysing the limited amount of post-legislative scrutiny that has taken place to date, before analysing which government departments have been producing post-legislative memoranda and whether these memoranda are being picked up by departmental select committees. In so doing the article analyses which committees have not, so far, been undertaking post-legislative scrutiny and explores some of the reasons for why they have not engaged.

Keywords: Committees, Scrutiny, Post-legislative scrutiny, UK Parliament, legislation

Introduction

Post-legislative scrutiny is defined by the Law Commission of England and Wales as;

“A broad form of review, the purpose of which is to address the effects of legislation in terms of whether intended policy objectives have been met by the legislation and, if so, how effectively. However this does not preclude consideration of narrow questions of a purely legal or technical nature”. (Law Commission, 2006: 7)

De Vrieze & Hasson (2017) state that post-legislative scrutiny holds two distinct functions; monitoring of the implementation of legislation and evaluating whether or not the aims of an Act are reflected in the results and effects of legislation once implemented.

In the last decade a more systematic approach has been taken by both government and parliament. With regards to the House of Commons, since 2008, through an agreement between the Committee Office and Cabinet Office, government departments have been required to prepare and publish post-legislative review memoranda, assessing whether an Act of Parliament has met its key objectives, within three to five years of the Act entering the statute books (Kelly & Everett, 2013) These memoranda are then presented to departmental select committees for additional scrutiny. With regards to the House of Lords, in 2012 the Liaison Committee promised to appoint at least one ad hoc committee per session to undertake post-legislative scrutiny on a subject chosen by it (House of Lords Liaison Committee, 2012).

However, it is now 10 years on from the introduction of that systematic approach to post-legislative scrutiny in the House of Commons and as such there is a need to assess this process, from the publication of post-legislative review memoranda through to the undertaking of post-legislative scrutiny by parliamentary committees. Although the procedures in the House of Lords are different, the extent of post-legislative scrutiny has also remained limited. Additionally,

while there are patterns emerging of certain committees engaging with post-legislative scrutiny, many do not (at least in terms of holding an inquiry). This article therefore aims to address what limited post-legislative scrutiny has taken place so far and assess what factors if any are impacting upon the ability and willingness of committees to undertake more post-legislative scrutiny.

It is important to answer the research questions of what is the post-legislative gap, and why is a post-legislative gap occurring on the basis that post-legislative scrutiny is a vital tool which allows parliaments to hold executives to account in terms of the implementation of legislation. Additionally, helping to identify the gap in scrutiny here is also important in understanding the behaviour of committees, particularly in understanding why they do not undertake particular types of scrutiny.

Background

As noted, post-legislative scrutiny is undertaken by two different types of committee in the UK Parliament; departmental select committees in the House of Commons and ad hoc committees in the House of Lords. As such the literature on these two types of committees should give an early indication of how these committees operate and some of the issues that might impact upon their operation.

Departmental Select Committees – House of Commons

The Hansard Society (2001), as with other academics such as Longley & Davidson (1998), Shaw (1998) and Strom (1998) regard departmental select committees as the main vehicle for promoting a culture of scrutiny and accountability in the House of Commons. Select committees in the UK undertake a range of ten core tasks, which were introduced in 2002, of which post-legislative scrutiny is just one (House of Commons Liaison Committee (2012)). The competition between core tasks sees committees focus upon breadth rather than depth in inquiries.

It is 40 years since these sessional committees were created and they still perform an important scrutiny function. Their success in holding the executive accountable comes from the fact that they do not have power over things which greatly matter to government's survival, in comparison to other parliamentary committees in Western Europe (Russell & Cowley, 2016). They are therefore treated in a different way to the chamber (Giddings, 1994; Hansard Society, 2001). They set their own agendas (Norton, 2013) and face little meddling in their day to day operation from party whips (Russell & Cowley, 2016). There is however concern that with extra demands and opportunities placed upon them, that committees may no longer be in full control of their own agendas (Brazier & Fox, 2011). They also usually produce reports on a cross party basis (Russell & Cowley, 2016). The emphasis of these committees was to enhance the role of individual MPs (as opposed to parties) in influencing decision making (Giddings, 1994).

Despite being free to set their own agendas, how and why committees decide which inquiries to undertake and the role the core tasks play in this determination are unclear (Brazier & Fox, 2011). However, there are a number of factors that are likely to play a part in their deliberations

such as the chair, member interest, party balance, political urgency and media interest (Brazier & Fox, 2011).

Recent reforms have increased the importance and influence of select committees, these reforms included the election of committee chairs, which has given them a welcome boost in legitimacy (White, 2015), as well as the election of members, thereby removing the patronage powers of the whips (Russell, 2011; Benton & Russell, 2013). There has also been an increase in the levels of independence among backbenches, which has contributed to a greater sense of independence among committees (White, 2015). Such select committees are now flexing their muscles (Crewe, 2015). However, research by Bates, Goodman & McKay (2017) has shown that recent reforms have not had an impact upon the attendance and turnover of Members which Brazier & Fox (2011) have noted as problematic.

