

A Tale of Two Houses? Post-legislative scrutiny in the UK Parliament

Tom Caygill

*School of Geography, Politics and Sociology
Newcastle University*

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Summary:

In the last decade a more systematic approach to post-legislative scrutiny has been taken by both the UK Government and Parliament. Currently, due to a lack of systematic scrutiny we do not know how both Houses of the UK Parliament are undertaking post-legislative scrutiny. The aim of the paper is to determine the similarities and differences between the House of Commons and House of Lords when undertaking post-legislative scrutiny. This paper addresses this gap in knowledge through the use of four case studies from both Houses. These case studies address how they select legislation for review, what recommendations they produce and how they deal with the follow up to government responses.

The paper finds that there are a number of differences in the way legislation is selected by both Houses and also highlights the differences between them in terms of the output of their recommendations. Overall this paper contributes to our knowledge of the processes available to the UK Parliament for the undertaking of post-legislative scrutiny. This is important as post-legislative scrutiny, as a formalized activity is relatively new, and there is a contribution to be made here in terms of how such procedures can be utilized in other legislatures.

Introduction

Post-legislative scrutiny is one of the core tasks of departmental select committees in the House of Commons¹. In the last decade a more systematic approach has been taken by both the UK Government and UK Parliament. With regards to the House of Commons, since 2008 government departments have been required to prepare and publish memoranda, assessing whether an Act of Parliament has

¹ House of Commons Liaison Committee. Select committee effectiveness, resources and powers. November 2012. HC 697.

met its key objectives, within three to five years of the Act entering the statute books^{2,3,4}. 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 it⁵.

Currently, due to a lack of systematic scrutiny we do not know how both Houses of the UK Parliament are undertaking post-legislative scrutiny and what the main differences are. The aim of the paper therefore is to determine the similarities and differences between the House of Commons and House of Lords when undertaking post-legislative scrutiny. In so doing it addresses the following research questions; what differences are there a) in the way both Houses select legislation for post-legislative scrutiny, b) in the outputs of post-legislative scrutiny; and c) in the way committees follow up on government responses. This paper will provide an evaluation of the current procedures. This has important implications on highlighting how the system is currently working and whether this is a process worth recreating in other legislatures.

This paper aims to address this gap in knowledge through the use of four case studies from both the House of Commons and the House of Lords. These case studies address how the respective Houses and committees select legislation for review, what the outputs of their scrutiny were and finally whether they followed up.

This paper contributes to our knowledge of the processes available to the UK Parliament for the undertaking of post-legislative scrutiny. This is also important as post-legislative scrutiny, as a formalized activity of Parliaments is relatively new, and there is a contribution to be made here in terms of how such procedures can be utilized in other legislatures. There is also a contribution to make here regarding the relationship between the two Houses.

Committees undertaking post-legislative scrutiny in the UK Parliament

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 the similarities and differences between the two Houses in this area.

Departmental Select Committees – House of Commons

² Cabinet Office. Guide to Making Legislation. July 2012. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/210917/Guide_to_Making_Legislation_July_2013.pdf. (Accessed on: 8th February 2014).

³ R. Kelly. Modernisation: Select Committees – pay for chairs. House of Commons Library Standard Note. February 2014. SN/PC/02725.

⁴ R. Kelly & M. Everett. Post-Legislative Scrutiny. House of Commons Library Standard Note. May 2013. SN/PC/05232.

⁵ House of Lords Liaison Committee. Review of select committee activity and proposals for new committee activity. March 2012. HL 279.

The Hansard Society⁶, as with other academics such as Longley & Davidson⁷, Shaw⁸ and Strom⁹ 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, of which post-legislative scrutiny is just one¹⁰. The competition between core tasks sees committees focus upon breadth rather than depth in inquiries.

These sessional committees were created in 1979 and perform an important scrutiny function. Their success in holding the executive to account comes from the fact that these committees do not have power over things which greatly matter to government's survival, such as the passage of legislation and the budget. As they are less of a threat to the passage of government bills and the government's survival, they are treated in a different way to the chamber^{11,12}. This has allowed them to develop somewhat free of party control. They set their own agendas¹³ and aim to produce reports on a cross party basis¹⁴. The emphasis of these committees was to enhance the role of individual MPs (as opposed to parties) in influencing decision making¹⁵. Select committees give backbenchers from both sides of the House the ability to contribute, in a less partisan manner to the scrutiny of government. As such, committees have significantly improved the processes of scrutiny in ways in which the House of Commons chamber could not, e.g. the willingness of select committees to rigorously scrutinize government agencies, not just government departments, and request written and oral evidence from them¹⁶.

