

# A Tale of Two Houses?

## Post-Legislative Scrutiny in the UK Parliament

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### Abstract

*In the last decade a more systematic approach to post-legislative scrutiny has been taken by both the UK Government and Parliament. Currently, owing to a lack of systematic analysis we do not know how both Houses of the UK Parliament are undertaking post-legislative scrutiny. The aim of the article is to determine the similarities and differences between the House of Commons and the House of Lords when undertaking post-legislative scrutiny. The article addresses this gap in knowledge through the use of four case studies, which address how legislation is selected for review, what recommendations are produced and how government responses are followed up. The article 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 article 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.*

**Keywords:** Post-legislative scrutiny, committees, recommendations, UK Parliament.

### A Introduction

Post-legislative scrutiny is one of the core tasks of departmental select committees in the House of Commons.<sup>1</sup> In the last decade a more systematic approach has been taken by both the UK Government and UK Parliament. With regard to the House of Commons, since 2008, government departments have been required to prepare and publish memoranda, assessing whether an Act of Parliament has met its key objectives, within 3-5 years of the entry of the Act into

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

the statute books.<sup>2,3,4</sup> These memoranda are then presented to departmental select committees for additional scrutiny. With regard 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.<sup>5</sup>

Currently, because of a lack of systematic analysis, 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 article, therefore, is to determine the similarities and differences between the House of Commons and the 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 government responses. This article also provides an evaluation of the current procedures. This has important implications in highlighting how the system is currently working and whether it is a process worth recreating in other legislatures.

The article aims to address this gap in knowledge through the use of four case studies, from the House of Commons and the House of Lords, and it 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.

## **B 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.

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](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/210917/Guide_to_Making_Legislation_July_2013.pdf) (last accessed 8 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.

### I Departmental Select Committees – House of Commons

Departmental select committees are regarded as the main vehicle for promoting a culture of scrutiny and accountability in the House of Commons.<sup>6,7,8,9</sup> Select committees in the UK undertake a range of 10 core tasks, post-legislative scrutiny being just one of them.<sup>10</sup> The competition between core tasks sees committees focus on 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 arises from the fact that these committees do not have power over things that 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 from the chamber.<sup>11,12</sup> This has allowed them to develop somewhat free of party control. They set their own agendas and aim to produce reports on a cross-party basis.<sup>13,14</sup> The emphasis of these committees was on enhancing the role of individual MPs (as opposed to parties) in influencing decision making.<sup>15</sup> Select committees give backbenchers from both sides of the House the ability to contribute in a less partisan manner to the scrutiny of government. Thereby, committees have significantly improved the processes of scrutiny in ways in which the House of Commons chamber could not.

Recent reforms have increased the importance and influence of select committees; these reforms included the election of committee chairs and members, which has given them a welcome boost in legitimacy, removing the patronage powers of the whips and government.<sup>16,17,18</sup> An increase in the levels of independence among backbenchers has also occurred, contributing to a greater sense

- 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 H. White, *Select Committees under Scrutiny*, London, Institute for Government, 2015.
- 17 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.
- 18 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.

of independence among committees.<sup>19,20</sup> This has reduced criticisms laid at select committees' doors, such as those of Flinders, that the government could steer committees away from controversial issues of scrutiny.<sup>21</sup> 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 available time.

Benton & Russell undertook an extensive study of the impact of select committees in Westminster<sup>22</sup> and concluded that although select committees could be more influential, their findings did challenge those who suggest that committees are ignored by the government. In fact, their research showed that committees have become an integral part of policymaking because of their detailed approach to the scrutiny of government policy and actions. Government departments are thus more willing to engage with committees so as not to fall foul of them later on in the policy process.