Select/ad hoc committees – House of Lords

The House of Lords was originally a chamber-orientated House, however since the late 1970s, it has developed a number of permanent committees alongside a more recent increase in the use of ad hoc committees (Rogers & Walters, 2015; Norton, 2013). Their focus tends to be more cross-cutting than House of Commons Committees as they were not created to scrutinise government departments (Norton, 2013). Committees in the House of Lords tend to focus upon making the best use of the expertise of Members, address cross-cutting issues and complement the work of the Commons (Russell, 2013).

There are however some similarities between the two Houses when it comes to committees, the same rules apply to both sets of committees in terms of responses from the government (Rogers & Walters, 2015), and they both operate in a consensual manner (Norton, 2013). However, Russell (2013) argues that the culture of committees in the House of Lords is different to the Commons in the sense that they tend to tackle more strategic and long-term issues and they also tend to have better relationships with government departments (Russell, 2013). Ad hoc committees form an important part of the committee structure in the House of Lords and their usage was expanded in 2012 (House of Lords Liaison Committee, 2012). These committees are only temporary and disband after they have reported, however they allow for detailed scrutiny of government over the course of a year.

Methods

This research took a mixed methods approach. The qualitative element begins with an audit of post-legislative scrutiny. As there was limited data on post-legislative scrutiny, including on the total number of inquiries that have taken place, descriptive data was needed to lay a foundation for the rest of the study. This audit included the collation of data on the number of post-legislative scrutiny inquiries that have taken place, the session, the parliament, the legislation which has received post-legislative scrutiny as well as the committee which had undertaken the scrutiny. Data has also been collated on the number of Acts receiving post-legislative scrutiny in each inquiry and the government under which the legislation was introduced. This data was located from individual committee webpages on the UK Parliament website, from individual

post-legislative scrutiny reports as well as from legislation.gov.uk. This data was collected for all post-legislative scrutiny inquiries that have taken place between 2008-2019. Inquiries were determined to be post-legislative scrutiny if the words 'post-legislative scrutiny' appeared in the title, the terms of reference, summary of the report or introduction. Post-legislative scrutiny can be challenging to locate as this article will address later.

Finally in terms of quantitative data collection, an audit was also undertaken of post-legislative review memorandum published by government departments. These memoranda were located through searches on the gov.uk website as there is currently no other central depository where these memoranda are stored. While this might not be the perfect method of detection, it is currently the only way to access them publicly. This data was compiled along departmental lines.

The paper comes to a conclusion with the qualitative elements of this study this took the form of eight semi-structured interviews from across seven different committees. Five of these committees were from the House of Commons, two of which had undertaken post-legislative scrutiny (Culture, Media and Sport; Health; Justice) and two had not at the time interviews were being undertaken (Education; Work and Pensions). The following criteria were deployed in order to aid selection; the committees have undertaken a formal post-legislative scrutiny inquiry (systematic post-legislative scrutiny); which took place either in the 2010-2015 or the 2015-2017 Parliaments (so that Clerks and/or Chairs would still be around and the inquiry wouldn't be a too distant memory). The final choices came down to the availability of interviewees and access to committee staff.

Three interviews were undertaken in the House of Lords, two from committees which had undertaken post-legislative scrutiny and one from the House of Lords Liaison Committee which selects which pieces of legislation go on to receive post-legislative scrutiny. Interviews took place with the clerks of these committees. The same criteria for the selection of House of Commons committees was used here too.

Post-legislative scrutiny undertaken between 2008 and 2017.

Table 1 shows that ad hoc committees (in the House of Lords) have undertaken the most post-legislative scrutiny since the start of the 2005 Parliament. This is due to the fact that since 2012, the House of Lords determined that it would create a number of ad hoc committees each session to scrutinise specific issues and that at least one of those committees would be a post-legislative scrutiny committee (House of Lords Liaison Committee, 2012). There was one committee in each session, except in the 2013-14 session which had two. In terms of the House of Commons, the Justice Committee and the Environment, Food and Rural Affairs Committee have been the most active, with the Digital, Culture, Media and Sport Committee and the Public Administration and Constitutional Affairs Committee coming joint third with two inquiries each over the course of the eleven year period studied.