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 legitimacy¹⁷, and members, removing the patronage powers of the whips and government^{18,19}. There has also been an increase in the levels of independence among backbenches, which has contributed to a greater sense of independence among committees²⁰. Such select committees are now flexing their muscles²¹. This has reduced criticisms laid at select committees' doors such as those of Flinders²² that the government could steer committees away from controversial issues of scrutiny. However it is possible that governments can find other ways to steer committees away from controversial issues such as publishing draft bills for departmental select committees to scrutinize, taking up more of their

⁶ Hansard Society. *The Challenge for Parliament: Making Government Accountable: Report of the Hansard Society Commission on Parliamentary Scrutiny*. London, Hansard Society. 2001.

⁷ L.D. Longley & R.H. Davidson. 'Parliamentary committees: Changing perspectives on changing institutions'. *Journal of Legislative Studies*. Vol. 4, No. 2, 1998, pp. 1–20.

⁸ M. Shaw. 'Parliamentary committees: A global perspective'. *Journal of Legislative Studies*. Vol. 4, No. 1, 1998, pp. 225–251.

⁹ K. Strom. 'Parliamentary committees in European democracies'. *Journal of Legislative Studies*. Vol. 4, No. 1, 1998, pp. 21–59.

¹⁰ House of Commons Liaison Committee, 2012.

¹¹ P. Giddings. 'Select Committees and Parliamentary Scrutiny: Plus Ça Change'. *Parliamentary Affairs*. Vol. 47, No. 4, 1994, pp. 669–686.

¹² Hansard Society, 2001.

¹³ P. Norton. *Parliament in British Politics*. 2nd ed. Basingstoke, Palgrave MacMillan. 2013.

¹⁴ M. Russell & P. Cowley. 'The Policy Power of the Westminster Parliament: The "Parliamentary State" and the Empirical Evidence'. *Governance*. Vol. 29, No. 1, 2016, pp. 121–137.

¹⁵ Giddings, 1994.

¹⁶ Hansard Society, 2001.

¹⁷ H. White. *Select Committees under Scrutiny*. London, Institute for Government. 2015

¹⁸ M. Benton & M. Russell. 'Assessing the Impact of Parliamentary Oversight Committees: The Select Committees in the British House of Commons'. *Parliamentary Affairs*. Vol. 66, No. 4, 2013, pp. 772–797.

¹⁹ M. Russell. 'Never Allow a Crisis Go To Waste': The Wright Committee Reforms to Strengthen the House of Commons'. *Parliamentary Affairs*. Vol. 64, No. 4, 2011, pp. 612–633.

²⁰ White, 2015.

²¹ E. Crewe. *The House of Commons: An Anthropology of MPs at Work*. London, Bloomsbury Academic. 2015.

²² M. Flinders. *The Politics of Accountability in the Modern State*. Aldershot, Ashgate Publishing. 2001

available time. While criticisms may remain, improvements have been made since 2010, which may mean that some of the issues raised in literature prior to these reforms require qualification. D’Arcy²³ notes in his article on the post 2010 Parliament that committees are more powerful and independently minded than ever before.

Benton & Russell²⁴ undertook an extensive study of the impact of select committees in Westminster. Their research concluded that although select committees could be more influential, their findings did challenge those who suggest that committees are ignored by government. In fact their research showed that committees have become an integral part of policy making, due to their detailed approach of scrutinising government policy and actions. Government departments are thus more willing to engage with committees in order so they do not fall foul of them later on in the policy process.

These departmental select committees are sessional, so continue for the duration of a Parliament, have multiple core tasks of which post-legislative scrutiny is just one, they set their own agendas and in terms of scope they got for breadth rather than depth. This is different to ad hoc committees in the House of Lords.