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

## II *Select/Ad Hoc Committees – House of Lords*

Since the 1970s, the House of Lords has developed a number of permanent committees, and indeed previously, it was very much a chamber-orientated House.<sup>23, 24</sup> House of Lords select committees tend to cover more cross-cutting areas and do not shadow government departments.<sup>25</sup> So there is a clear difference here in terms of their structure. Indeed, it has been noted that Lords committees should make the best use of Members' knowledge, complement the work of the House of Commons and address cross-departmental issues.<sup>26</sup> Unlike the House of Commons, the focus of the Lords is on depth rather than breadth, in view of the fact that Lords committees do not have core tasks. There are some similarities here too in that the same rules apply to Lords committees as to Commons committees regarding the government responding to reports and both the committees face similar challenges.<sup>27</sup> In addition, they tend to be consensual in nature.<sup>28</sup> However, the membership of Lords committees is usually based on

19 White, 2015.

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

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

22 Benton & Russell, 2013.

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

24 Norton, 2013.

25 *Ibid.*

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

27 Rogers & Walters, 2015.

28 Norton, 2013.

merit owing to the expertise present in the House.<sup>29</sup> *Ad hoc* committees have also been created since the 1970s and form an important part of this committee structure in the House of Lords, and their number set up each session was expanded in 2012.<sup>30</sup> They are set up temporarily and disbanded after the publication of their reports, differing from sessional committees such as departmental select committees in this important respect. They are popular among Peers as they allow topical issues to be examined without the need for the appointment of a permanent committee. 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 up.<sup>31</sup> Russell argues that the culture of Lords committees differs from that of committees in the Commons and that they tend to tackle more strategic and longer-term issues. They also tend to have a less adversarial relationship with government departments.<sup>32</sup>

### C 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 had undertaken a full post-legislative scrutiny inquiry, which took place between 2012 and 2017, and Committee staff were still available for interview; that is, they had not moved on to work outside of Parliament.

The cases chosen are all from parliamentary committees that have similar procedures and powers and that 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 members who took part in the inquiries were interviewed, with their remarks for attribution. In total, eight 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 posted on

29 *Ibid.*

30 House of Lords Liaison Committee, 2012.

31 Rogers & Walters, 2015.

32 Russell, 2013.

the House of Commons and House of Lords committee websites for all sessions between the 2005/2006 and 2016/2017 sessions. Following the posting of these inquiries, a content analysis of reports was undertaken to code committee recommendations and the government's response to those reports. This involved the coding of 20 reports and 20 government responses.

Recommendations were coded in terms of which organizations they were directed at, with the focus on those directed at the central government. There were a total of 468 recommendations. Once formal recommendations directed at the central government had been identified, each recommendation was coded on the type of recommendation made, using a coding scheme deployed by Russell & Benton.<sup>33</sup> Additionally, the strength of change that the recommendation calls for was also coded. This employed a modified version of Russell and Benton's 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.<sup>34</sup> 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 amendment of primary legislation), as defined by Russell and Benton.<sup>35</sup> 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 as follows: (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 by a second coder to ensure reliability.

#### **D 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 article, the creation of *ad hoc* committees in the House of Lords is determined by the House of Lords Liaison Committee (which oversees the committee system in the Lords); 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 num-

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

34 *Ibid.*

35 *Ibid.*

ber of representations from the gambling industry”.<sup>36</sup> The industry was concerned that legitimate commercial interests were being interfered with and that the Act was difficult to interpret because it was overly complex.<sup>37</sup> Philip Davies MP, a member of the committee, noted that “it is common for organizations to approach committees with their concerns and problems”.<sup>38</sup>

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 government’s 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 and restricting the use of it”.<sup>39</sup> “The fact that the government wanted to make changes made it more urgent to get the report out as quickly as possible” as the committee wanted to share its assessment of the challenges before the government made a decision.<sup>40</sup> The Chair also noted that there was “a reasonably high level of interest among the Members”, particularly as the committee had previously assessed whether departments were ready for freedom of information.<sup>41</sup>

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 of a particular act and have no choice over the matter once it has been created. One of the key factors that the House of Lords Liaison Committee takes into account is whether the inquiry would “make the best use of the expertise of Members of the House of Lords”.<sup>42</sup> Indeed, one of the unique characteristics of the second chamber is that it contains many people with expertise in different sectors, so when undertaking post-legislative scrutiny it is important to tap into that expertise as well.