The other committees in table 1 have undertaken post-legislative scrutiny once in that time period and not every parliamentary committee is part of the table; indicating they have not undertaken formal post-legislative scrutiny at all during this time period

Table 1: Formal post-legislative scrutiny inquiries by committee

Committee	Number of Inquiries
Ad hoc (House of Lords)	9
Environment, Food and Rural Affairs	3
Justice	3
Digital, Culture, Media and Sport	2
Public Administration and Constitutional Affairs	2
Education	1
Housing, Communities and Local Government	1
Home Affairs	1
Health	1
Joint Committee on Human Rights	1

Source: (www.parliament.uk/committees)

Table 2 shows the party of government which introduced the legislation receiving formal post-legislative scrutiny. It shows that 20 out of the 24 Acts which have been subject to formal post-legislative scrutiny were introduced under previous Labour Governments (1964-1970, 1997-2001, 2001-2005 and 2005-2010), with only four pieces of legislation being introduced by the 2010-2015 Coalition Government. This can potentially be explained by the fact that the 2008 system encouraged the production of a memorandum, and thus encouraged post-legislative scrutiny, of Acts passed since 2005. During the first half of the 2010 Parliament, it would be Labour-introduced legislation which was receiving post-legislative review by the relevant government department. However, we are now well beyond the first half of the 2010 Parliament (Caygill, 2019b). The legislation of the 2010-2015 Coalition Government should now be receiving departmental post-legislative review.

It should also be noted that not all post-legislative scrutiny is driven by memoranda published by government departments under the systematic process, as committees can and do select legislation to receive post-legislative scrutiny without receiving a post-legislative memorandum first. There is no procedural obstacle that could stop committees addressing the legislation of the 2010-2015 Coalition Government. Recent reforms were supposed to have emboldened committees; however, this does not appear to be the case in relation to the selection of legislation to receive post-legislative scrutiny.

Table 2: Legislation receiving formal post-legislative scrutiny by party of government

Committee	Session	No of Acts scrutinised	Act(s) involved	Party of Government
Environment, Food and Rural Affairs	2007/08	1	Veterinary Surgeons Act 1966	Labour
Digital, Culture, Media and Sport	2008/09	1	Licensing Act 2003	Labour
Ad hoc (Lords)	2012/13	2	Adoption and Children Act 2002; Children and Adoption Act 2006	Labour
Digital, Culture, Media and Sport	2012/13	1	Gambling Act 2005	Labour
Justice	2012/13	1	Freedom of Information Act 2000	Labour
Public Administration and Constitutional Affairs	2012/13	1	Statistics and Registration Service Act 2007	Labour
Ad hoc (Lords)	2013/14	1	Inquiries Act 2005	Labour
Ad hoc (Lords)	2013/14	1	Mental Capacity Act 2005	Labour
Health	2013/14	1	Mental Health Act 2007	Labour
Housing, Communities and Local Government	2013/14	1	Greater London Authority Act 2007	Labour
Joint Committee on Human Rights	2013/14	1	Terrorism Prevention and Investigation Measures Act 2011	Conservative/Liberal Democrat
Justice	2013/14	1	Serious Crime Act 2007	Labour
Public Administration and Constitutional Affairs	2013/14	1	Charities Act 2006	Labour
Ad hoc (Lords)	2014/15	1	Extradition Act 2003	Labour
Home Affairs	2014/15	1	Regulation of Investigatory Powers Act 2000	Labour
Justice	2014/15	1	Legal Aid, Sentencing and Punishment Act 2012	Conservative/Liberal Democrat
Ad hoc (Lords)	2015/16	1	Equality Act 2010	Labour
Ad hoc (Lords)	2016/17	1	Licensing Act 2003	Labour
Environment, Food and Rural Affairs	2016/17	1	Animal Welfare Act 2006	Labour
Environment, Food and Rural Affairs	2016/17	1	Flood and Water Management Act 2010	Labour
Ad hoc (Lords)	2017/19	1	Natural Environment and Rural Communities Act 2006	Labour
Ad hoc (Lords)	2017/19	1	Bribery Act 2010	Labour
Education	2017/19	1	Children and Families Act 2014	Conservative/Liberal Democrat

Ad hoc (Lords)	2017/19	1	Electoral Administration and Registration Act 2013	Conservative/Liberal Democrat
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Source: (www.parliament.uk/committees; www.legislation.gov.uk)

This suggests that there might be some bias in the selection of legislation that receives post-legislative scrutiny on the basis that some of the legislation of 2010-2015 Coalition Government now falls into the three-five year timeframe for post-legislative review by a government department. However, the subsequent memoranda from these reviews do not appear to be getting picked up by committees. This raises the question of whether this is a result of the party in government at the time. There may be an unwillingness among MPs from the governing party to subject their own government's legislation to post-legislative scrutiny. The bias here is not completely unexpected as parliament is a political body and as such is going to act in a political way. It is key however for parliament and especially committees to be aware of these inherent biases over selection and work to address them.