Select/ad hoc committees – House of Lords

Since the 1970s, the House of Lords has developed a number of permanent committees²⁵, indeed before then it was very much a chamber orientated House²⁶. House of Lords select committees tend to cover more crosscutting areas and do not shadow government departments²⁷. So there is a clear difference here in terms of their structure. Indeed has been noted that Lords committees should make best use of Members knowledge, complement the work of the House of Commons and address cross-departmental issues²⁸. In comparison to the House of Commons the focus in the Lords is on depth rather than breadth, on the basis that Lords Committee do not have core tasks. There are some similarities here to as the same rules apply to Lords committees as they do to Commons committees regarding the government responding to reports and they also face similar challenges that Commons committees do²⁹. In addition they tend to be consensual in nature³⁰. However the membership of Lords committees is usually based on merit due the expertise present in the House³¹. Ad hoc committees have also been created since the 1970s and also form an important part of this committee structure in the House of Lords and their number set up each session was expanded in 2012³². They are set up temporarily and disband after the publication of their reports, this is a key difference to sessional committees such as departmental select committees. They are popular among Peers as they allow topical issues to be examined without a permanent committee being appointed. As they are an established part of the committee structure in the House of Lords, there is competition in terms of Peers bidding for committees covering their preferred area being set up³³. Russell argues that the

²³ M. D’Arcy. ‘Time to salute the post-2010 Parliament’. BBC News. 2011. Available at: <http://www.bbc.co.uk/news/uk-politics-14330865>. (Accessed on: 5th March 2015).

²⁴ Benton & Russell, 2013.

²⁵ R. Rogers & R. Walters. How Parliament Works. 7th ed. Abingdon, Routledge. 2015

²⁶ Norton, 2013.

²⁷ *ibid.*

²⁸ M. Russell. The Contemporary House of Lords. Oxford, Oxford University Press. 2013.

²⁹ Rogers & Walters, 2015.

³⁰ Norton, 2013.

³¹ *ibid.*

³² House of Lords Liaison Committee, 2012

³³ Rogers & Walters, 2015.

culture of Lords committees is different to committees in the Commons, they tend to tackle more strategic and longer term issues. They also tend to have a less adversarial relationship with government departments³⁴. As with House of Commons committees, House of Lords committees are regarded as an effective mechanism when it comes to scrutinising the government.

Methodology

For the case study analysis, four select committee inquiries were chosen. The individual inquiries selected for this case study analysis were determined on the basis of the following criteria; they have undertaken a full post-legislative scrutiny inquiry; which took place between 2012-2017; and that Committee staff are still available for interview i.e. they have not moved on to work outside of Parliament.

The cases chosen are all from parliamentary committees, who have similar procedures and powers, who the government is required to respond to in terms of their reports and correspondence and they are independent of government. The following committees and inquiries were assessed:

- House of Commons Culture Media and Sport Committee – Gambling Act 2005
- House of Commons Justice Committee – Freedom of Information Act 2000
- House of Lords Select Committee on the Equality Act 2010 and Disability – disability elements of the Equality Act 2010
- House of Lords Select Committee on the Licensing Act 2003 – Licensing Act 2003

For each committee a representative of the committee secretariat and membership who took part in the inquiries were interviewed, with their remarks for attribution. In total 8 semi-structured interviews were undertaken (two per committee).

In addition to the case study analysis, the recommendations of all post-legislative scrutiny inquiries between 2008 and 2017 were assessed to provide a comparison of the output of post-legislative scrutiny. These inquiries were located on House of Commons and House of Lords committee websites for all sessions between the 2005/2006 and 2016/2017 sessions. Following the location of these inquiries a content analysis of reports was undertaken in order to code committee recommendations and the government's response to those reports. This involved the coding of twenty reports and twenty government responses.

Recommendations were coded in terms of which organisations they were directed at, with the focus upon those directed at central government. There were 468 recommendations in total. Once formal recommendations directed at central government had been identified each recommendation was coded on the type of recommendation made, using a coding scheme deployed by³⁵. Additionally the strength of change that the recommendation calls for was also coded. This employed a modified version of Russell and Benton's³⁶ coding scheme (no/small, medium and large change), with the scale increased to five on the basis of the types of changes that post-legislative scrutiny calls for. The medium action category was expanded into three separate categories to account for the differences in action classified under the medium category (e.g. calls for more resources versus calls for the

³⁴ Russell, 2013.

³⁵ M. Russell & M. Benton. *Selective Influence: The Policy Impact of House of Commons Select Committees*. London, Constitution Unit. 2011.

³⁶ *ibid*.

amendment of primary legislation), as defined by Russell and Benton³⁷. Additionally the no/small category has been separated into no action and small action, to account for the difference between no change and small change. The categories used to measure strength of recommendation for this study are; (0) no action, (1) small action, (2) medium a action, (3) medium b action, (4) medium c action and (5) large action (see appendices for a full breakdown of coding descriptors). All reports were double coded and a random sample of committee reports were coded outside of the research team to ensure coder reliability.