Another obvious criterion is whether the legislation or topic has been or is likely to be considered by a Commons Committee. This is an important consideration, because while resources are stretched, it is important to ensure that there is as little overlap as possible between the two Houses. Hence, if committees were assessing the same issue, then it would be a waste of resources but it would also raise the question of what else committees might be foregoing. It is also impor-

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

37 *Ibid.*

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

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

40 *Ibid.*

41 *Ibid.*

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

tant here to take into account the primacy of the House of Commons as well as the general timidity of the House of Lords as a result of its unelected status.<sup>43, 44</sup>

Timing is also an important factor, in the sense of whether it is the right time to review the legislation. The Clerk of the Lords Liaison Committee noted that “there is an optimal time for post-legislative scrutiny and that is five to ten years after it has come into force”.<sup>45</sup> This is different from the time frame that the Cabinet Office guidelines suggest, with the publication of post-legislative memoranda (3-5 years).<sup>46</sup>

Other criteria noted by Clerks are 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”.<sup>47</sup> 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 but it also suggests timidity from the Lords. This does restrict the House of Lords in terms of potential post-legislative scrutiny inquiries. Another criterion the Clerk noted was to “avoid legislation that is about to be substantially amended” because there would not be much point in conducting a full review.<sup>48</sup> However, that being said, surely there is an argument that if an Act were to be amended (even through another Act), a post-legislative inquiry might help to inform such amendments.

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, because if the criteria were the same then they may well select similar legislation for review, which would be a waste of limited resources.

## **E Differences in the Outputs of Post-Legislative Scrutiny**

In terms of the breakdown of post-legislative scrutiny, the House of Commons has undertaken 12 inquiries and the House of Lords six. On average, committees in the House of Commons produce 19 recommendations per report compared with 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 wide range of tasks, *ad hoc* committees have (usually) only one task they were set up to undertake. Hence, they are able to dedicate a full session to the inquiry and produce more detailed scrutiny.

Table 1 shows the types of recommendations being made by both Houses of Parliament. First, the table shows that the *ad hoc* committees of the House of

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

44 Russell, 2013.

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

46 Cabinet Office, 2012.

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

48 *Ibid.*



**Table 1** *Type of Recommendations from Each House*

Type of Recommendation	House of Commons		House of Lords	
	N	%	N	%
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
Cooperation	8	4	3	1
Funding and Resources	7	3	5	3
Campaigns/Public Information	4	2	5	2
Guidance	3	1	15	6
<b>Total</b>	<b>205</b>	<b>100</b>	<b>231</b>	<b>100</b>

Lords are making proportionally more recommendations calling for action in relation to legislation. It also shows that the *ad hoc* committees of the House of Lords are producing more recommendations relating to policy and practice.

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

With regard 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. If there are Members on a committee with particular experience of working in the field under examination, their recommendations will carry more weight.

Finally, the Lords makes fewer recommendations calling for research and review. This can be explained by the fact that committees in the Lords are able to hold an inquiry over an entire session and therefore have more time to undertake a 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) is lack of evidence to support a stronger call for action.<sup>49</sup>

Table 2 shows that there is only a limited difference between the House of Commons and the House of Lords with respect 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 produced in

49 Interview with a Clerk of a House of Commons Committee (anonymous).

**Table 2** *Strength of Recommendations Made from Each House*

Strength of Recommendation	House of Commons		House of Lords	
	N	%	N	%
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
<b>Total</b>	224	100	244	100

both Houses. It is argued by Aldons<sup>50</sup> and Benton & Russell<sup>51</sup> that committees use a strategy of producing weaker recommendations so that the government accepts more of them and that they appear more influential as a result. While it is not possible to conclude that this is what is happening, the data from both Houses does not contradict this argument. Sixty-two per cent of the House of Commons' recommendations called for action classed as no, small or medium (A) action in comparison with 56% of the 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 the government that could have an impact on that working relationship. Without a productive relationship, committees risk seeing their recommendations ignored.<sup>52</sup>

Table 1 shows 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).

## F 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. Interviewees from the Gambling Act inquiry went as far as to say that this is because by the time

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

51 Benton & Russell, 2013.

52 White, 2015.

they have produced their report they are tired of the issue.<sup>53,54</sup> However, even if the committees themselves do not focus on the government response, the staff do.