The post-legislative gap: Selection of legislation

In the previous section, the selection of legislation was addressed and in particular the party which introduced it. It showed that there is something of a party bias when it comes to the selection of legislation, with legislation introduced by the 2010-2015 Coalition Government not yet receiving much attention when it comes to post-legislative scrutiny with only four Acts having been reviewed so far. There is clearly a gap here in the coverage of post-legislative scrutiny, especially if you consider that government departments are now required to complete their own post-legislative review 3-5 years after an Act has entered the statute books. This could be more accurately referred to as a post-legislative gap (i.e. what legislation is not receiving post-legislative scrutiny). While the government process appears to be systematic, the parliament side of it is less so.

At the time of writing, taking into account the 3-5 year post-legislative departmental review process, committees, as long as departments are producing their reviews on time, should now have received the reviews for the first three sessions of the 2010 Parliament (2010-2012; 2012-2013; 2013-2014). This is assuming that government departments take the full five years to produce the review. The Head of the House of Commons Scrutiny Unit noted that they tend to come towards the end of the given time period because of other departmental priorities (Interview with the Head of the House of Commons Scrutiny Unit). That totals 102 pieces of legislation¹ that should have received their departmental reviews and only 4 pieces of that legislation have received post-legislative scrutiny (4%).

In terms of the lack of post-legislative scrutiny on the coalition government's legislation in the House of Lords, this might be explained by the longer time frame the Lords likes to take when undertaking post-legislative scrutiny. Interviews with clerks in the House of Lords pointed to a period of time greater than five years needing to pass before legislation is deemed suitable to undertake post-legislative scrutiny on an Act (Caygill, 2019a). The Clerk of the Licensing Act 2003 Committee suggested that seven to eight years would need to pass before it was possible to see the full effects of the Act (Interview with the Clerk of the Licensing Act 2003 Committee). This was on the basis that not all of the Act necessarily comes into force at the same time. Indeed, this view was shared by the clerk of the House of Lords Liaison Committee who stated that the optimal time for post-legislative scrutiny is somewhere between 5 and 10 years (Interview with the Clerk of the House of Lords Liaison Committee). This would potentially explain why the House of Lords has not addressed much legislation

¹ Not including financial legislation.

passed by the 2010-2015 Coalition Government, if it is taking that long term view. Although that particular reason 10 years on from the formation of the 2010-2015 Coalition Government is losing what strength it has.

In justifying this longer term view the Clerk of the Equality Act 2010 Committee noted that '3 years is too short a time as you can't really see what an Act is doing, what has been achieved and what hasn't' (Interview with the Clerk of the Equality Act 2010 Committee). So while the government focuses upon the date of Royal Assent, it might, in fact, be better to focus upon the date of commencement, as the House of Lords Constitution Committee (2004) does. In relation to this point he raised the case of the Licensing Act 2003 which the House of Commons Culture, Media and Sport Committee scrutinised just three years after it the Act had come into force. The report ended up being short, on the basis that there wasn't much to say other than noting that it was too soon after the Act had been passed to make any concrete suggestions (Interview with the Clerk of the Equality Act 2010 Committee). The House of Lords assessed the legislation again in the 2016/2017 session, 11 years after its enactment on the statute books.

From the perspective of the House of Commons, the former clerk of the Culture, Media and Sport Committee noted that there is a tendency to put at least a parliament (around five years) between the legislation being passed and the undertaking of post-legislative scrutiny. She also noted that it is possible that a time frame of seven to eight years would be necessary depending upon the policy area in question (Interview with the former Clerk of the Culture, Media and Sport Committee).

The post-legislative gap: House of Commons Committees and UK Government

Post-legislative gap does not just appear in terms of the legislation selected for post-legislative scrutiny. There is also a post-legislative gap in terms of the committees that have not undertaken formal post-legislative scrutiny since 2010.