Differences in the selection of legislation

There are differences in how the two Houses select legislation to receive post-legislative scrutiny, as was noted earlier in the paper the creation of ad hoc committees in the House of Lords is determined by the House of Lords Liaison Committee however in the House of Commons post-legislative scrutiny is one of the core tasks of departmental select committees and as such with their independence it is up to them to determine when to undertake such scrutiny.

In relation to the House of Commons there are a number of reasons why a committee may decide to undertake post-legislative scrutiny and select the legislation that it does. The Culture, Media and Sport Committee's inquiry into the Gambling Act 2005 was selected on the basis that they had received 'a large number of representations from the gambling industry'³⁸. The industry was concerned that legitimate commercial interests were being interfered with and that the Act was difficult to interpret due to it being overly complex³⁹. Philip Davies, a member of the committee, noted that "it is common for organisations to approach committees with their concerns and problems"⁴⁰. Another factor here was the fact that the Department of Culture, Media and Sport is generally not a department that sponsors many bills and legislative changes often are tacked on to other bills from other departments e.g. school sports being added to bills from the Department for Education⁴¹.

In terms of the Justice Committee's inquiry into the Freedom of Information Act 2000, it was selected because the Committee had received the memorandum from the Ministry of Justice and these government produced memoranda do often Act as a trigger for post-legislative scrutiny. So there is a benefit to the governments system of departmental post-legislative review. The issue was also salient at that particular moment as "the government was proposing to make changes to the Act in terms of narrowing the scope of and restricting the use of it"⁴². "The fact that the government wanted to make changes made it more urgent to get the report out as quickly as possible"⁴³ on the basis that the committee wanted to share its assessment of the challenges before the government made a decision. The Chair also noted that there was "a reasonably high level of interest among the Members"⁴⁴,

³⁷ *ibid.*

³⁸ House of Commons Culture, Media and Sport Committee. The Gambling Act 2005: a bet worth taking. July 2012. HC 421.

³⁹ *ibid*

⁴⁰ Interview with Philip Davies MP, former member of the Culture, Media and Sport Committee.

⁴¹ Interview with the former Clerk of the Culture, Media and Sport Committee.

⁴² Interview with Lord Beith, former Chair of the Justice Committee.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

particularly as the committee had previously assessed whether departments were ready for freedom of information.

The Liaison Committee in the House of Lords is more proactive when it comes to post-legislative scrutiny, than its House of Commons equivalent, as it formally recommends which committees are set up and what topics are examined. As such the ad hoc committees themselves are set up to undertake scrutiny into a particular Act and have no choice over the matter once it has been created. In terms of the factors that the House of Lords Liaison Committee takes into account, one of the key factors that the Committee takes into account is whether the inquiry would “make the best use of the expertise of Members of the House of Lords”⁴⁵. Indeed one of the unique selling points of the second chamber is that it contains many people with expertise in different sectors, as such when undertaking post-legislative scrutiny it is important to tap into that expertise as well.

One other obvious criteria is whether the legislation or topic has been or is likely to be considered by a Commons committee. This is an important consideration; while resources are stretched it is important to ensure that there is as little overlap as possible between the two Houses. This is on the basis that if committees were assessing the same issue then it is a waste of resources but it would also raise the question of what else committees might be foregoing. It is also important here to take into account the primacy of the House of Commons⁴⁶ as well as the general timidity of the House of Lords as a result of its unelected status⁴⁷.

Timing is also another important factor, in the sense that whether it is the right time to review the legislation. The Clerk noted that “there is an optimal time for post-legislative scrutiny and that is five to ten years after it has come into force”⁴⁸. This is different from the time frame that the Cabinet Office guidelines suggests, with the publication of post-legislative memoranda (three-five years)⁴⁹.

Other criteria noted by Clerks include that “the Act should be a major one that has reformed the law in a fairly substantial way and to avoid anything too politically controversial”⁵⁰. This is because the focus of post-legislative scrutiny is more on the Act itself rather than looking at the underlying politics of the policy. However this does restrict the House of Lords in terms of potential post-legislative scrutiny inquiries. One other criterion the Clerk noted was to “avoid legislation that is about to be substantially amended” because there wouldn’t be much point in conducting a full review⁵¹. However that being said, surely there is an argument that if an Act were to be amended (even through another Act), that a post-legislative inquiry might help to inform such amendments.