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", 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".<sup>55</sup>

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".<sup>56</sup> 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 up.<sup>57</sup> Committees tend to take a holistic view of the fact that a lot of the work they do will overlap with other inquiries. "They do not want to lose sight of what they have recommended but they do not necessarily think it is helpful to get a Minister in and go through a list of recommendations".<sup>58</sup> 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".<sup>59</sup> The setting up of a Freedom of Information Commission in July 2015 meant it was put on hold.<sup>60</sup> In the end, the Commission concluded that the Act was "working well" and recommended only minor tweaking, to the surprise of many, as the setting up of the Commission and its remit were deemed controversial.<sup>61,62,63</sup>

The Chair noted that official follow-up "wasn't necessary at that stage because the government did back off and left things as they were".<sup>64</sup> The Committee Lead noted that "if they had recommended some significant amendments they would have followed up on how those amendments had played out".<sup>65</sup>

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

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

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

56 *Ibid.*

57 *Ibid.*

58 *Ibid.*

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

60 M. Rosenbaum, 'FOI Commission: Why has it surprised observers?', *BBC News*, 2016. Available at: [www.bbc.co.uk/news/uk-politics-35550967](http://www.bbc.co.uk/news/uk-politics-35550967) (last accessed 21 July 2017).

61 *Ibid.*

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

63 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.

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

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

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 the 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 from the practice in 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, it is 1 year after the publication of the report or 1 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".<sup>66</sup>

To combat the challenges facing follow-up, the Liaison Committee decided to follow up specific recommendations in writing with the relevant government department. "At the end of each inquiry, the Liaison Committee will ask the committee to highlight the recommendations they want to be followed up".<sup>67</sup> A downside is that this approach may signal to the government that there are going to be certain recommendations that the committee will not follow up, thereby creating 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".<sup>68</sup> 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 does not think "it makes a great difference".<sup>69</sup> Indeed, it is questionable how effective such a mechanism can be as writing a single letter is unlikely to apply much pressure on the government to act.

In relation to both case studies on the House of Lords, Clerks noted that "although the committees cease to exist, the Members continue to be Members of the House of Lords and retain their interest".<sup>70</sup> This was also supported by Baroness McIntosh, who noted that she would continue to ask questions relating to the inquiry, and Baroness Deech, who noted the Equality Act inquiry sought to continue work with the House of Commons Women and Equalities Committee to fur-

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

67 *Ibid.*

68 *Ibid.*

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

70 *Ibid.*

ther their recommendations.<sup>71,72</sup> 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 ability 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".<sup>73</sup>

## G 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 on representations from outside organizations, the production of memoranda and the salience of issues. In relation to the House of Lords, the focus is on 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 on the more technical aspects such as whether the timing is correct. There is also a focus on whether it is a major piece of legislation and whether they have the expertise to do it well.

This article 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 on legislative style recommendations in the Lords, but the strength between both Houses is generally similar, suggesting those legislative style recommendations are not calling for large legislative change.

The research also showed that there were similarities between the two Houses in that their follow-up leaves a lot to be desired. If committees in the House of Commons do 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 because of the time and resource pressures on the House of Commons committees. This is different from the House of Lords, and 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 ensure the process runs more smoothly, for example allowing *ad hoc* committees to re-form after a report has been published, and perhaps a year later for follow-up.

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

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

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

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

## Appendix: Coding Schemes

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

### Strength of Action Called for

Captures the strength of the action that the recommendations called for; this took place on a six-point scale.

- 0 **No Action** – for recommendations that support or endorse existing policy and/or legislation.
- 1 **Small Action** – for recommendations that 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 that 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 that 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 that call for substantial amendments (relating to powers) or for the repeal of specific clauses of an Act, additionally for recommendations that 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 that 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 from what the recommendation calls for) already in place to deal with the issue raised by the recommendation.

- 3 **Neither accepted nor rejected** – for recommendations that were accepted in part and rejected in part. Also for recommendations that 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 that the committee called for. Also for recommendations that 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.