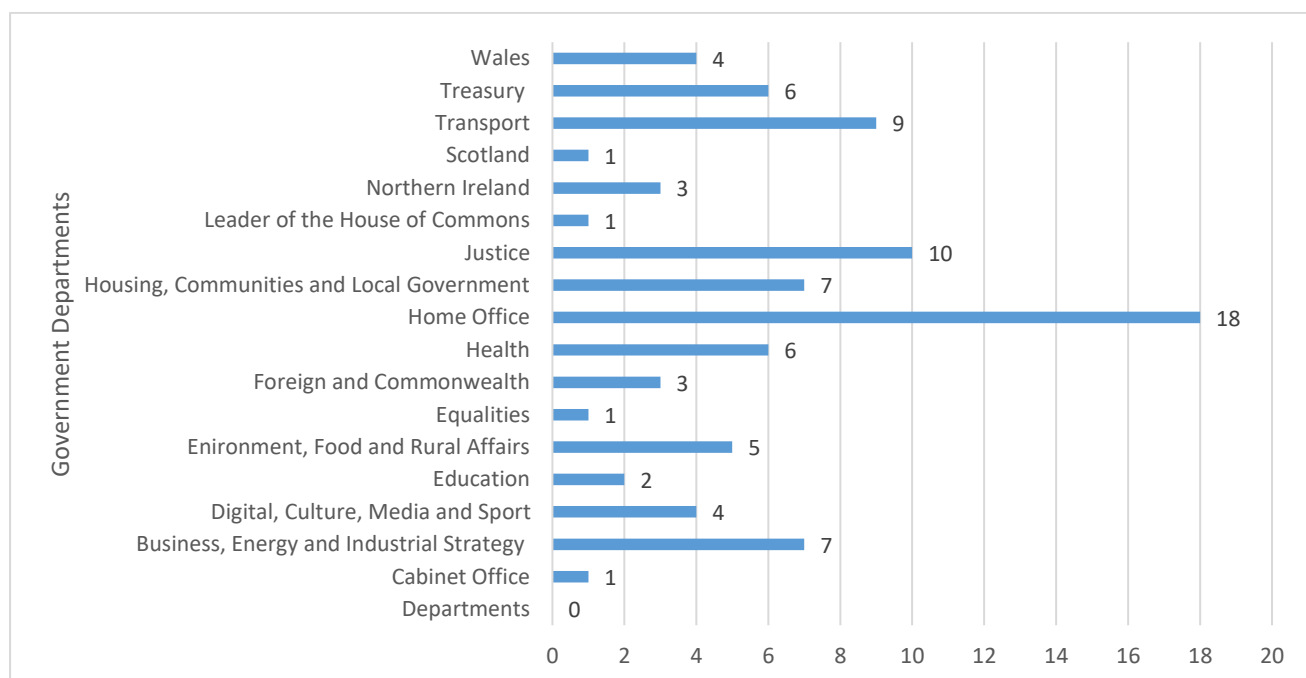
Table 3 shows the House of Commons departmental select committees that have not undertaken a formal post-legislative scrutiny inquiry since 2010. The Foreign Affairs, International Development, Defence and the Northern Ireland, Scottish and Welsh Affairs committees can be excused to some degree as these departments are not as legislatively intensive in comparison to the others. Additionally, the Treasury Committee could also be excused to a limited degree because financial legislation is currently not eligible for post-legislative scrutiny under the government's agreement with parliament, nor was it deemed eligible by the House of Lords Constitution Committee (House of Lords Select Committee on the Constitution, 2004; Office of the Leader of the House of Commons, 2008). Nevertheless, the core tasks of departmental select committees are relevant to all departmental select committees, of which post-legislative scrutiny is one of those tasks. That leaves an additional three committees which have not undertaken a formal post-legislative scrutiny inquiry. While it might be expected that the party of the chair might have an impact here, half of the committees which have not undertaken any post-legislative scrutiny between 2010-2019 have had opposition chairs and half have had government chairs and as such there does not appear to be a trend.

Table 3: Departmental select committees which have not undertaken a formal post-legislative scrutiny inquiry.

Committees
Business, Energy and Industrial Strategy Committee
Defence Committee
Foreign Affairs Committee
International Development Committee
Northern Ireland Affairs Committee
Scottish Affairs Committee
Transport Committee
Treasury Committee
Welsh Affairs Committee
Work and Pensions Committee

However, when assessing the post-legislative memoranda published by government departments, figure 1 raises a number of issues. Firstly, the Home Office has published far more memoranda than the Home Affairs Committee has taken up for post-legislative scrutiny. While not all legislation will require scrutiny, with the Home Affairs Committee having only undertaken one inquiry in comparison to eighteen memoranda having been published, it again shows that post-legislative scrutiny is not systematic. Additionally, for each of the committees listed in the previous paragraph for not having undertaken any post-legislative scrutiny, all of their respective departments (except International Development and Defence)² have been publishing memoranda, albeit, some more than others.