In relation to the Equality Act 2010, Baroness Thomas of Winchester put forward the proposal to look at the effect of the Equality Act on disability and as such the Liaison Committee limited the ad hoc committee to this. So far this is the only example where the Liaison Committee has restricted the scope of the inquiry but the Clerk admitted “it was the correct decision”⁵², as the Act was lengthy and complex. In the case of the Licensing Act, the committee was able to undertake a full review and decide for itself which particular parts of the Licensing Act they wanted to address. The Clerk noted

⁴⁵ Interview with the Clerk of the House of Lords Liaison Committee.

⁴⁶ P. Norton. *Reform of the House of Lords*. Manchester, Manchester University Press. 2017.

⁴⁷ Russell, 2013.

⁴⁸ Interview with the Clerk of the House of Lords Liaison Committee.

⁴⁹ Cabinet Office, 2012.

⁵⁰ Interview with the former Clerk of the Select Committee on the Licensing Act 2003.

⁵¹ Ibid.

⁵² Interview with the former Clerk of the Select Committee on the Equality Act 2010 Committee.

that “it was a detailed piece of legislation and that it was a fairly compressed topic, as such there was no difficulty in dealing with it in one inquiry”⁵³.

With the processes of selection being different between the two Houses there is a clear difference in how they approach the criteria used to select legislation for post-legislative scrutiny with the House of Lords paying attention to its role as a chamber that adds value and complements the work of the House of Commons. A difference in selection is important, as if the criteria were the same then they may well be selecting similar legislation for review which, with limited resources, would be a waste.

Differences in the outputs of post-legislative scrutiny

In terms of the breakdown of full act based post-legislative scrutiny, the House of Commons has undertaken twelve inquiries and the House of Lords has undertaken six. On average committees in the House of Commons produce 19 recommendations per report in comparison to 41 recommendations per report made by Lords committees. This difference can be accounted for by the ways in which the two different types of committees undertake post-legislative scrutiny. Unlike departmental select committees which have a large range of tasks, ad hoc committees have (usually) only the one task they were set up to undertake. As such they are able to dedicate a full session to the inquiry and produce more detailed scrutiny.

Table one shows the types of recommendations being made by both Houses of Parliament. Firstly the table shows that proportionally the ad hoc committees of the House of Lords are making more recommendations calling for action in relation to legislation. The table also shows that the ad hoc committees of the House of Lords are producing more recommendations relating to policy and practice

Table 1: Type of Recommendations from each House

Type of Recommendation	House of Commons		House of Lords	
	<i>N</i>	%	<i>N</i>	%
Policy and Practice	74	36	111	48
Research/Review	53	26	25	11
Related to legislation	25	12	49	21
Disclosure	22	11	14	8
Recommendations from other bodies	9	4	3	1
Co-operation	8	4	3	1
Funding and resources	7	3	5	3
Campaigns/Public information	4	2	5	2
Guidance	3	1	15	6
Total	205	100	231	100

In relation to the production of more recommendations calling for action relating to legislation this can be explained by the fact that the House of Lords often takes a more technical approach to scrutiny, as it does with the full line by line scrutiny it undertakes during the formal legislative process. Such

⁵³ Interview with the former Clerk of the Select Committee on the Licensing Act 2003.

technical scrutiny mixed with the expertise and time ad hoc committee have to undertake their inquiries leads to more legislative recommendations.

With regards to ad hoc committees producing more policy related recommendations, this could be a reflection that the House of Lords is willing to pressure the government with stronger recommendations on the basis that they can justify their decisions through expertise and experience. This is especially true if there are Members on a committee with particular experience of working in the field under examination meaning recommendations to carry more weight.

Finally there is also a difference in terms of recommendations calling for research and review, with the Lords calling for fewer. This can be explained by the fact that committees in the Lords are able to hold an inquiry over an entire session and as such have more time to undertake more detailed review and potentially reach firmer conclusions than committees in the Commons. Indeed Clerks have noted that one of the reasons they produce recommendations such as research and review (generally seen as weaker recommendations) are due to a lack of evidence to back up a stronger call for action⁵⁴.