Figure 1: Post-legislative memoranda published by government departments

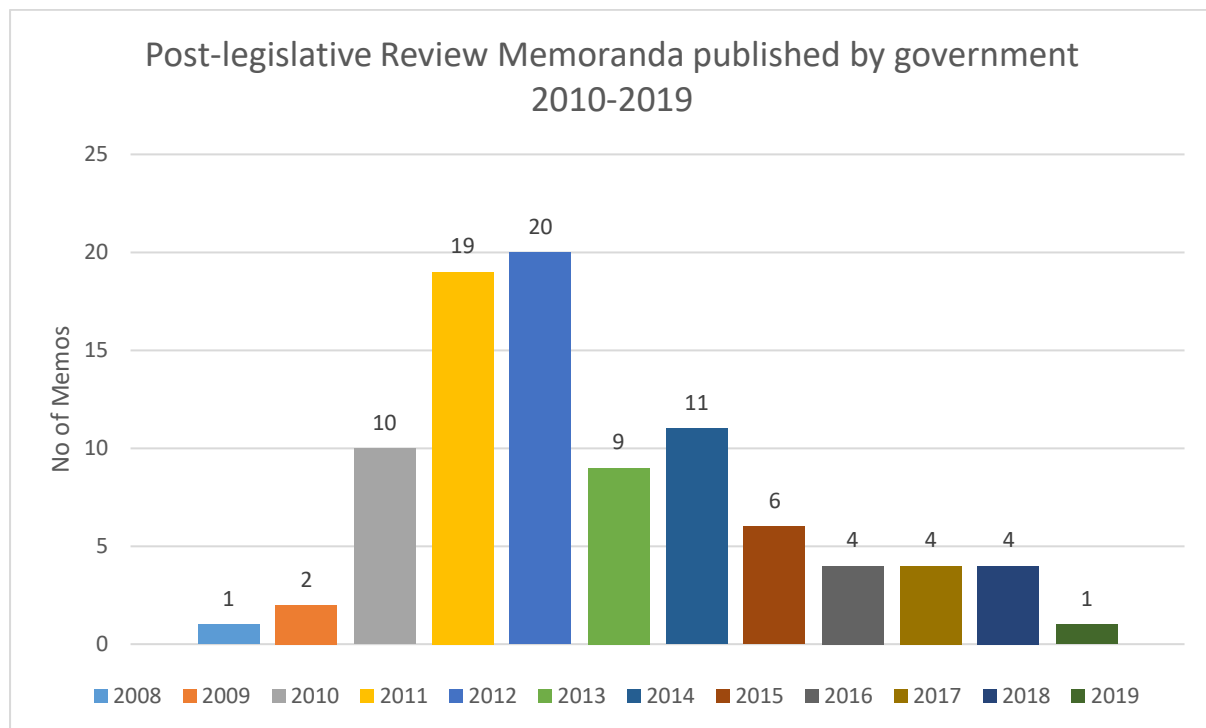


(Source: gov.uk)

² The Department for Exiting the European Union and the Department for International Trade have been excluded from this study on the basis that their legislation is not eligible for post-legislative scrutiny

While 91 post-legislative memoranda have been published by government departments between 2008 and 2019. This is some way below the amount of legislation that has gone on to receive royal assent in the same time period. For instance between the 2010-2012 and 2013-2014 session 102 pieces of legislation received royal assent however only 11 of them (11%) have received their post-legislative review memoranda. Eight of those were on government bills and three on private members bills³. This suggests that while there is a problem with committees picking up memoranda (and they do not need a memo to launch an inquiry) there is also a problem at the government end in terms of publishing these memoranda.

Figure 2. Post-legislative memoranda published between 2010-2019



(Source: gov.uk)

Figure 2 shows a steady increase in the undertaking and publication of post-legislative review memoranda up until 2012 however since then it has declined to single figures each year⁴. It is between 2011 and 2014 when most memoranda are published, perhaps it is not surprising that in this time period it will be Labour introduced legislation that will be within the timeframe for post-legislative review. It has been highlighted that there is some bias in the selection of legislation (Caygill, 2019b) however perhaps there is a bias in relation to government departments as well. Particularly as we see the number of memoranda decline as coalition legislation reaches the point of requiring review. This will also be having an impact upon the selection of legislation by committees for post-legislative scrutiny as these memoranda act as a trigger for committees (Caygill, 2019a). There is an additional factor impacting upon the 2017 to the mid 2019 period and that is the pressure that the UK's exit from

³ Post-legislative scrutiny has not yet been undertaken on a private members' bills.

⁴ 2016, 2017 and 2018 each include one memorandum requested by the House of Lords Liaison Committee for scrutiny by an ad hoc committee, therefore not officially part of the 3-5 timeframe set out by the government and the House of Commons.

the European Union is putting on government departments (e.g. staff being loaned from other departments to the Department for Exiting the European Union) (Owen & Lloyd, 2018), it is conceivable that post-legislative review has fallen off departmental radars. It is currently not known how much encouragement there is in relation to post-legislative scrutiny between the Cabinet Office and other government departments. In their 'Guide to Making Legislation' (published in 2017) the Cabinet Office reaffirmed their commitment to the 2008 agreement and made clear that the responsibility for undertaking post-legislative review was with respective government departments but made no mention of enforcement mechanisms (Cabinet Office, 2017). The lack of an enforcement mechanism within parliament only adds to the fact that there doesn't appear to be a commitment from the Cabinet Office to oversee the process within government either. Until such an enforcement mechanism exists, post-legislative scrutiny is likely to continue to fall off the radar of both government departments as well as House of Commons committees.

The post-legislative gap: Case studies

In order to understand why this post-legislative gap is occurring interviews were undertaken, with the clerks of two House of Commons committees which had not engaged with post-legislative scrutiny at the time that interviews were undertaken. These committees were the Education Committee and the Work and Pension Committee. In terms of the Education Committee, the clerk noted that they came very close to launching a post-legislative scrutiny inquiry into the Children and Families Act 2014 but due to the surprise calling of the 2017 General Election this inquiry did not proceed (Interview with the former Clerk of the Education Committee). A version of this inquiry has since taken place, and the report was published just before the 2019 General Election. So there was a problem here of events taking over. This can be both political events like elections halting committee work or even new policy announcements which divert the attention of the committee away from tasks such as post-legislative scrutiny. However, it appears that post-legislative scrutiny was on their agenda even if only lower down it. In terms of the Work and Pension Committee, attention is paid to what is likely to be published by the department in terms of post-legislative memoranda and discussions are held about what if anything the committee would like to move forward with but the committee does not usually make much further progress than that (Interview with the former Clerk of the Work and Pensions Committee). These factors only add to the list of factors which impact upon committee work programmes which Geddes (2020: 99-101) notes.

There is also the potential for committee work programmes to be overtaken by parliamentary and legislative cycles, in the sense that once one bill has been passed work starts on the next (Interview with the former Clerk of the Education Committee). There is then a conveyor belt of legislation, which a) undertakes some of its own post-legislative review in terms of looking back at the previous Act and amending it through a new one and b) means post-legislative scrutiny doesn't take place as the legislation is not on the statute books long enough before the next piece of legislation comes along and supersedes it. The former Clerk of the House of Commons Education Committee noted that the Department for Education had been in a state of permanent revolution since 2010 with a near constant cycle of legislation coming out of the department. This means there is plenty of material to potentially look at but also makes the job of undertaking post-legislative scrutiny more challenging if it is superseding earlier laws. It also potentially eliminates some legislation from the running for post-

legislative scrutiny. This problem was also raised in relation to the Work and Pensions Committee, in that nearly every year a new Pensions Bill appears, potentially superseding or dealing with the challenges presented in the previous Act. As a result, the government department does not undertake a formal post-legislative scrutiny review as it claims it reviewed the legislation when crafting the new bill (Interview with the former Clerk of the Work and Pensions Committee). This might partially explain the low number of post-legislative review memoranda arriving for Coalition legislation however an equally compelling explanation would be that government departments are being overwhelmed by Brexit and as such post-legislative review is even further down on the agenda than usual.

This does come down to power, to some extent, as the power to pull together and produce these memoranda rests with the government, and not parliament. Although parliament can call for papers they rely upon government for their production and for the information contained within them. While parliament has little or no coercive powers, it is also left weaker by being at an informational and resource disadvantage to government. Access to information is a vital foundation for all scrutiny and the government led focus in terms of post-legislative scrutiny memoranda, could be a limitation to wanting to undertake it in the first place. In terms of power in this situation, parliament often relies upon convention and the creation of an obligation, and commitment from government what Lukes (1974) would term persuasion or manipulation. Boulding (1989) in *Three Faces of Power* refers to this as the kiss. Although, as the parliamentary reform literature notes, the government will be in no hurry to change this face and alter the balance of power (Kelso, 2009). It should be noted that it is not unusual to see bodies internal to legislatures undertaking this kind of review which is currently undertaken by the executive in the UK (De Vrieze & Hasson, 2017).

That being said both clerks argued that their committees had undertaken post-legislative scrutiny in other ways (Interview with the former Clerk of the Education Committee; Interview with the former Clerk of the Work and Pensions Committee). For the Education Committee, this included a number of sessions they had on the work of the Children's Commissioner for England which the clerk argued had a clear and demonstrable link to the Children and Families Act 2014. In relation to the Work and Pensions Committee, the former Clerk argued that they did a lot of work that was driven by politics and driven by constituency mailbag issues. Geddes (2020) also noted that constituency experience can drive select committee inquiries and this ties in with his typology of styles of scrutiny (e.g. constituency champions who represent their constituents in the topics they pursue). One of those issues related to the state pension age and the Women Against State Pension Inequality (WASPI) campaign. It was a very high profile politically driven inquiry and in practice, a lot of what they focused upon was tantamount to looking at the legislation and whether it was achieving its objectives or whether policy was enacted in a way it ought to have been (Interview with the former Clerk of Work and Pensions Committee). He argued that a lot of it was about communication and it bore quite a lot of the hallmarks of a post-legislative scrutiny inquiry. He also noted that he didn't think anyone involved was consciously thinking that at the time. However, in hindsight, you could see it in those terms (Interview with the former Clerk of the Work and Pensions Committee). This highlights the issue that perhaps post-legislative scrutiny, is being undertaken in a variety of forms, aside from a formal committee inquiry, which might not be detectable at first glance. Care is required here however; these alternatives forms have not yet been mapped out and caution should be taken in classifying them as post-legislative scrutiny. That being said the Law Commission in its 2006 report on post-legislative scrutiny noted that more systematic post-legislative scrutiny could take different forms (Law

Commission, 2006), the problem is we do not yet know what these different forms are. This emphasises the need for additional research into alternative forms of post-legislative scrutiny, particularly as both clerks noted the challenges in identifying where post-legislative scrutiny has taken place.