Table 2: Strength of Recommendations made from each House

Strength of Recommendation	House of Commons		House of Lords	
	<i>N</i>	%	<i>N</i>	%
No	9	4	2	1
Small	89	40	90	37
Medium (A)	40	18	43	18
Medium (B)	62	28	82	34
Medium (C)	21	9	23	9
Large	3	1	4	2
Total	224	100	244	100

Table two shows that there is only a limited difference between the House of Commons and the House of Lords in relation to the strength of the recommendations that committees in both Houses are producing. This suggests that there is some consistency here in terms of the strength of recommendations that are produced in both Houses. It is argued by Aldons⁵⁵ and Benton & Russell⁵⁶ that committees use a strategy of producing weaker recommendations so that the government accepts more of them and as a result they appear more influential. While it is not possible to conclude that this is what is happening, the data from both Houses is showing what you might expect it to show if it were. 62% of House of Commons recommendations called for no, small or medium a action in comparison to 56% of House of Lords recommendations, so a majority of recommendations in both Houses are calling for weaker style recommendations. This difference could be explained by the more direct relationship that departmental select committees in the House of Commons have with government departments than ad hoc committees in the House of Lords. With a closer working relationship there may be a reluctance to make recommendations potentially deemed unrealistic by

⁵⁴ Interview with a Clerk of a House of Commons Committee.

⁵⁵ M. Aldons. 'Rating the Effectiveness of Parliamentary Committee Reports'. *Legislative Studies*. Vol. 15, 2000, pp. 22–32.

⁵⁶ Benton & Russell, 2013.

the government which could impact upon that working relationship. As without a productive relationship committees risk seeing their recommendations ignored⁵⁷.

Table one showed a larger proportion of recommendations calling for some kind of legislative action coming from the House of Lords, which are more likely to be classed as stronger recommendations. However with few recommendations calling for large change and the same proportion of recommendations calling for medium c change, it appears that the legislative recommendations that the House of Lords are making are not extreme in their strength (e.g. calling for the repeal of an Act or new legislation).

Differences in the follow-up to government responses

In relation to the House of Commons it has been noted that committees in general are not good at looking closely at government responses with the interviewees from the Gambling Act inquiry going as far as to say that this is because by the time they have produced their report they are tired of the issue^{58,59}. However even if the Committee themselves don't focus upon the government response, the staff do (Interview with the former Clerk of the Culture, Media and Sport Committee).

In relation to the Culture, Media and Sport Committee's inquiry into the Gambling Act, it was noted that "the Committee opted for a magisterial silence"⁶⁰ suggesting that they were standing by their report, which they believed to be more dignified than getting into a war of words with the government. While this may look like backing down, it might more accurately be named 'picking your battles'⁶¹.

In terms of the Committee's follow up of the inquiry the Clerk noted that the Committee was "interested in following up on the bits of legislation that were brought forward in relation to online gambling"⁶². The Committee also followed it up with evidence with the Gambling Commission, and trawled through previous reports to find any recommendations they wanted to follow up⁶³. Committees tend to take a holistic view with regards to the fact that a lot of the work they do will overlap with other inquiries. "They don't want to lose sight of what they have recommended but they don't necessarily think it is helpful to get a Minister in and go through a list of recommendations"⁶⁴. It is clear that follow up in this case is very ad hoc.

In relation to the inquiry into the Freedom of Information Act, the government's response to the Committee's report "wasn't particularly effusive and the government backed off from making changes"⁶⁵. The setting up of a Freedom of Information Commission in July 2015⁶⁶ meant it was put

⁵⁷ White, 2015.

⁵⁸ Interview with the former Clerk of the Culture, Media and Sport Committee.

⁵⁹ Interview with Philip Davies MP, former Member of the Culture, Media and Sport Committee.

⁶⁰ Interview with the former Clerk of the Culture, Media and Sport Committee.

⁶¹ Ibid

⁶² Ibid

⁶³ Ibid

⁶⁴ Ibid

⁶⁵ Interview with the former committee legal specialist of the Justice Committee

⁶⁶ M. Rosenbaum. 'FOI Commission: Why has it surprised observers?'. BBC News. 2016. Available at: <http://www.bbc.co.uk/news/uk-politics-35550967>. (Accessed on: 21st July 2017)

on hold. In the end, the Commission concluded that the Act was “working well”⁶⁷ and only recommended minor tweaking⁶⁸, to the surprise of many, as the setting up of the Commission and its remit were deemed controversial⁶⁹.

The Committee didn’t do any official follow up to the inquiry. The Chair noted that “it wasn’t necessary at that stage to follow up because the government did back off and left things as they were”⁷⁰, however they did regularly see the Information Commissioner. The Committee Lead noted that “if they had recommended some significant amendments they would have followed up on how those amendments had played out”⁷¹.