The former Clerk of the Education Committee also noted a problem of Members' interest in relation to post-legislative scrutiny and the potential lack of interest. Indeed, the former Clerk of the Work and Pensions Committee argued that post-legislative scrutiny is often way down on the list of priorities of members and because they only maybe spend a couple of hours a week on committee work, it never rises much higher on the list of priorities. Indeed, a survey undertaken by the Hansard Society in 2011 found that MPs spent only 14% of their time on committee work (Korris, 2011). This is in comparison to 21% of time being spent in the Chamber and 59% spent on constituency related issues (campaigning, casework, and meetings) (Korris, 2011). The Clerk of the House of Commons Education Committee argued that interest in the study or review of legislation and the legislative process is probably restricted to the Members who are lawyers or who are more technically minded (Interview with the former Clerk of the Education Committee), these kind of MPs would be referred to as 'specialists' under Geddes' (2020) typology. The former Clerk of the Education Committee suggested that they would never refer to an inquiry as post-legislative scrutiny as it was a sure way to turn off Members and potentially miss an opportunity for public engagement (Interview with the former Clerk of the Education Committee). Instead, he noted that mentions of post-legislative scrutiny would be placed in the terms of reference so that witnesses would understand how to approach the inquiry.

There is also an additional problem raised by the former Clerk of the Work and Pensions Committee which has impacted upon the Work and Pensions Committee at least, and that is in relation to the turnover of committee membership. Data from the Institute for Government shows that turnover on the Work and Pensions Committee in the 2010-2015 Parliament was over 150%, which will have had a big impact upon the dynamic and interests of the Committee (Freeguard, 2015). That being said, the Justice Committee was active in terms of undertaking post-legislative scrutiny during the 2010 Parliament but had a turnover of just over 140% (Freeguard, 2015). The chair of the Justice Committee at the time, however, was committed to undertaking post-legislative scrutiny (Interview with Lord Beith, former Chair of the Justice Committee) which will have had an impact upon its prevalence here despite the turnover in Members. Turnover might not be the most important factor when determining whether to undertake post-legislative scrutiny, but if a chair is ambivalent to it, turnover is unlikely to help push it up the agenda. The Clerk argued that you may at the start of a parliament plan to address a particular Act a few years down the line but if a number of Members' change (including those with the desire to do it) then that can cause a change to the work programme via Members' priorities (Interview with the former Clerk of the House of Commons Work and Pensions Committee). This potentially ties in with events discussed earlier and a high membership turnover makes planning and sticking to a long-term work programme more challenging. Members' interest is important here in determining committee behaviour but also in terms of new Members' interests as they join committees and dilute the earlier interests.

Conclusion

Post-legislative scrutiny remains limited as a form of scrutiny at least from the perspective of committees launching inquiries and publishing reports. From the limited amount of post-legislative scrutiny that has taken place it is possible to locate a gap or rather a post-legislative scrutiny gap. This gap appears both in terms of the selection of legislation (in particular through a lack of selection of legislation passed by the 2010-2015 Coalition Government onwards), but also in terms of committees in the House of Commons which are not undertaking post-legislative scrutiny despite post-legislative review memoranda being published across almost the full range of government departments. However, there is now a post-legislative scrutiny gap created through a slowdown in the number of reviews coming out of government departments. Although not all inquiries are launched because of post-legislative review memos, they do act as a prompt for committees to undertake post-legislative scrutiny. Putting the 2008 agreement between the Commons Committee Office and Cabinet Office on to firmer footage would likely help increase the production and take up of memoranda. The Liaison Committees of both Houses of Parliament would be a suitable unit to provide some parliamentary oversight of the process.

However, there are a number of reasons for why committees might not be formally engaging with post-legislative scrutiny. These included, events taking over. These can be both political events like elections halting committee work or new policy announcements which divert the attention of the committee away from tasks such as post-legislative scrutiny. There is also the problem of committee work programmes being overtaken by legislative cycles. There is often a conveyor belt of legislation, which undertakes some of its own post-legislative review in terms of looking back at the previous Act and amending it through a new one. This often means that post-legislative scrutiny doesn't take place as the legislation is not on the statute books long enough to receive a post-legislative memorandum or before the next piece of legislation comes along and supersedes it. In addition, there was a problem, with long term planning due to the turnover of committee membership. Turnover might not be the most important factor when determining whether to undertake post-legislative scrutiny, but if a chair is ambivalent to it, turnover is unlikely to help push it up the agenda. Finally, there is also a lack of Member interest in post-legislative scrutiny, and with member driven committees, interest is vital.

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