A committee’s reaction to a government response is usually limited unless something has really irritated them and the focus is on the positive things that government said it would do in response to the report. When committees in the Commons respond it is usually through written correspondence or through routine oral evidence sessions. However this is different to the House of Lords.

Ad hoc committees cease to function once they report and are therefore not formally constituted when the government’s response arrives and when it comes to following up. Thus the Lords Liaison Committee also plays a role in the follow up of post-legislative recommendations with the government. Usually one year after the publication of the report or one year after the government’s response to the report has been published, to allow the government some time to implement the recommendations. The fact that “ad hoc committees dissolve after the publication of their report is seen as one of the weaknesses, if not the main weaknesses of House of Lords ad hoc committees”⁷².

To combat the challenges facing follow up, the Liaison Committee decided to follow up on specific recommendations in writing with the relevant government department. “At the end of each inquiry the Liaison Committee will ask the committee to place an asterisk next to or otherwise highlight the recommendations they want to be followed up”⁷³. A downside is that this approach may signal to the government that there are going to be certain recommendations that the committee won’t follow up on and as such create an incentive for inaction in these areas. The Clerk also noted that she and her team “do not have the civil service contacts and relationships that Chairs and their secretariat build up during a nine month inquiry”⁷⁴. The expertise is held by the ad hoc committee secretariat who by this point have moved on to another committee. In terms of the role that the Liaison Committee plays following up priority recommendations, the Clerk of one of the ad hoc committees noted that “while some formal follow up is better than none”, he doesn’t think “it makes a great difference”⁷⁵. Indeed it is questionable how effective such a mechanism can be as through writing a single letter is unlikely to apply much pressure on the government to act.

⁶⁷ Ibid

⁶⁸ B. Worthy. *The Politics of Freedom of Information*. Manchester, Manchester University Press. 2017.

⁶⁹ B. Worthy & R. Hazell. ‘Disruptive, Dynamic and Democratic? Ten Years of FOI in the UK’. *Parliamentary Affairs*. Vol. 70, No. 1, 2016, pp. 22–42.

⁷⁰ Interview with Lord Beith, former Chair of the Justice Committee.

⁷¹ Interview with the former committee legal specialist of the Justice Committee.

⁷² Interview with the Clerk of the House of Lords Liaison Committee.

⁷³ Ibid.

⁷⁴ Ibid

⁷⁵ Interview with the former Clerk of the Select Committee on the Equality Act 2010 and disability.

In relation to both case studies on the House of Lords, Clerks noted that “although the committees ceases to exist, the Members continue to be Members of the House of Lords and retain their interest”⁷⁶ This was also supported by Baroness McIntosh who noted that she would continue to ask questions relating to the inquiry⁷⁷ and Baroness Deech who noted the Equality Act inquiry sought to continue work with the House of Commons Women and Equalities Committee to further their recommendations⁷⁸. When government responses come they are circulated to Members by the Clerk. There is clearly an informal process going on here, although they do not have the powers of the committee at hand, if Members who retain an interest can organize and apply pressure themselves then they might achieve more than if they worked independently. One of the Clerks views the lack of being able to reform as a committee following the government’s response (and potentially later to follow up) “as a major failure of post-legislative scrutiny in the Lords”⁷⁹.

The Liaison Committee has also experimented with debates on reports. However a limitation of this is that the time on the floor of the House is limited. The Clerk of the Liaison Committee noted that “there was nothing she or the Committee could do that would ever likely be enough for Members in general”⁸⁰. One of the Clerks noted that “this process doesn’t necessarily take you any further forward in terms of getting the government to agree to your recommendations unless you get a commitment from them”⁸¹. Floor time in the House potentially brings publicity both within and outside the House, but it is questionable how much publicity it will bring.

Conclusion

To conclude there are a number of differences in the way legislation is selected by both Houses of Parliament. In the House of Commons there is a focus upon representations from outside organisations, the legislative intensity of government departments, the production of memoranda and the salience of issues. In relation to the House of Lords, the focus is upon its subservient role in the UK Parliament. For example it focuses on considerations of whether committees in the Commons are likely to undertake post-legislative scrutiny. It is also more focused upon the more technical aspects such as whether the timing is correct. There is also a focus upon whether it is a major piece of legislation and whether they have the expertise to do it well.

This paper has also highlighted the differences between the two Houses of Parliament in terms of the output of their recommendations. In terms of the average number of post-legislative scrutiny recommendations produced by each House, the House of Lords on average produces 41 per report and the Commons, 19 per report. This will be a reflection on the amount of time that the House of Lords can spend on each inquiry. The data showed that there was a greater focus upon legislative style recommendations in the Lords but the strength between both Houses is somewhat similar suggesting those legislative style recommendations are not calling for large legislative change.

In terms of follow up the research showed that there were similarities between the two Houses on the basis that their follow up leaves a lot to be desired. If committees in the House of Commons do

⁷⁶ Ibid.

⁷⁷ Interview with Baroness McIntosh, former Chair of the Select Committee on the Licensing Act 2003.

⁷⁸ Interview with Baroness Deech, former Chair of the Select Committee on the Equality Act 2010 and disability.

⁷⁹ Interview with the former Clerk of the Select Committee on the Equality Act 2010 and disability.

⁸⁰ Interview with the Clerk of the House of Lords Liaison Committee.

⁸¹ Interview with the former Clerk of the Select Committee on the Equality Act 2010 and disability.

follow up, then they use convenient methods, such as written correspondence or annual oral evidence sessions, rather than undertaking a follow up inquiry. This makes sense due to the time and resource pressures on House of Commons committees. This is different to the House of Lords, the challenges ad hoc committees face are procedural as they dissolve after the publication of their report. While the Liaison Committee does provide the only follow up likely in the Lords, it is limited to written follow up. However changes could be made to make the process run more smoothly, such as allowing ad hoc committees to re-form after a report has been published, and perhaps a year later for follow up.

To an extent this is a tale of two Houses as each House is operating its own slightly different system of post-legislative scrutiny, with limited co-operation. This has implications for other bicameral legislatures, especially those yet to introduce post-legislative scrutiny formally, on the basis that they need to determine whether to introduce a joined up system of scrutiny or to have a separate system in each House.

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Appendices

Coding Schemes

Detailed below are some of the important codes that have been referred to in the main body of the article. The coding schemes were tested and trailed and each recommendation was double coded to ensure validity.

Strength of action called for

Captures the strength of the action which the recommendations called for, this took place on a six point scale.

- 0) **No Action** – for recommendations which support or endorse existing policy and/or legislation.
- 1) **Small Action** – for recommendations which call for information to be released, for guidance to be issued/amended and for reviews, assessments and further consideration to be taken.
- 2) **Medium (a)** – for recommendations which call for a pause in a policy, for a pilot/trial run to be undertaken, for a change in practice, for additional resources or training to be made available, for the implementation of parts of an Act and for existing legislation to be utilized.
- 3) **Medium (b)** – for recommendations which call for policy changes, new regulations or for regulations to be amended and for minor amendments to be made to an Act (e.g. for drafting purposes).
- 4) **Medium (c)** – for recommendations which call for substantial amendments (relating to powers) or for the repeal of specific clauses of an Act, additionally for recommendations which call on the Government to legislate but do not specifically call for primary legislation.
- 5) **Large** – for recommendations that call for the repeal of all or part of an Act or for new legislation to be introduced.

Government Acceptance

Captures the extent to which the recommendations produced by committees were accepted by the government, this took place on a six point scale.

- (0) **No response** – for recommendations that did not receive a direct written response within the Government's response, or for recommendations which are not acknowledged explicitly or implicitly in the government's response.
- (1) **Rejected outright** – for recommendations where the government states that it rejects or disagrees or through its response signals outright rejection.
- (2) **Partially rejected** – for recommendations that were part rejected and part ignored, or where the government dodged the point the recommendation made, including suggestions that the recommendation was not necessary. Additionally for recommendations where the government rejects but acknowledges frustration or where the government states that it has

a policy/initiative (which is different to what the recommendation calls for) already in place to deal with the issue raised by the recommendation.

- (3) Neither accepted nor rejected** – for recommendations which were accepted in part and rejected in part. Also for recommendations which received lukewarm support (e.g. saying the recommendation required further consideration) or where it is not clear whether the recommendation is accepted or rejected.

- (4) Partially accepted** – for recommendations where there was agreement with the general thrust (in principle) but not the finer detail which the committee called for. Also for recommendations which were accepted in part and ignored in part. Finally for recommendations where the government accepts the objective or principle of a recommendation but proposes an alternative policy or initiative to that recommended by the report.

- (5) Fully accepted** – for recommendations where the government states that it accepts or agrees, or through its response signals full acceptance or for recommendations where the government claimed the committee’s demands were already in progress.